"Critical Empiricism" in American Legal Studies: Paradox, Program, or Pandora's Box?

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"It is our aspiration, and my insistence, that it is possible to be both critical and empirical."

——Susan Silbey, Address at Plenary Session on Critical Traditions in Law and Society Research, Law and Society Association, Chicago, Illinois, June 1986

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This essay was originally presented at the Conference on American and German Traditions of Sociological Jurisprudence and Critical Legal Thought organized by the Center for European Legal Policy, Bremen, Federal Republic of Germany, July 10-12, 1986. Subsequent versions were discussed at the Department of Sociology, Northwestern University (February 1987) and the Workshop on Legal Theory at the University of Virginia Law School (March 1987). Comments by participants at these events, members of the Amherst Seminar, Boaventura Santos, Kristin Bumiller, and G. Edward White are gratefully acknowledged. An earlier version of the paper appears in Joerges & Trubek, eds., Critical Legal Thought in Germany and America: A German-American Debate (Baden-Baden: NOMOS, 1989).

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I. INTRODUCTION: ASSESSING “CRITICAL EMPIRICISM”

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

For those who equate empiricism with a value free search for objective knowledge, critical empiricism is a contradiction in terms. For them, Silbey’s call to make law and society scholarship “critical” sounds like nonsense. For others, the idea may seem attractive but addressed to the wrong audience. Supporters of a critical sociology of law might wonder if the law and society movement, with its historic ties to state institutions, positivist social science, and the interests of the legal profession, could ever turn itself into a source of contestation and social critique.

We do not share these concerns. We see the ideal of a critical sociology of law as desirable and think the law and society movement can foster such a practice. We support those in the movement who have raised the banner of “critical empiricism”—a phrase that condenses many ideas: doubts about prior practices, in which empiricists have taken law too much at face value; hopes for new directions, in which they will interrogate legal values and question legal institutions; faith that critical practices will strengthen, not weaken the admittedly fragile law and society movement. We share these doubts, hopes and faith. But we also recognize that the call for critical empiricism raises philosophical issues, requires the elaboration of a research program, and poses practical questions for the movement. Before one can say if critical empiricism is a paradox, program, or Pandora’s box, these matters must be analyzed. The purpose of this essay is to deal with such questions.

The method we have chosen is a critical review of the work of a group of scholars associated with the Seminar on Legal Process and Legal Ideology which meets regularly in Amherst, Massachusetts. Drawn from many disciplines and institutions, the Amherst Seminar is committed to the ideal of a critical sociology of law. Its work illustrates the project of “critical empiricism” and reflects some of its dilemmas. By concentrating on the Seminar, we can illuminate the project we hope to explain and foster. There are costs to this strategy: chief among them are the exclusion of other voices who have called for a critical approach in law and society. But its virtues outweigh the costs. The Amherst project is one of the few collective efforts to reconstruct law and society research, and is notable for

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1. We use the terms “law and society,” “sociolegal studies,” and “sociology of law” interchangeably.
that fact alone. Further, given the diversity of the Amherst group, which
draws on many disciplines and perspectives, and the range of work it has
produced, a review of the scholarship serves well to illustrate the complex-
ity and richness of critical law and society studies.

II. THE CRISIS IN LAW AND SOCIETY STUDIES

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

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

Three concerns seem to predominate. First, a fear that the movement
is losing intellectual vitality. Law and society was once a vanguard move-
ment in legal thought. Law and society scholars critiqued the pretensions
of mainstream legal scholarship, imbibed heady ideas from many fields of
knowledge, charted new academic paths. Today, some fear the movement
is becoming an intellectual backwater, drawing on outmoded ideas about

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2. We found the following especially useful: Richard Abel, “Redirecting Social Studies
   of Law,” 14 Law & Soc’y Rev. 805 (1980); Lawrence M. Friedman, “The Law and Society
   Movement,” 38 Stan. L. Rev. 763 (1986); Marc Galanter, “The Legal Malaise; Or, Justice
   Sciences: Is There Any There There?,” 6 Law & Policy 149 (1984); Austin Sarat, “Legal
   Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research
   Tradition,” 9 Legal Stud. F. 23 (1985); and William Whitford, “Lowered Horizons: Imple-
   mentation Research in a Post-CLS World,” 1986 Wis. L. Rev. 755 (1986). We have also
drawn on G. Edward White’s recent analysis of the relationship between the Law and Soc-
ity movement and Critical Legal Studies: “From Realism to Critical Legal Studies: A Trun-

3. Some argue for a purer, more adequately funded objective social science of law
   (Friedman, 38 Stan. L. Rev.); some declare a limited victory and counsel lowered horizons
   and continued muddling through (Whitford, 1986 Wis. L. Rev.); others predict a dawn of a
   new age when the value of the special brand of knowledge which has come out of the empiri-
cal epoch will finally be recognized by the academy and the legal profession (Galanter, 19
   Law & Soc’y Rev.); while a few raise the cry for a “critical empiricism” (Susan S. Silbey &
law and social inquiry and cut off from strong currents of thought in legal and social theory.

Second, there are political concerns. Some fear that law and society work has lost its political "edge," becoming little more than the handmaiden of policymakers. No one pretends that the law and society movement ever had an explicit political agenda. But because it was founded in the heyday of liberal reform and the Warren Court, when law was being used to enfranchise the poor and expand civil rights, the law and society movement took shape in a period when research on law was easily linked to progressive politics. With the disintegration of the liberal reform project and the pullback of the Supreme Court, this alliance of legal sociology and progressive politics has come unstuck.

A third source of disquiet is recognition that the movement's support base is fragile. While the movement has secured a beachhead, the support some hoped for has not materialized. Law and society's founders envisioned three bases for support: university social science departments, law schools, and government. Law and society scholars would develop theories that could guide public policy; government would seek assistance from the academy. Law schools would see the need for social science theory and empirical study and develop close links with social science departments. While all this has occurred, none of the "legs" of this triangle has developed quite the way the founders might have wished. Law and society scholars have been able to get jobs in social science departments, but they have often felt marginal within their disciplines and departments. While the law schools have begun to accept the need for empirical research, the move has been slow and sporadic. Even the law schools that accept this idea often think it is enough to hire just one social scientist. Moreover, law and society is threatened by the rapid rise of other movements in legal thought. For example, law and economics, a later movement, has been much more warmly received by most law school faculties and offers an alternative way for law schools to incorporate social science into legal studies. At the same time, feminist legal theory and critical legal studies raise questions about "conventional" social science and threaten to displace law and society in the legal vanguard. Finally, support for policy research on law has not grown as fast as had been hoped, and the policy and academic agendas have tended to diverge. Much of the policy research that gave the movement its initial support base was tied to a political agenda that has largely disappeared. Also, policy research has become more focused and funds more tightly controlled by policymakers with explicit agendas.

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

III. ORIGINS OF LAW AND SOCIETY

A. Rotations

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

We think the best way to understand the origins of law and society is to see it as a legally constructed domain of social knowledge. While recognizing that social science and social scientists have played an important role in the formation of law and society practices, we think that the impact of academic legal culture was a dominant force in the development of the movement’s theories of knowledge and politics. Thus we want to portray the origins of law and society as a moment in American legal thought. This perspective allows one to see how certain concerns and constraints of academic legal thought shaped law and society research and influenced the movement’s views on the nature of knowledge and the function of law. Since these views are the main targets of the critique that the proponents of “critical empiricism” have put forth, our approach should facilitate understanding of the work of the Amherst Seminar and cognate projects.

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

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4. In explaining law and society as a legally constructed domain of social knowledge we do not mean to deny other determinants of this scholarship. There may well be some truth to the traditional understanding that law and society was created as a discipline situated outside law and to the view that many of law and society’s assumptions were borrowed from the existing social sciences. The narrowness of our focus demonstrates our desire to bring an as-yet-unrecognized or underappreciated cause to light.
law in whose name legal scholars speak, and the rationality of legal "science" itself.

These three themes of mainstream legal scholarship are problematic. They deny the frequent marginality of law, ignore the constant play of class and interest behind law's neutral façade, and obscure the fragile foundations of legal scholarship itself. Therefore, these themes are repeatedly challenged, and such challenges threaten to disintegrate the mainstream's scholarly project. Faced with such critiques, the legal academy must respond or lose its sense of boundaries and meaning. But at the same time the challengers, themselves caught in the web of academic legal scholarship, ironically restate the themes of the vision they are reacting to, so that cycles of legal scholarship are often "rotations" around the abiding themes that law is vital, legal processes are neutral and rational, legal scholarship is authoritative.

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

B. Legal Realism

The law and society movement took shape in the late 1950s and early 1960s. But the theories of knowledge and law on which it was based were forged much earlier, during the ascendancy of the Legal Realist movement (1920–40). Realist ideas and traditions created the framework of thought within which law and society pioneers conceived the idea of using social science empiricism to illuminate the workings of the law in action. Realists made empiricism a central feature in legal studies. The reasons the Realists gave for privileging empiricism, and the definition of empiricism they offered, shaped the later law and society movement. To understand law and society as a legally constructed domain of social knowledge, therefore, we must understand the Realist vision of empirical legal studies.

The Realists' greatest contribution was their "deconstruction" of

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

Empiricism offered one answer to the threat "deconstructive realism" posed to the practice of academic law. As Peller and Boyle have pointed out, the Realists themselves constructed a defense against the disintegrative thrust of their critique of doctrine. To do this, the Realists posited what Peller calls a "transcendental objectivity," a world of determinate "realities" beneath the empty rhetoric of traditional legal language. Positioning a tangible, determinate world of facts or objective social functions whose operation could be seen at work upon, behind, or beneath the illusionary world of legal doctrine, the Realists pointed to what seemed to be a foundation for the reconstruction of legal science: the observation of "reality." Reality meant tangible facts, rationally and thus objectively grounded social policies, and indwelling normative prescriptions that could be treated as factual premises rather than as contested social visions. This "reality," like nature, could be grasped through the same methods of empirical inquiry which the Realists (and probably most other American intellectuals of the time) thought that physicists and chemists used. Empirical methods would identify the real facts that law must deal with, unearth the real objective forces that determine law's response to social needs, reveal the real functional necessities of social life, specify the real indwelling norms that were shaped by these objective forces and functions, and equip reformers with the tools to perfect bodies of rules and systems of governance. A Realist legal science, modeled on the natural sciences, would restore the law's ability to serve as a central yet autonomous social

“steering mechanism.” It would point to the needs that law must meet and the functions it must perform, and could equip the law with the tools required to rationally manage a complex society in accordance with non-problematic objectives. At the same time, by adopting the methods of natural science, the practice of academic law would itself once again become objective and thus consonant with the overall vocation of the modern university. In a sense, the Realists’ invocation of science as the grounding for an authoritative legal scholarship was a very conservative move in the discourse of legal thought, for isn’t that precisely what Langdell had argued for at an earlier day?

In this view, at the core of the Realists’ effort to reintegrate academic legal discourse were the very themes which have become troubling in the autumnal period of the law and society movement. The Realists’ empirical science of law would reveal natural laws governing social interaction, explore the necessary functions of a legal order, and identify normative commitments that were so universal or time-tested that they were uncontestable. The knowledge produced by such a science would provide a rational grounding for the operation and reform of the legal order. The move to empiricism preserved core themes of mainstream legal discourse. Armed with scientific knowledge, law could maintain—or reclaim—its central position in American society. Objective social science would ensure that law would remain neutral and rational and scholarship remain authoritative.10

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

The epistemology and politics of this “constructive” form of Legal Realism was accepted, tacitly at least, by many of the founders of the law and society movement. At the core of the original law and society understanding lay three very basic ideas: universal scientism, determinism, and

10. For illustrations, see John Henry Schlegel’s discussion of the two traditions of social research in Legal Realism: the “progressive reform tradition” and the “social scientific tradition.” The social-scientific tradition eventually lost ground to the progressive reform tradition. While Underhill Moore was associated closely with the social scientific tradition, most Legal Realists were originally caught somewhere between the two traditions. When the time and energy required to produce good social science research became evident, it also became evident that the knowledge produced would appear too late to be used for legitimating progressive reform proposals in political struggles. Consequently, most legal realists, such as William O. Douglas and Charles E. Clark, tended to move away from the social science tradition and toward the progressive reform tradition. See John Henry Schlegel, “American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore,” 29 Buffalo L. Rev. 195, esp. 293–94 (1980). See also id., “American Legal Realism and Empirical Social Science: From the Yale Experience,” 28 Buffalo L. Rev. 459, esp. 517–19 & 579–85 (1979).
untroubled reformism.\textsuperscript{11}

\textit{Determinism} is an understanding of the nature of the social world. It suggests that social action is governed by laws, much like the laws that govern the rotation of the planets. These laws exist irrespective of our wills and provide social action with a deep logic.

\textit{Universal scientism} is an understanding of the nature of knowledge and its construction. It presupposes a radical distinction between an external world of objects and behaviors and an internal world of consciousness. Within consciousness statements of "fact" can be constructed that can provide an accurate description of specific elements of the external world of objects and behaviors. Scientific knowledge is a set of fact statements and, possibly, statements concerning the manner in which these fact statements are interrelated.\textsuperscript{12} The ultimate arbiters of any scientific knowledge are the objects or occurrences in the external world that fact statements purport to describe. Knowledge evolves through an iterative process by which we test fact statements against what we can demonstrate to be the case. Methods of empirical inquiry allow us to determine if the knowledge we hypothesize adequately describes the external world we can apprehend. Theory and method are defined in this context. We must make scientific statements in ways that allow them to be falsified by factual inquiry (theory), and we must have ways to measure the facts against the relationships posited by the theory (method).

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

\section*{D. The Critique of the Original Understanding}

Determinism, universal scientism, and untroubled reformism are the ideas through which the founders of law and society maintained the cen-

\textsuperscript{11} One of us has in an earlier paper specified two of these themes—universal scientism (positivism) and determinism—and the role they have played in constituting the original law and society perspective. See Trubek, \textit{36 Stan. L. Rev.,} esp. at 579–85 (cited in note 3).

\textsuperscript{12} These statements relating facts can be seen to be (1) presumptions about elements of the external world that go unseen; (2) generalizations of characteristics a class of fact statements share; (3) creations of consciousness that serve as heuristic devices for controlling our comprehension of facts; (4) presumptions about unseen forces in the external world (such as the "laws" of a determinist perspective) that constitute actual connections between facts; or any of a number of other things.
tality of law, neutrality of the legal process, and authority of legal scholarship. Each of these themes has come under criticism. Critics assert that determinism and universal scientism are outmoded notions of social science. They question whether we can distinguish fact statements from theories, facts and theories from values and interests, "law" from other aspects of society. They challenge the idea that legally related behavior is governed by general laws. They assert that a commitment to determinism, scientism, and reformism obscures contested questions of value and social vision. This commitment leads scholars to accept as unproblematic the values of the legal system, to celebrate rather than contest the law, to legitimate rather than interrogate power.\textsuperscript{13}

The critiques of scientism, determinism, and untroubled reformism mark the beginning of an effort to reconstruct law and society as a critical sociology of law. But the proponents of this move face two fundamental dilemmas. First, we are ourselves part of the discourse we want to transform. We work with concepts and vocabularies imbued with meanings drawn from the very views of knowledge and politics we seek to escape. This is why the term "critical empiricism" seems paradoxical. Since empiricism has been identified with an objectivist discourse and an apolitical stance, the idea of wedding empiricism to normative concerns and transformative politics seems contradictory.\textsuperscript{14} Second, the critics' account of the prevalence of scientism, determinism, and reformism in law and society scholarship has a strong structural dimension. It explains the dominant tradition by looking at the institutional position of the law and society movement within the academy and in relationship to policymakers. This account—summarized in such phrases as a "legally constructed domain of knowledge" and "the pull of the policy audience"—suggests that strong structural forces determine the movement's epistemology and political position. But if this were really so, how could an alternative practice develop, unless of course the whole set of structural constraints was changed?

These problems are serious ones. But the fact that a new approach to social research on law is beginning to develop suggests that the tradition has never been as monolithic as the critics sometimes suggest, nor the structural forces as strong as might appear. Thus, there has always been a strand within law and society which rejected scientism, determinism, and reformism. Some law and society scholars have, since the beginning, questioned the idea of objective knowledge and challenged the values of the legal order. When the critics began to search for new directions, they


\textsuperscript{14} For an effort to redefine these categories, see Trubek, 20 Law & Soc'y Rev.
could find a critical tradition within the discourse they wanted to transform. While these alternative practices and ideas may have been submerged or marginal, they were available as starting points for a new turn in law and society. After all, Silbey’s call for “critical empiricism” was a plenary address to the Law and Society Association, given at a meeting whose theme was “Critical Traditions in Law and Society.”

IV. THE DEVELOPMENT OF CRITICAL EMPIRICISM

Whatever the shortcomings of “critical empiricism” as an analytic concept, it has served as a banner for some who want to reconstruct law and society studies. To explore this project, we shall examine the work of the Amherst Seminar on Legal Ideology and Legal Process. Since 1982 a group of social scientists living and working in and around Amherst, Massachusetts, have met to discuss the sociology of law and develop an alternative practice within the law and society movement. Their work illustrates the emerging critical legal sociology project and reveals some of its dilemmas. In this section we analyze some of the general programmatic statements the Seminar has produced; describe the account they give of the tradition they seek to reform; examine the sources they have drawn on for reconstructive inspiration; analyze some illustrative field studies they have conducted; and assess some unresolved questions.

A. Announcing the Program

Although relatively informal, the Amherst Seminar has institutional coherence. Participants meet regularly. They invite visitors, including law and society leaders (e.g., Marc Galanter), CLS scholars (e.g., Duncan Kennedy) and a significant number of European legal sociologists, many associated with European critical legal studies movements (e.g., Alan Hunt, Boaventura Santos, Maureen Cain, Peter Fitzpatrick, Yves Dezalay). They have edited a special issue of the Legal Studies Forum composed entirely of articles by Seminar members. They are jointly editing a special issue of the Law and Society Review. They explicitly claim to be developing a new approach to sociolegal scholarship: Silbey “envision” and “proposes” a sociology of law which “would study law as a social practice.” Sarat “offers a reorienting strategy for empirical research on law in action.”

Brigham endeavors to “recast the study of impact into the framework of interpretive social science.”

The work of the Seminar is diverse. Participants come from a variety of disciplines. They have produced empirical studies, analyses of legal concepts and movements, theoretical essays, and programmatic statements. The essays and statements suggest the reconstructive project they jointly envision. The Seminar seeks to reconstitute sociolegal research by locating and examining its scholarly tradition, rethinking the relationship between legal institutions and social relations, and defining new research projects by highlighting objects and spaces in the world not previously recognized as significant:

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

B. Constructing an Account of the Law and Society Tradition

A substantial portion of the recent work produced by Seminar participants seeks to identify presuppositions underlying prior law and society research, thus creating an account of the tradition which is then critiqued. This account describes law and society as a mixture of an “instrumental” theory of action and a liberal legalist view of law. According to the Amherst scholars, the instrumental theory of action sets the basic agenda for law and society research, and it is this agenda they want to alter. To un-

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20. Brigham, Harrington, Pipkin, Mather, and Villmoare are political scientists. Merry, Messick, and Yngvesson are anthropologists. Silbey and Ewick are sociologists. Sarat is a political scientist and lawyer.
nderstand their project it is essential to understand the tradition they critique and the alternative they offer.

In the Amherst account, the "instrumental theory" that animated original law and society work includes notions about social action and law. It rests on a fundamental distinction between the subjectivity of actors and their behavior. Subjectivity includes (1) desired ends or values, (2) knowledge, perceptions, or descriptions of the objective world of things and behaviors, and (3) evaluative criteria. Behaviors of others represent instruments and constraints actors must take into account when orienting their own behavior. Actors use their knowledge of these instruments and constraints to ascertain the variety of behaviors they might possibly undertake. Actors choose values and then use their knowledge of the world to select a behavior which will realize that value. In selecting a given behavior—or "means"—actors employ certain evaluative criteria as the standard of selection.

The "instrumental theory" integrates notions of action and law. Once created by human beings, laws and legal institutions act as objective constraints on behavior. Citizens perceive the legal system as a constraint and orient their behavior accordingly. Therefore, if the law is effective, the actual behavior of citizens will correspond to the behavior prescribed by legal doctrine. If legally prescribed behavior occurs, the values the law is designed to achieve are realized. In a society with a multiplicity of values, behavior becomes patterned as social behavior either because individuals internalize a common body of rules and the values implicit in them, or because they all experience these rules and the institutions that enforce them as constraints in an environment in which they must all act.

Implicit in the instrumental understanding of law is a project for an empirical social science. It is by no means certain that the behavior of citizens will conform to legal norms: the "law-in-action" (the actual behavior of citizens) may not correspond to the "law-on-the-books" (the prescriptive rules of legal doctrine as authoritatively interpreted). Empirical science can be used both (1) to determine whether actual behavior conforms to or deviates from the law and, if it does deviate, (2) to specify the

25. The instrumental model of action often presumes that actors use evaluative criteria of rationality: that is, they select those means that most efficiently achieve the desired ends. See Merry & Silbey, 9 Just. Sys. J. 151, 156–58 (cited in note 22).
conditions that cause this variation. Empirical science can also aid the process of law formation by ensuring that lawmakers take account of existing conditions of the material world and the natural and necessary "laws" of human and social behavior. In this vision, empirical legal science is a neutral rather than a value-motivated activity. While knowledge may be used in the service of certain values, values are not involved in its construction.

The Amherst account is that the law and society movement was constituted as an empirical science in this sense. Law and society began with an acceptance of the desirability of law, constituted itself as a policy science providing supposedly value-neutral knowledge, set out to identify places in society where the law was ineffective and explain the conditions that allowed such gaps to occur:

The history of social research on law is quite closely tied to the study of legal effectiveness, that is, to the desire to understand the conditions under which legislation and/or judicial decision effectively guide behavior or result in anticipated and desired social changes. . . . Legal effectiveness research begins by identifying the goals of legal policy and moves to assess its success or failure by comparing the goals with the results produced. Where, as is almost inevitably the case, the results do not match the goals, attention is given to the factors which might explain the "gap" between law on the books and law in action. 27

C. Rethinking the Law and Society Tradition

Susan Silbey provides three critiques of the way the "sociology of law" has conceived the relationship between law and society. 28 First, she argues that law and society research treats specific legal doctrines and the particular situations in which they are constructed and applied as abstract, universal categories: as LAW and SOCIETY. Second, law and society research fails to make the idea of law itself problematic. The boundaries of THE LAW are defined as existing legal doctrine and institutions. Finally, in restricting its research agenda to questions of legal effectiveness, law and society research has limited its field of vision to problematic cases. By focusing only on cases of ineffectiveness and not on cases where the law is effective, it has provided a misleading representation of the legal system's social significance: "The research paints pictures of a legal system struggling to retain what seems like a tenuous grasp on the social order . . .

27. Sarat, 9 Legal Stud. F. at 23 (notes omitted) (cited in note 2).
28. Silbey, "Law and Ordering."
effacing the overwhelming reality of lawfulness, of law's contribution to
the reproduction and maintenance of existing social relations and
practices. 30

Implicit in each of these criticisms of the law/society distinction is a
critique of the instrumental theory of action. From them we can see an
alternative view of action emerging which we will call the interpretive the-
ory. 31 This theory rejects several key features of the instrumental
approach.

First, instrumentalism falsely posits that individual subjects are auton-
omous and self-constituting. For an interpretist, the values, knowledge,
and evaluative criteria embodied in the subjectivity of actors are not indi-
vidually held units of meaning but rather are the threads or traces of a
collectively held fabric of social relations. Further, in the interpretivist
perspective the individual does not appropriate this fabric through the
conscious selection of values or learning of existing knowledge. Rather, in
some sense the fabric "appropriates" the individual so that without self-
conscious reflection the actor comes to desire the ends, use the perspec-
tives, and apply the rationality that makes up the social fabric. In the
Amherst literature, this web of social meaning is designated as
"ideology." 31

Second, under instrumentalism the relationship between social mean-
ing and social action is misunderstood. Instrumentalism makes a radical
distinction between ideas and behavior and conceives action as responding
to external sanctions, legal and otherwise. The interpretive theory rejects
the ideas/behavior distinction and conceives action as a synthesis of be-
havior and social meaning. It sees social action as practices that combine

29. Id. at 20.


31. The following quotations give an idea of the way the concept "ideology" is used in
this literature: "Ideology, as I am using the term, describes an aspect or slice of culture
located within a particular institutional arena. An ideology is a set of categories by which
people interpret and make events meaningful. . . . Instead of viewing ideas and action as
analytically distinct, the goal is to develop a way of understanding the social world that
bridges these categories. Ideology is viewed as separate from action but as integral to all
social practices. Ideology is constitutive, in that ideas about an event or relationship define
that activity, much as the rules about a game define a move or a victory in that game." Sally
Engle Merry, "Everyday Understandings of the Law in Working-Class America," 13 Am.
Ethnologist 253–70 (1986). Legal ideology is "the structure of values and cognitive ideas pre-
supposed in and expressed through legal doctrines developed by courts and other practical
law finding or law creating agencies and in the work of legislators and jurists insofar as these
ideas and values serve to influence the manner in which social roles and relationships are
conceptualized and evaluated." Cotterrell, quoted by Christine Harrington, "Socio-Legal
Concepts in Mediation Ideology," 9 Legal Stud. F. 33, 36 (1985). "Dispute processing ideol-
ogy refers to the structure of values presupposed in justification for this reform and ex-
pressed through its practice. These values shape the way in which social relations are
conceptualized and evaluated." Christine Harrington, Shadow Justice: The Ideology and Insti-
tutionalization of Alternatives to Courts 30n. (Westport, Conn.: Greenwood Press, 1985)
("Harrington, Shadow Justice").
interests in and perceptions of the world to create implicit schemes of response, disposition, or habit. In this new model, changes in ideas do not cause changes in behavior nor do changes in behavior cause changes in ideas. Rather, social actors apply (or attempt to apply) dispositions or meaningful patterns of action in changing situations. "[I]mplicit principles or schemes," writes Sally Merry, "enable actors to generate a wide variety of practices in response to an infinite array of changing situations without these schemes being constituted as explicit principles."32

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

These principles of structuring and change are especially evident in social interactions with two or more actors which may involve the clash of two or more schemes of action. The confusion resulting from the coming together of several actors, each seeking to enact their own dispositional schemes of activity, must result in the transformation of some if not all of these competing schemes. Amherst members use the terms "process" or "practice" to communicate this notion of meaningful action and interaction.33

This interpretive theory of action, in which "ideology" and "practice" (or "process") are key concepts, generates a new conception of sociological studies that explains Susan Silbey's three criticisms. First, it explains her argument that the law and society tradition defined law too narrowly. Ideologies are webs of values, perspectives, and evaluative criteria that in some sense constitute subjects. Among the ideologies in our society are sets of norms and perspectives in and about law. These legal ideologies operate most clearly in the core regions of legal doctrine and legal institutions but may be found in social practices taking place any-

32. Merry, 13 Am. Ethnologist 253 (cited in note 31).

33. The following quotations give an idea of the way the concept "process" is used in this literature: "Anthropologists moved from a study of the analysis of law as a system of rules to an analysis of law as a process for handling trouble cases. This shift paralleled a more general shift within the field to a more voluntaristic, actor-centered mode of analysis. The description of societies came to focus more on actors' strategies and choices rather than rules of behavior, on fleeting and ephemeral social aggregations such as networks and factions rather than enduring groups such as lineages and clans." Merry & Silbey, 9 Just. Sys. J. 159 (cited in note 22). "The 'processual' approach within legal anthropology is developing a way of understanding the flexibility of the process of invoking rules and norms in conflict situations that promises to provide the analytical basis for dealing with the relationship between legal ideas and systems of power, as is true of other legal anthropologists who are looking at the implications of systems of meaning for legal behavior." Merry, 13 Am. Ethnologist 267 n.3 (cited in note 31) (emphases added).
where. If such practices are not included within the domain of sociolegal research, something essential will have been omitted. By limiting its conception of "law" to doctrine and legal institutions, Silbey argues, the law and society movement has missed a key feature of how law participates in the social construction of reality.

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

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

D. Divergent Tendencies in the Construction of an Interpretive Sociology of Law

Arguments could be made that this account of the law and society tradition overlooks work within this tradition that was sensitive to ideology, aware of practices outside doctrine and legal institutions, concerned with contexts and particulars. But our interest is not in such quibbles. We read the Amherst account not as a full-blown intellectual history but rather as an outline of a new approach to the sociology of law. The critique seeks to present a new perspective and initiate a new research agenda. The task is to assess the alternative vision that is emerging in the work of the Seminar. However, the task is complicated by the fact that the work of the Seminar contains not one but several possible new agendas. We shall seek to describe not only what the Seminar agrees on but also where they diverge.

One would expect that participants in a seminar on legal ideology would agree on the importance of ideology as a concept for studying law.

And all the Amherst scholars would, probably, accept the following set of propositions:

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

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

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

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

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

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

Acceptance of propositions at this general level does not, however, preclude basic disagreement on how concepts like "ideology," "practice," and "process" are to be interpreted and deployed. Close attention to the work of the Seminar shows it is influenced by different strands in social theory with different implications for the meaning of a "critical sociology of law." Thus one can see in the work traces of at least three strands of thought: Cultural anthropology, British Neo-Marxism, and American Critical Legal Studies. To both understand more fully the diverse origins of the Amherst project and see the potential for divergence among its proponents, one must look closely at the disparate strands the Seminar has sought to draw on and weave together.

1. Cultural Anthropology

One source of Seminar concern with ideology and process comes from the anthropology of law. Anthropologists concerned with the comparative study of legal phenomena found a place within the law and society movement from the beginning.\textsuperscript{35} The initial law and society agenda, with

\textsuperscript{35} Laura Nader represented the American Anthropological Association on the First Board of Trustees of the Law and Society Association. The first three volumes of the \textit{Law and Society Review} included articles by anthropologists Bohannon and Huckleberry (Paul
its related themes of universal science and determinism, raised questions that anthropology and its methods seemed particularly well suited to address. In order to provide a neutral, authoritative description of the central and autonomous role which the law played (or should play) in every society, sociolegal scholarship had to identify those functional needs in all societies that required law or law-like institutions. What better way is there to identify these universal functional needs than through the comparison of legal phenomena in a number of diverse societies?

(a) Defining the Disputes Paradigm. While anthropologists were initially happy to advance law and society's themes of determinism and universal scientism, they immediately found problems with its theme of untroubled reformism. Recall that in the early years law and society scholars tended to accept the value and authority of existing legal institutions as self-evident. However, a cursory comparative study of legal institutions across cultures quickly demonstrated that the general concepts of "law" present in American law and society scholarship were ethnocentric. For example, the movement's initial unquestioning acceptance of the value of adjudicatory institutions, anthropologists argued, blinded it to the fact that in other societies "legal functions" were carried out by nonformal, nonadjudicatory institutions. Therefore, they contended, sociolegal scholarship required a broader, more general framework for the analysis of law's general functions. They thus substituted for the study of law and society the study of dispute resolution institutions and disputes.36

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

However, early formulations of the disputes paradigm accepted the underlying themes of determinism or universal scientism. It was assumed that all societies needed institutions to serve the function of resolving disputes and that certain types of dispute resolution institutions were best suited to deal with certain types of disputes. Researchers assumed that an empirical social science could identify universal types of dispute institu-


tions and disputes and specify the principles that defined the ideal fit of dispute and institution through the careful description and comparison of disputing in existing societies.

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

In contrast, the anthropologists and others in the Amherst group find that applying an interpretive theory of action to the study of disputes adds an important historical dimension to disputes research. Rather than accept disputes and dispute resolution institutions as societal givens, the new disputes paradigm can bring into question the manner in which disputes are generated and change over time:

An assumption fundamental to our approach is that a dispute is not a static event which simply “happens,” but that the structure of disputes, quarrels, and offenses includes changes or transformations over time. Transformations occur because participants in the disputing process have different interests in and perspectives on the dispute; participants assert these interests and perspectives in the very process of defining and shaping the object of the dispute. What a dispute is about, whether it is even a dispute or not, and whether it is properly a “legal” dispute, may be central issues for negotiation in the disputing process. By transformation of a dispute we mean a change in its form or

37. Merry, 100 Harv. L. Rev. 2057, 2062 (cited in note 22); Austin Sarat, “The ‘New Formalism’ in Disputing and Dispute Processing,” 21 Law & Soc’y Rev. 695 (1988).
38. Merry, 100 Harv. L. Rev. at 2063.
40. Merry, 100 Harv. L. Rev. at 2063.
41. Id. at 2062.
content as a result of the interaction and involvement of other participants in the dispute process. . . . At a fundamental level, the transformation of a dispute involves a process of *rephrasing*—that is, some kind of reformulation into a public discourse.42

Note the concept of “ideology” implicit in this paragraph and the role ideology is assumed to play in the transformation of disputes. First, the perceptions of the parties involved in the processing of a dispute are elements that, in part, constitute a social relationship as a dispute. A change in the perception of the parties results in a change in the form and substance of the dispute. Second, “perceptions” include both motivations (goals and values) and cognitions (of the “facts of the situation”). Third, perceptions are brought into the processing of a dispute both from the “society” side (the parties) and from the “law” side (by the third-party intervenor). Finally, perceptions interact with one another to form a new set of shared perceptions—a “public discourse.”

Note also the concept of “process” implicit in this paragraph and the role it plays in explaining social and legal change. If the processing of the dispute involves the creation of a new set of shared perceptions by those involved (the “public discourse”), and if by perception we mean both cognitions and interests, then this suggests that these parties may leave with different interests and cognitions than they had when they entered the “process.” When this insight is combined with the fact that those involved in a dispute include both the disputants and a third party, we arrive at the notion that the transformative outcome of the processing of a dispute may be “carried back,” so to speak, by the disputants to “society” and by the third party to “the law.” The handling of a dispute is thus a dialectical process that transforms not only the dispute itself but the legal system and the community as well. Dispute processing not only changes the form and content of the social relationship in question, but also may alter law and legal consciousness. “Process” relates social change to legal change. “Process” (or “practice”) sits between law and society, providing a site where legal meanings can “flow through” and become part of community meanings and vice versa.

(b) *Disputing at the Boundaries: Developing a Research Agenda.* Revision of the original disputes paradigm through incorporation of the interpretive theory of action allowed the Amherst Seminar to generate a new research strategy and agenda. A substantial portion of the field studies they have produced reflects this strategy and develops this agenda. The studies examine instances where meanings originating within the legal system and the community are brought into contact with one another in commonplace judicial institutions, are worked together in the processing of minor

disputes, and are “returned” in their new form to both the legal system and the community. From a traditional law and society perspective, this would have been seen as a way in which meanings originating in the community “flow into” and become part of the legal system and vice versa. However, the interpretive account is more complex. The processing of the dispute is dialectical: in it, new patterns of meaning are constructed out of traces from the past for both the legal system and the community. These new patterns of meanings do more than simply redefine the content of legal and community ideologies; they also redefine the boundaries of legal and social institutions and the relations between them.

Such an approach can be seen in Merry and Silbey’s study of inferior courts and mediation programs associated with them.43 It is reflected in Harrington’s examination of a Neighborhood Justice Center,44 Yngvesson’s study of criminal complaint hearings in lower criminal courts,45 Sarat and Felstiner’s observations of lawyer-client conferences,46 and Merry’s exploration of law in everyday neighborhood life.47 These studies have four distinctive features. First, they focus on “normal” disputes in institutional sites that are “low” in the judicial system hierarchy. These disputes rarely raise major doctrinal questions. They are conceived of as “petty” by court personnel and hence relegated to institutions designed for processing petty disputes (such as small claims courts). Second, the studies emphasize the role participant subjectivity—perceptions, values, and criteria of judgment—plays in the definition of relationships as a “dispute.” Third, in looking at participant perception, they pay attention to pictures of the world derived from legal doctrine, but also examine the use of narratives that employ meanings drawn from the community and the experiences of court personnel. Finally, they are concerned with the way lawyers and officials manage and transform participant perceptions and vice versa.

Contrasting these studies of “disputing at the boundaries” with the classic law and society “gap study” allows us to see how the Amherst Seminar has challenged some of the core themes of the law and society tradition while retaining others. “Gap studies” compared law on the books with “law in action,” measuring the distance between prescription and


44. Harrington, Shadow Justice (cited in note 31).


47. Merry, “Crowding” (cited in note 43).
behavior. As Sarat has pointed out, the classical gap study confirmed the centrality and autonomy of the law while pointing to the limits of its impact. Gap studies took the law as desirable and assumed that “filling the gap” was a legitimate goal. Amherst studies of disputing at the boundaries, like gap studies, recognize that legal doctrine may be deployed in settings where other discourses are also at play. But in contrast to the gap studies, research on disputing at the boundaries does not treat law and legal doctrine as universal, consensual, necessarily rational, or presumptively central in shaping behavior. Rather, in this picture, concepts drawn from formal doctrine are deployed along with other narratives in processes or interactions among disputants, attorneys, court officials, and judges. Legal doctrine is one of several ideological practices whose interaction constitutes subjectivities and defines the boundaries of law and society.

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

But while the Amherst studies challenge the universalism of legal doctrine, they restate the universalism—and hence the authority—of sociological studies of the law, while reconstituting the grounding for social knowledge. They assume that social scientists are able to use standard social science methods to provide valid descriptions of the historical and contingent practices the new paradigm identifies. Moreover, the very discovery of historicity and contingency makes “social science” all the more important to law’s understanding of itself. Since, in this approach, the true meaning and impact of law lies in complex and contingent practices often of exceedingly low visibility, the work of social scientists, especially those who have access to the methods and procedures of anthropology, becomes essential if we are to understand what is really going on.

49. For further discussion, see sec. IV.E infra.
2. British Neo-Marxism

A second source of Seminar interest in ideology and process derives from appropriation of ideas from the Marxist tradition, particularly recent efforts to theorize the role of law in the reproduction and transformation of capitalist hegemony. Marxist themes have found a place within law and society in recent years. The movement has always reflected a concern about unequal justice and an interest in the liberal theme of increasing access to justice. But as faith in liberal reforms began to fade, some law and society scholars began to question whether the system’s commitment to equality of access and justice was more than a façade. In the twilight of untroubled reformism more critical themes, including those drawn from Marxist scholarship, came to the fore. Yet at the same time, the introduction of Marxism made it possible to reformulate and re-ground ideas of determinism and universal science. To understand how this occurred, one has to trace the history of recent Marxist theories of law and their impact on the Amherst project.

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

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

this would lead to the identification of ideology as a central concept for legal studies.

While structural Marxism recognized that legal ideology was important, originally it provided neither encouragement nor direction for detailed empirical investigation because the functions and impact of law were taken for granted. It was only when a group of Marxist legal scholars began to develop a richer notion of ideology that it became possible to make "legal ideology" a theme for Marxist-inspired empirical studies of law. These developments in Marxist thought were followed closely by the Amherst group, and several leading Neo-Marxist scholars visited the Seminar and influenced the work of its members. The leading figures in this effort to rethink the Marxist notion of legal ideology are a group of British scholars, including Alan Hunt, Colin Sumner, and Roger Cotterrell. Since Hunt has had substantial contact with the Amherst group, we will focus on his contribution.

In a lecture given initially in Amherst and later published in the Law and Society Review, Hunt argues that the production, transmission, and effect of legal ideology cannot be assumed but must be established empirically. He contends that Marxists err if they assume that legal doctrine (a) simply contains an unqualified restatement of capitalist values and ideals, (b) is directly transmitted to all members of society, or (c) operates mechanically to constitute all citizens as compliant subjects. In contrast, Hunt suggests that fully to understand the content and impact of legal ideologies we must identify these ideologies as they exist in the world, specify their content, and identify through empirical investigation the institutional and economic contexts in which they operate. Note that this approach loosens the tight structuralist assumption of a deep and unalterable logic of social laws. Hunt thereby allows for the possibility that empirical investigations may uncover counter-hegemonic visions and imperfect transmission of hegemonic values. Nevertheless, Hunt does not abandon the goal of a "material" account of ideological practices. While he argues that the empirical study of legally oriented ideologies in capitalism may reveal

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52. Empirical investigation must describe the various structures of value, perception, and choice criteria embedded in legal thought; establish the boundaries of these ideological structures; establish their coherence or incoherence; identify the institutional and economic context in which they exist; determine the functions that these ideologies serve for their institutional context; determine the functions that the institutional context serves for these ideologies; and trace how these ideologies are produced, how they are transmitted, and whether their effects are reproduced or transformed through the empirical study of practices.
counter-hegemonic as well as hegemonic tendencies, at the same time he suggests that these “deviant” legal visions have no real persistence or impact unless they can find “material” support in institutional and economic practices. “My object,” he writes, “is to use the concept [ideology] to explore the connection between ideas, attitudes, and beliefs, on the one hand, and economic and political interests, on the other.”

He refers to his approach as the study of “materialist ideology.”

With Hunt’s transformation of the Marxist concept of ideology, legal ideology’s role in reinforcing, legitimating, or challenging existing relations of domination is opened to empirical examination. Whether ideologies are hegemonic or counter-hegemonic, and whether they find material support for their continued existence, depends on the nature of the relationship between ideologies and the institutional and economic context in which they exist. These relationships are determined conjuncturally, and thus their nature can only be established through empirical investigation.

This defines a research agenda for empirical social science, an agenda directly addressed by the work of Seminar members Christine Harrington, John Brigham, and Adelaide Villmoare but reflected in the work of others as well. These studies seek to describe the ideologies of law and legal reform prevalent in policy circles today and to explain their production, persistence, or effect by relating them to the underlying structure of institutional and social relations in which they are situated.

Brigham examines the ways the ideology inherent in legal doctrine affects how participants in social movements perceive the world and design their movement strategies. He examines conservative opposition to

54. Brigham and Harrington explicitly state this assumption of the relation between ideology and institutional context. Brigham writes: “Insight into the constitutive dimensions of ideology comes from establishing a referent or context that can be delimited. . . . The very institutional relations that constitute the communities responsible for interpreting the law have considerable importance for social research. . . . This is due to the embodiment of ideology in the social relations of institutional life. . . . Doctrine as ideology can be understood through the social and institutional relations that determine its impact.” Brigham, 9 Legal Stud. F. 47, 49 (cited in note 19). Harrington writes: “The approach of this book has been shaped by the notion that reform ideology is itself problematic and linked to institutional practices. . . . A sociological perspective on legal ideology informs this study of the relationship between the ideology and institutions of informalism. This perspective leads to the examination of the content of ideology and its role in securing the conditions for the exercise of power. . . . The object is to identify ‘the conditions under which ideologies develop, are sustained and disintegrated because of the sociological and politically practical significance of the knowledge’ (Cotterrell, 1983:70). We are concerned with the structures of reform ideology and their political significance.” Harrington, Shadow Justice at 11–13 (cited in note 31).
abortion, feminist opposition to pornography, the gay movement for equal rights, and the movement for alternatives to adjudication (ADR). In the case of abortion, for example, Brigham argues that the U.S. Supreme Court's Roe v. Wade decision simultaneously removed a major incentive that pro-abortion women's groups had to organize political action, provided an incentive for anti-abortion groups to organize politically, and determined that the law would be a primary arena for the anti-abortion coalition's political strategy.

Christine Harrington is concerned with the rhetoric of legal reformers—be they academics, policymakers, or implementors. She wants to explain why these ideologies take the form they do, why they are accepted or not and what impact they have on the nature of social relations. More specifically, she looks at reforms in dispute processing and in the practice of law before federal agencies. In her study of the alternative dispute resolution movement, for example, she argues that reform ideologies that call for informalism in dispute processing have found acceptance not because of their explicit purpose to replace formal legal mechanisms with informal, delegalized fora, but rather because these ideologies increase the scope, legitimacy, and efficiency of the existing (formal) judicial system.

Adelaide Villmoare argues for the potential a “rights” ideology can have for emancipatory social change. She argues that a reform ideology constructed around a new conception of legal rights can be an effective means to social change. However, for such an ideology to be effective, it must be constructed using theoretical categories that recognize the shape of existing legal, political, economic, and social institutions. Otherwise, there will be no “material” basis for the ideology or its implementation.

The Neo-Marxist turn in law and society studies evident in some Amherst work stands in distinct tension with the directions indicated by the particular forms of anthropological thought deployed in the Seminar’s re-

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59. Harrington, Shadow Justice; id., 9 Legal Stud. F.
60. Harrington, “Regulatory Reform.”
62. “One necessary step in analyzing changing formations of rights within the contemporary American legal system is to be able to identify new types of rights. In order to identify new forms, theoretical categories are needed for guidance. The building of categories to aid in perceiving new forms of rights is drawn from the conceptually informed observation of particular historical configurations of existing law and changing political, economic, and social relations. In other words, the theoretical construction of different kinds of rights is contingent upon the sophistication of abstract ideas as well as concrete historical circumstances.” Id. at 43.
search. Thus, where Neo-Marxism and Amherst legal anthropology both identify “ideology” as a central concept, each develops different notions of the nature of legal ideology and its study. Where the Marxist strand points toward the study of ideology on a macro-scale, the anthropological tradition focuses on micro-encounters. While Marxism demands that ideologies must be related to, and explained by, economic and political interests and institutions, anthropology (as used by Amherst scholars) loosens the presumed tie between culture and structure. Where Marxist-inspired studies tend to present ideology as relatively stable and definable, the tendency within the anthropological approach is to picture ideology as a much looser, fluid, and even accidental conglomeration of images and metaphors. Finally, while Marxism pulls toward a bipolar model of social power and focuses on the hegemony of the capitalist class, anthropology has been used in the Amherst work to identify multiple, localized, and molecular forms of both power and resistance.

As a result, while both the newer legal anthropology and Neo-Marxism would lead to a significant reconstruction of the traditional law and society agenda, the Marxist strand points in a different direction. Marxist-inspired studies reject the liberal ideas of law’s autonomous character and benign nature that animated early law and society work. The Marxist studies do restate the theme of the centrality of law, but it is the centrality of a dominant ideology, not a neutral “social steering mechanism.” Marxist-inspired studies distance themselves completely from instrumental policy analysis. While they may examine policy formation, they do so to expose the underlying play of interests behind seemingly neutral reforms, not to carry the reforms forward in an instrumental fashion. Finally Marxism, like anthropology, is used to reconstitute law and society’s claim to scholarly authority through science. Indeed the Marxist “trace” in Amherst work is closest to this aspect of the original law and society understanding. While the move from the structural Marxism of the 1970s to the current Neo-Marxist formulation abandons determinist themes about the deep structural laws of the capitalist mode of production, Neo-Marxism continues a program of universal scientism by emphasizing the need to describe the structure of economic and political institutions in order to “explain” how ideologies function. Thus it points in directions that differ from the more contextualizing thrust of the anthropological work.

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

3. **American Critical Legal Studies**

The Critical Legal Studies movement in American law schools has had an impact on the work of the Amherst Seminar. However, the relationship between Amherst and CLS is complex. Thus in an unpublished paper commenting on this question and delivered to the Seminar, Duncan Kennedy, a leading CLS scholar, noted that CLS has played two contradictory roles in the development of the Seminar:

— a scapegoat role: CLS represents some things that all . . . can agree should be avoided, though this is putting it too mildly: the collective reference to the ways CLS is to be avoided is one of the ways the group constitutes itself;

— an exemplary role: many of the positions or attitudes on which the group converges are important aspects of CLS work, and as time passes more and more pieces by group members use references to CLS as a shorthand way to refer both to commonly accepted background premises of their own work and to goals or aspirations of the work of the group.\(^63\)

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

One might have expected that the Amherst Seminar’s aspiration toward a “critical sociology of law” would have impelled the group to identify itself with the law school-based American Critical Legal Studies Movement. The participants in the Seminar have been influenced by many of the same intellectual trends that have animated CLS, including those already described. Amherst scholars cite CLS literature with some frequency, indicating that they do read and discuss the work of CLS scholars. Like the “crits,” the Seminar seeks to reconstitute the scholarly field in which they work. Yet, despite the similarities in ideas and commonalities between the two projects, participants in the Seminar have tended to

\(^63\) Duncan Kennedy, “Critical Legal Studies and the Work of the Amherst Seminar” (paper delivered before Amherst Seminar on Legal Process and Legal Ideology, Amherst, Mass., April 1987 (1986)).
take a distanced, skeptical, and even occasionally adversarial stance toward the work of the legal scholars who dominate the American Critical Legal Studies movement.

This distancing takes on particular saliency when it is contrasted with the close relations the Amherst group has established with critical legal scholars in other countries. Even though Amherst is close to many centers of critical legal thought in the United States, and individual Seminar participants have contacts with many CLS scholars, the number of CLS people who have been invited to address the Seminar pales in significance next to the long list of British and other European critical scholars who have been asked to visit Amherst. Where the traces of British Neo-Marxism, for example, are easy to identify, the influence of CLS on Amherst work is more complex and harder to uncover.

The ambivalence of the Amherst group toward the American CLS movement has many explanations. One is the reappearance of an old problem that has haunted the law and society movement from the inception. Law and society has always had a contradictory relationship with legal thought of any kind. On the one hand, law and society scholars must identify themselves with the concerns of legal scholarship so their voices will be heard in academic legal culture. On the other, they have always sought to differentiate themselves from what legal (as opposed to "sociolegal") scholars do so they can claim a legitimate and distinctive role in the production of knowledge about law. What was always a complex relationship in the "liberal" era of legal reformism becomes even more complex in the present moment when a critical tradition has emerged in the legal academy and has itself embraced and employed themes, concepts, and modes of argument drawn from a variety of social disciplines, thus eroding any clear line between "legal" and "social" theory. Amherst scholars may fear that if they embrace CLS wholeheartedly they will be swallowed up by it, but if they maintain too great a distance they will be isolated from a major and cognate development in legal thought.

But there is more to the story. The Amherst ambivalence toward CLS also reflects pressures created by tensions internal to the Seminar itself. These include questions of theory and method already alluded to, and questions of scholarly practice and politics which we will discuss in the final section. As we have seen, the group has embraced a variety of strains in social thought, and it is hard to hold on to all of these simultaneously. While CLS itself contains similar disparate strands, and has had the same debates on social theory as the Amherst group, a principal feature of recent CLS work has been a gradual moving away from the Neo-Marxist, structural account of legal ideology toward what we have described here as the "anthropological" perspective. If the Seminar were to draw closer to CLS, the contact could upset the precarious balance they have struck between these two strands within their work.
But, we contend, even this concern is only a minor factor in explaining the strange mix of attraction and withdrawal, of acceptance of shared themes and reiteration of difference and distance, that characterizes Amherst reactions to the work of the American CLS movement. Most important is the pervasive anxiety of Seminar participants about the relationship between knowledge and politics. Of all the issues that the Amherst group has grappled with, this has proven to be the most difficult and potentially the most divisive. Yet it is the question that any real encounter with CLS must force them to deal with. If one seeks a single explanation of the curious distance between critical scholars in American law schools and this group of critical scholars in American legal sociology, it is to be found in the anxiety which CLS epistemology and politics create for most law and society scholars.

CLS scholarship starts from the premise that legal theory is an ideological product, part of the process through which unequal and unjust relationships are produced and reproduced in society. Among the projects that the “crits” embrace is that of reducing inequality and injustice by changing legal thought. The issue is: How does one carry on transformative politics in legal theory? The debate within CLS over how—and to what extent—this can be done is intense and unresolved. Most CLS scholars would probably agree that the first task is to understand the political nature of the work of producing legal theory and doctrine, and to be self-conscious about how one’s teaching and scholarship affects cultural definitions that have political implications. The question of what to do once this understanding and self-consciousness has been developed is more controversial. Some within CLS argue for a practice called “trash,” or the relentless critique of mainstream legal culture. Others favor a process of “deviationist doctrine.” This means working within the tradition of mainstream legal culture to identify suppressed visions and counterhegemonic notions which can be found within legal thought and doctrine. Because CLS scholars see legal thought and doctrine to be complex and contradictory, those who favor the latter approach believe that such counter visions are already present within the very tradition they seek to transform.

Some of the work of Seminar participants shows an awareness of the need to understand the political significance of scholarly production and interrogate the scholar’s role in this process. Thus, Susan Silbey and Austin Sarat are concerned, as is CLS, with the problem of complicity in the production, reproduction, and transmission of legal ideology. This has inspired them to interrogate their own work as sociolegal scholars. If, they

argue, sociolegal scholars are just as embedded in webs of meaningful activity as are the subjects they describe, then they must interrogate the structure of the discourse they weave. This requires interrogating the conceptual terrain which their language constitutes, the strategies their production of knowledge pursues, the interests their projects advance, and the institutional position from which they carry on this production of ideology.

If Silbey and Sarat’s discussion of scholarly position seems to echo and reinforce aspects of the CLS approach, the views of these and other Seminar participants on questions of scholarly method seem to draw clear lines between critical sociology and CLS. Thus, one finds repeated references to the fact that CLS scholarship fails adequately to account for the impact of legal ideology because CLS scholars only study legal doctrine and do not examine the actual processes or practices through which this ideology is produced and transmitted. These critiques of CLS for limiting its analysis of ideology to the “mandarin materials” of elite legal culture permit Seminar participants to accept and embrace some of CLS’s theoretical positions while asserting that full realization of the critical project in law demands the collaboration of sociolegal scholars who really know how to discover the way in which power is produced and reproduced in everyday life. As Kennedy suggests, the group at Amherst has found in its shared background in the empirical disciplines a way both to relate to and distinguish itself from CLS. By identifying empirical studies as a necessary aspect of a critical tradition in legal studies and by identifying social science as necessary for empiricism, this aspect of the Seminar’s work restates the theme of scientism and thus promises continuity in law and society. But at the same time, by privileging science in their account of the nature of a critical sociology of law, the Amherst group has distanced itself decisively from CLS, which vehemently rejects scientism. As a result, the Seminar has obscured the very questions about the political significance of the knowledge law and society scholars produce that critical empiricism was supposed to illuminate. It is to this final set of questions that we now turn.

69. The foregoing sketch of the sources of the Amherst project is incomplete. It gives insufficient attention to such influences as poststructuralism, which are clearly at play in the work. It also could be misleading if it is read as suggesting that Amherst is just three very different groups and projects potentially at war with one another. By focusing on sources, and on the potential conflicts among the projects derived from these sources, we underestimate
E. A Common Thread? Scientism Without Determinism

While no one can foresee the long-term results of the Amherst project, three things can be said. First, in highlighting concepts like "ideology" and "process" and reconstituting the disputes paradigm, the Amherst Seminar has made a decisive turn in the law and society tradition. Second, this turn puts in question two of the original themes around which the movement was organized: untroubled instrumentalism and determinism. Third, despite their willingness to challenge two of the central pillars of the original law and society understanding, Seminar participants seem to retain and share a belief that social science can provide authoritative descriptions of the world. This belief keeps them from questioning the theme of universal scientism. It offers a possible point of agreement among an otherwise diverse set of perspectives. Yet such a belief seems to be inconsistent with elements of the "interpretive" model of action the Seminar itself is developing. And it raises serious questions about the nature of the "critical empiricism" participants champion. In this subsection we address the question of scientism without determinism. In the next section we will explore the problems this belief creates for the critical sociology of law project.

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

the degree of common commitment and give too little emphasis to the dialectical process of interaction that can be observed if the work of the Seminar is studied chronologically. Thus, one of the interesting features of Amherst scholarship is the amount of coauthored work that has been produced, as people who come from different disciplines and whose prior work draws on different sources have joined to produce work that seeks to synthesize different perspectives. We do think it is important to see the sources and the potential conflicts among them, but it is also essential to understand that as they draw on these sources to define a critical practice the Seminar participants share a common aspiration. This is to develop a critical sociology of law that incorporates ideas of structure without abandoning the idea of agency; is able to identify patterns and regularities while holding onto the basic insight that social life is indeterminate and unstable; and insists that micro- and macro-level analyses must inform each other. This interpretation of the Amherst project was suggested by Boaventura Santos (personal communication to the authors, May 1988).
accept interpretive assumptions regarding the nature of the objects observed while simultaneously maintaining assumptions from the instrumental theory of action regarding the process through which scientific knowledge of these objects is constructed.

This is the most common theoretical position implicit or explicit in Amherst writings: an interpretive ontology coupled with an instrumental epistemology. When it is not stated explicitly, it manifests itself through statements in which an author claims that the reason why we should pursue a sociolegal strategy which abandons untroubled instrumentalism and determinism is that such a strategy provides a more “accurate,” more “theoretical,” less “narrow,” more “complete,” more “sociological” description of the nature of legal phenomena.70

The theme of universal scientism manifests itself within the instrumental theory of action through a particular understanding of the values, perspectives, and evaluative standards involved in the production of empirical scientific knowledge. A universal science is motivated by a value to construct valid descriptions of the world that can be used instrumentally for whatever purpose individuals find useful. The validity of the descriptions constructed is assured by following a defined set of procedures in the empirical observation of phenomena that meet certain evaluative standards of descriptive validity. The valid descriptions or perspectives so constructed serve as additions to “the big picture” of the world scientific knowledge is slowly constructing.

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

70. John Brigham, for example, in his study of judicial impact, argues that “to understand these processes, it is necessary to go beyond politics and attitudes. The more accurate representation presents both of the behavioral factors . . . as functions of knowledge.” Brigham, 133 U. Pa. L. Rev. at 51 (cited in note 8). Often such claims for a more accurate science are expressed indirectly through critiques of prevailing theoretical positions. Silbey and Sarat, for example, argue that the pull of the policy audience has caused sociolegal scholars to construct a limited, partial, and distorted version of the relation of law and society. If we shift to an interpretive ontology, it will “enable us to provide a richer more complete picture of law in society.” Sarat & Silbey, 10 Law & Policy at 141 (cited in note 13). Another example is Yngvesson’s analysis of the “continuing relations hypothesis.” She argues that while research motivated by this hypothesis has “made available a rich body of data,” at the same time “it points to the limitations of a model which may indeed distort our understanding.” Barbara Yngvesson, “Re-examining Continuing Relations and the Law,” 1985 Wis. L. Rev. 623, 624–25 (1985). All emphasis in this footnote is ours.
tempting to describe the same phenomena will produce the same description.

Such vestiges of instrumentalism sneak into the most sophisticated interpretivist accounts. Consider as an example Merry's 1986 study of working-class ideology in small claims courts. The conceptual structure of this article maintains the presumption that empirical studies generate evidence from particular contexts that can be used to generate or verify general theoretical insights. Merry justifies her research by identifying a lacuna in the current state of knowledge regarding the extent to which disputants in small claims courts see legal doctrine as legitimate.71 In other words, she identifies an area of the world for which we have no accurate description. This lacuna in science's "big picture" is specified, in part, by her reference to certain existing literature that already provides a valid description of surrounding phenomena.72 By identifying the lack of accurate description in the specified area, Merry defines the purpose of the research: to advance scientific knowledge by "filling the lacuna." Many Amherst articles explicitly state that the purpose of their writing is to provide science with accurate descriptions for the purpose of expanding general knowledge.

Having specified the purpose of her article, Merry then discusses the methods of empirical investigation she used in the construction of her description. It is assumed that these scientific procedures of data collection conform to universal criteria of validity; anyone who investigates the same phenomena while following these procedures of empirical investigation will construct the same description. By following these universal procedures, Merry insures that the description she constructs will be accurate. By reporting her use of these procedures, she assures her readers (her fellow scientists) that her results are valid.73 Having substantiated her procedure as valid, Merry goes on to communicate the description she constructed and to derive certain general conclusions about the nature of reality from this description. She presents her description and her conclusions as authoritative scientific knowledge of the nature of legal phenomena.74 Presumably, this knowledge is now available to any reader who has an interest or value that can be achieved by using it.

71. "We [social scientists] have little empirical evidence about the extent to which legal doctrine is known to people in subordinate positions or the implications of this knowledge for their ideas about the legitimacy and justice of the social system. . . . As yet, the role of legal ideology in preserving or changing the existing power relations has not typically been addressed by anthropologists studying law." Merry, 13 Am. Ethnologist at 255 (cited in note 31).

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

73. "This paper draws on several years of ethnographic research. . . . The study includes extensive ethnographic observation." Id. at 256.

74. Merry, 13 Am. Ethnologist at 267 (cited in note 31).
In this example we find the three component processes of the instrumental theory of action: descriptions of reality, evaluative criteria, and valued ends. Yet Merry's conclusions about the nature of legal phenomena demonstrate that the phenomena she describes operate according to the principles of an interpretive theory of action. "The extent to which a local ideology is controlled or constrained by a dominant ideology and an institutional structure is an empirical question . . . . In different social situations, the relationship between local and dominant ideologies may be quite different." In other words, there is no determinism to the content and impact of formal or local legal ideologies; however, we can establish this truth through the universalism of scientific inquiry.

The Amherst Seminar's failure to follow through on interpretivism's implications for universal scientism, especially given their willingness to apply the interpretivist critique to the themes of untroubled instrumentalism and determinism, suggests the radical implications interpretist theory has for the Seminar members' understanding of their role as social scientists and the institutional constraints placed on them by their disciplines. Taken to its logical conclusion, interpretivism would raise serious questions about their own practices and the institutions in which they work. Amherst Seminar members are social scientists concerned with redefining the activity of sociolegal research. Of the three themes of law and society scholarship we have identified, it is universal scientism in which Amherst members and their disciplines (as opposed to legal system actors or traditional legal scholars) have the most at stake. The justification of the need for social-scientific inquiry is based on its claims of providing authoritative descriptions and explanations. This justification provides social scientists with their own selfworth as well as the status and material support they receive from the rest of society. Abandoning universal scientism could be seen as undermining sociolegal scholarship's own source of power. Even if such a sophisticated social scientist as Merry is willing to question this theme privately, it seems difficult for her to do so in her public writing. For even if she is willing to undermine existing legitimations of her own authority, her colleagues may not be willing to accept the consequences of such writing for their discipline as a whole.

V. CRITICISM AND EMPIRICISM

How should a shift from an instrumental to an interpretive theory of action affect the way we understand our practice and products? In this section we examine the way several Amherst scholars deal with this ques-

75. Id.
tion and clarify what is at stake when "criticism" is juxtaposed with "empiricism."

A. Law and Society Research as Ideological Practice

In the instrumental theory of action accurate descriptions of the world are necessary for effective achievement of ends no matter what those ends might be. The presumption is that all humans share a particular set of evaluative criteria by which they assess the degree to which descriptions of the world actually correspond to that world. In social science, these evaluative criteria provide a series of methods through which descriptions can be constructed that closely reflect the actual nature of external behaviors and objects. In this context, "empirical" investigation refers to a process of careful observation of the external world for the purpose of providing valid descriptions—"re-presentations"—of that world.76

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

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

76. Peller, 73 Cal. L. Rev. (cited in note 6).
However, the transition from an instrumental to an interpretive theory transforms our understanding of values, knowledge, evaluative criteria, and the manner in which these three phenomena are related. In this model, specific values, knowledge, and evaluative criteria combine into a common trans-individual web of meaning—an "ideology" or discourse. The values, perceptions, and standards that constitute a specific ideology are thus deeply implicated with one another. A given perspective, for example, can be identified as part of a given ideology through the relations of meaning that bind it to the values and evaluative criteria which are also constitutive of that ideology. As one moves from one ideology to another, or as given ideologies are transformed, the values, knowledge, and criteria that compose those ideologies change as well. This means that values, knowledge, and evaluative criteria are historicized and pluralized: there are a multitude of values, knowledge perspectives, and criteria; these elements vary across societies and across time; and they are bound together by different relations in different combinations to constitute different ideologies.

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

If we accept the concepts "ideology" and "process" as characteristic features of the social relations we as social scientists describe, then we must accept these as characteristic features of our own meaningful behavior. Since the construction of "scientific knowledge" is one of our primary activities, we must recognize this activity as a moment in the reproduction, transmission, and transformation of ideologies. This implies that the values we advance, the perspectives we construct, and the evaluative criteria we apply are all historical; they are deeply implicated with one another; they hold together (though loosely) as webs of meaning; and they change over time and over space. In short, if we sincerely believe that an interpretive model of action is more appropriate than an instrumental theory, then we as law and society scholars must abandon not only our themes of untroubled instrumentalism and determinism but our theme of universal scientism as well.77

77. Bill Whitford has made us aware that many readers may interpret our rejection of universal scientism as a call to substitute immediate intuition for investigatory practices. This is an appropriate conclusion only so long as one stays within an instrumental understanding of "criticism" and "empiricism." If empiricism is understood to mean the construction of valid descriptions of the world through investigatory practices of observation, if
B. Tentative Steps by the Amherst Seminar

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

To do this we focus on Amherst efforts that examine sociolegal studies as an ideological enterprise. Do these works maintain or abandon the assumptions that science (1) is motivated by a universal set of guiding values and interests, (2) constructs universally valid descriptions of the world, and/or (3) follows universally recognized procedures in its construction of knowledge?

Our review of the Amherst literature identified three somewhat distinct epistemological positions with increasing reliance on interpretive assumptions. We call these the description and evaluation of ideologies, the multiplication of perspectives, and the pursuit of knowledge as politics.

1. The Description and Evaluation of Ideologies

The first Amherst interpretive move acknowledges that sociolegal scholars are themselves involved in an ideological practice when they produce knowledge. However, some want to hold to the objectivist orientation of the instrumental theory of action. They suggest that while social scientists are enmeshed in ideologies, some of these ideologies paint a picture of social relations that is more in keeping with the facts than others. In other words, valid descriptions constructed through the application of proper scientific procedures can be used to assess the degree to which ideologies are accurate descriptions of the world. This same evaluation can then be used as a criteria for making a value choice between ideologies. The better ideology is the one that incorporates a more accurate description of the actual state of the world. This process of using positivist empirical investigations to “test” ideologies is often referred to in Amherst work as “the sociological perspective.”

Criticism is understood to mean the selection of values through intuitive judgment, and if these are understood to be radically-distinct processes, then a call for the rejection of universal science is easily understood as a call to replace investigatory practices with their “opposite”—intuitive judgment. An interpretive theory of action, however, does not call for replacing empiricism with criticism, but rather for redefining what “empiricism” and “criticism” mean. It understands that criticism requires investigatory practices and that empirical investigation requires intuitive judgment.

78. Consider the following quote as an example: “This paper has examined the construction of social relations in law. I have tried to assess the role of dispute processing...
These works imply that they are "critical" because they recognize that meaningful activity, including the activity of policymakers and sociolegal scholars, can only be described within the context of the ideologies through which this activity is perceived by the individuals involved. Knowledge must therefore supplement descriptions of behavior with descriptions of the ideologies which frame that behavior. To this extent, all practices—including scientific practices—are ideological practices.

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

2. The Multiplication of Perspectives

In their 1987 "Critical Traditions" article, Susan Silbey and Austin Sarat present a second epistemological position. They argue that the same indeterminacy that the Seminar assumes regarding the objects of their knowledge (ontology) also applies to the "scientific" knowledge they produce (epistemology). "To maintain a critical distance from our present project, we would be compelled to demonstrate regularly the indeterminacy of our analysis of indeterminacy." 79 If the perspectives we construct are indeterminate, then these perspectives can no longer be assumed to be universally valid contributions to the project of building "the big picture." No "sociological perspective" exists that can distinguish between competing perspectives on the basis of the accuracy of their description. This undermines the universalism of social science. If it is no longer possible to construct "the big picture," then science must pursue different purposes from those proposed by an instrumental epistemology.

Although in their article Silbey and Sarat reject accurate description as the single goal of scientific research, they do not make the purpose of science relative to whatever interests are embedded in the ideological orientation of the scientist. Rather, science is seen as having a new, yet singular and distinctive, purpose all its own. In this account, science must continually "challenge the dominant paradigm" by "producing new understandings of law" that privilege what was "marginal, invisible, and un-

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heard" in the previous dominant paradigm. In this formulation, we see echoes of the CLS notion of "deviant doctrine."

Here we have a new set of procedures for science. These are not designed to ensure the construction of valid descriptions. Rather, they provide a method through which the constitutive assumptions of the dominant paradigm can be identified and changed. This new method, called "participation at a distance," involves the following:

First, we are asked to notice the location and historicity of the communities within which social construction takes place, for example, to notice the institutional locations of law and society research; second, we are urged to guard against turning these bounded observations of law into universals. This approach urges attention to the specific situations, institutions, and struggles out of which the field of law and society emerged.

[Second], criticism . . . requires an unwillingness to rest content with primary orienting norms and a willingness to invert what is central so that the marginal, invisible, and unheard becomes a voice and a focus. . . . [Third], fidelity also requires more than unmasking and debunking; it demands a willingness to construct anew.

"Criticism" then, means the construction of a new perspective out of the prevailing one through the inversion of the dominant perspective's categories. This practice must also be "empirical." But in the context of this epistemology, "empiricism" does not mean the accurate description of the external world through careful observation. Rather, it means the imperative to construct new perspectives through (a) the study (if not observation and description) of meaningful activity in (b) locales that are defined as unorthodox and trivial from the point of view of the dominant perspective. It includes the description, contextualization, and inversion of the boundaries defining the meaningful activities we study. This means moving the "dominant discourse" beyond the boundaries of legal doctrine and legal institutions to the study of legal ideology in the community.

3. **Knowledge as Politics**

In "The Pull of the Policy Audience," Sarat and Silbey suggest yet

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80. *Id.* at 170–72.
81. *Id.* at 165.
82. *Id.* at 169–70.
83. *Id.* at 172.
84. "If we take as our subject the constitutive effect of law we cannot be content with literary theory applied to legal doctrine. We must instead study families, schools, work places, social movements, and yes, even professional associations to present a broad picture in which law may seem at first glance virtually impossible." *Id.* at 173.
another epistemology. While at points the later text restates the argument of “Critical Traditions,” at others the authors suggest that knowledge does not merely interpret the world; rather, it has a real impact on persons, groups, and institutions in that world. Consequently, “critical” knowledge construction puts value on particular voices and political projects while devaluing others. In this epistemological approach Silbey and Sarat want to reserve the label “critical” for knowledge construction that delegitimates certain voices and interests—the voices and interests of policymakers—and legitimates others—the voices and interests of marginal and invisible groups. In this view, “empiricism” can no longer refer to a simple process of interpreting meaningful activity in unorthodox locales. “Empiricism” is now understood to mean that in discussing these meaningful activities one is advancing a particular ideology. Therefore, one must consider the empirical impact the knowledge one is constructing will have on specific persons, groups, and institutions, and decide whether one is ready to accept responsibility for this impact.

As an example of this new type of “critical empirical” research, Sarat and Silbey cite a recent study by Kristin Bumiller. They support Bumiller for giving voice to a marginal and dominated group (the victims of discrimination) and for explicitly calling on her readers to identify with and work for social change that achieves their vision of society:

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

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

85. Sarat & Silbey, 10 Law & Policy (cited in note 13).
87. Sarat & Silbey, 10 Law & Policy at 140.
VI. CRITICAL EMPIRICISM: PARADOX, PROGRAM, OR PANDORA'S BOX?

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

Has the work of the Seminar resolved the paradox apparent in the juxtaposition of "critical" with "empirical"?

Has the Seminar developed a program or research agenda that will reconstitute law and society studies as critical sociology of law?

Will the resolution of the paradox and the development of a critical research agenda open a Pandora's box, threatening the hard-won gains of the law and society movement and undermining its relative stability and integration just as it approaches the 25th anniversary of its founding?

A. Paradox

Our answer to the first question is that "critical empiricism," as used by the Seminar, remains a paradox. The basic antinomy between objectivism and social critique is reflected throughout their writings. Few, if any, have really abandoned the notion that science can and often does provide an authoritative description, or re-presentation, of the world. Because they have not fully worked out their views on the relationship between knowledge and politics, they have not fully recognized their own complicity in knowledge production. And perhaps because of this, the Seminar's work often lacks the sense of political engagement and the richness of moral criticism that one finds in the best work of CLS, feminist, and other scholars who are engaged in critiques of the legal order. To be sure, the Seminar's partial critique of the law and society tradition and their partial adoption of an interpretivist stance has disrupted the complacency of the law and society mainstream's commitment to policy science. The welcome but timid efforts to introduce marginal voices and give value to victims suggests the beginning of a politically self-conscious practice of knowledge construction. The debunking of specific reform ideologies like that of the ADR movement has been liberating. And Seminar participants have produced empiricial studies, like Sarat and Felstiner's study of divorce lawyers,\(^88\) which engage our moral imagination and point toward transformative action. But often the most powerful moral and political

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arguments, the most effective examples of “trashing,” are shot through with an objectivizing discourse that confirms the very idea of neutral science which the Seminar sought to make problematic, and which it must uproot if it is to launch a truly critical practice of knowledge construction.

B. Program

Our answer to the second question is that the Seminar has developed multiple research programs with potentially divergent implications. Thus, in our survey of the “sources” of the interpretive and critical turn in law and society studies reflected in the Amherst work, we have suggested that there are several possible ways in which the project might play out. The Seminar may be struggling toward a synthesis, in which sociolegal studies will recognize agency and structure, recognize regularity and indeterminacy, investigate micro as well as macro arenas, and accept the political nature of its knowledge. But it is premature to say whether this will occur.

C. Pandora’s Box

Our answer to the third question is that the moves being made by the Seminar do represent a Pandora’s box, and that is a good thing. By this, we mean several things.

First, we admire the work being done at Amherst and deeply appreciate the difficulties it entails. While the role of critics and reviewers seems to permit us to speak with detachment and to claim a position that is somehow different and even superior to the work being reviewed, we renounce any such reading of this essay. Our project is largely the same as that we have been reviewing, our doubts and understanding of the dilemmas involved in transforming an academic discourse similar to those of the scholars we have discussed. Indeed, our primary aim in this essay is to call attention to this project and make a modest contribution to furthering its goals.

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

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

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