SCHOLARS IN SELF-ESTRANGEMENT: SOME REFLECTIONS ON THE CRISIS IN LAW AND DEVELOPMENT STUDIES IN THE UNITED STATES*

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I. INTRODUCTION

A. Scholars in Self-Estrangement

This is a study of the relationship between scholarship and action. It will show how changes in specialized concepts, theories, and modes of scholarly activity affect and are affected by changes in the moral attitude of scholars towards their professional work. The essay examines the recent history of a specialized area of United States academic study concerned with the relationship between the legal systems and the “development”—the social, economic and political changes—occurring in Third World countries.¹ We will focus

* This essay originated in a report we prepared for the Research Advisory Committee of the International Legal Center. The views expressed herein, however, are our own, and do not reflect the views either of the Committee or the Center. The Committee’s debate on the issues discussed here helped us immensely in formulating the ideas in the essay. We also benefited from an opportunity to discuss the recent history of the law and development movement with James A. Gardner of the Ford Foundation and to read a draft of his internal Foundation report on the movement. Stewart Macaulay and James Magavern gave us useful comments on earlier drafts and Mary Ann Perga assisted us in the research.

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¹ In this essay, we shall speak of “developing countries” and the “Third World” interchangeably. We use these terms primarily to refer to countries with relatively low per capita incomes and relatively small industrial sectors. We include all of Latin America, Africa, and Asia except Japan and China. China, like parts of Eastern Europe, is excluded from our focus for historical as much as analytical reasons. Recent changes in oil revenue make the classification of some middle eastern nations difficult; since our story focuses on Latin America, Africa and Asia we do not try to resolve these issues. When we speak of development, we mean nothing more than the social, political and economic changes in “developing nations.” Since others whom we discuss have used this term differently, the usage will vary with the context.
on the small group of academics who have attempted both to create a specialized body of knowledge about such relationships, and to institutionalize these "law and development studies" in American universities. The principal thesis of the essay is that intellectual and moral shifts have created a crisis for this small group of academics, a crisis which threatens the future of their efforts to create theories about and to institutionalize the study of law and development. This crisis has two dimensions. Many scholars in the area have encountered difficulties defining the nature of their work or explaining its social utility. At the same time, the scholars have been unable to agree on the common interests that might unite them and justify their seeking permanent identity as a "field of inquiry."

To understand the crisis in law and development research, we must examine significant changes in ideas about the role of law in American society, the relationship between the United States and the Third World, and the relationship between scholarship and action programs. Therefore this story may be instructive to those outside the law and development field as well as to those in it.

The moral shift we shall chronicle concerns the group's attitude toward United States aid for law reform abroad. Law and development studies originated largely as by-products of "development assistance" activities by the United States government, international agencies, and private foundations working with governments and legal institutions in the Third World. Many of the early writings on law and development resulted directly from assistance activity, and many scholars formed an interest in law and development through their work in the assistance effort. As time went on, however, and as academic interest in the area grew, others who had not been involved in assistance activities entered the field. Development-focused academic work began to differentiate itself from assistance activities, and some scholars began to subject the aid efforts to critical scrutiny. This scrutiny began the process that led to today's crisis.

Legal development assistance was originally justified as a rational and effective method to protect individual freedom, expand citizen participation in decisionmaking, enhance social equality, and increase the capacity of all citizens rationally to control events and shape social life. While the assistance agencies consistently maintained that the legal development projects they supported were achieving these goals, many scholars began to wonder whether these projects were, in fact, contributing to freedom, equality, par-

2. For a general discussion of law and development studies throughout the world, see RESEARCH ADVISORY COMMITTEE ON LAW AND DEVELOPMENT OF THE INTERNATIONAL LEGAL CENTER, LAW AND DEVELOPMENT (1974) [hereinafter cited as LAW AND DEVELOPMENT].

ticipation, and shared rationality. These doubts led the scholars to question the moral worth of some or all legal development assistance activities, and thus, necessarily to question their own scholarship itself.

These doubts, we believe, have created the malaise we shall call "self-estrangement," and it is the existence of this malaise which constitutes the present crisis. When law and development scholars criticize assistance programs, they are condemning something which some had helped to create, more had participated in, and most look to for support of the continuation of law and development work. The critical effort has led these scholars truly into estrangement from themselves. If they are to be true to their ideals and values, they feel they must express skepticism about, if not condemnation of, the assistance programs; but in doing so they must condemn the results of their own actions, past and present, and attack the very agencies they must turn to for individual funding and the major support needed if the field is to become institutionalized.

As law and development scholars, we have personally felt this malaise—this essay is our effort to clarify its nature and understand its meaning. This goal imposes special problems of method. The small size of the academic group, the immediacy of the events, and the subjective nature of the moral feelings we wish to describe all make it impossible to rely exclusively on conventional tools of social and historical study. Accordingly, in this essay we draw heavily on our own experience, incorporating what we have learned from self-analysis and informal conversations with colleagues with what we have gleaned from articles and other documents. Given the goals of our study and the nature of our subject, this choice seemed necessary.

In the pages that follow, we first trace the gradual emergence of a sense of self-estrangement and examine the forces that have produced it. Then we briefly discuss how scholars seem to be grappling with the moral and intellectual issues underlying the crisis in law and development studies. To do this we will take a look at the various competing definitions of the field being proffered, showing that the moral dilemmas are leading scholars who might once have seen themselves as members of a group with shared goals to find separate ways to deal with—or reject—the moral tensions we describe. In a final section we try to identify the positive contributions which critical research on law and development has made to both legal theory and development thought, and we speculate on the future prospects for law and development studies.

4. Because this type of work involves a radical break with disciplinary traditions and normal academic priorities, many scholars feel that only the assistance agencies can understand and support what their universities and conventional research support agencies see as exotic and peripheral. See, e.g., Law and Development, supra note 2, at 45-46.
B. A Short History of the Law and Development Movement

While some United States scholars studied law in Third World countries before the 1960's, in that decade we can see a substantial expansion of effort, more explicit concern with the relationship between law and the process of development, and an attempt to organize separate efforts into some sort of an academic "field." The stimulus for these events came as much from government and foundations as from the universities. Law and development studies were a small and rather late aspect of the general response of United States universities to pressures from development assistance agencies. Billed as the first international "development decade," the 1960's marked the highpoint of U.S. bilateral aid to the Third World. As foundations and agencies committed to the promotion of "development" expanded their assistance activities, they looked increasingly to the Academy for guidance in planning development projects and for personnel to man them. Indeed, some hoped the universities would create a science of development to guide the effort to "modernize" Third World nations.5

In this period, many academics cashed in on foundation and government interest in development. The economists led the pack and economic development studies were for a time one of the most glamorous areas of applied economics.6 But development studies were not limited to economics: political and other social scientists attempted to define the nature of "political development"7 and to chart such issues as the "social bases of economic development."8

The lawyers were latecomers to the development research game, responding more slowly than social scientists to the demand for theoretical insights into the processes of development. Factors internal and external to the university help explain this lag. Internally, the structure of legal scholarship made law schools less equipped for development studies than social science departments. Law schools were primarily professional in orientation and domestic in outlook,9 and law and development work had little if any apparent relevance to practicing lawyers in the United States. Moreover, there was little capacity in the universities for any sys-

6. For an introduction to economic development literature see E. HAGEN, THE ECONOMICS OF DEVELOPMENT (1968).
tematic social research on law in other societies. What little "law and society" work existed was marginal, unorganized, and focused almost entirely on domestic issues. At the same time, since action agencies placed relatively little emphasis on "legal development" in the Third World, they did not exert any pressure on the law schools for research or action in this area.

But even as early as the 1950's there were some lawyers interested in development and some developers interested in law. And as the development decade unfolded, a number of "legal development" projects, many aimed at reform of legal education, were begun. This meant that action agencies became interested in attracting legal scholars into assistance work, and a number of scholars thus secured an exposure to the problems of legal life in the Third World.

These initial contacts between lawyers and developers created an interest in theories and studies of the role of law in development. The scholars who helped design and staff legal development projects found that there was no explicit body of knowledge that could chart the relationship between legal systems and social, political, and economic change in the Third World. Some began to articulate the assumptions and theories that underlay their assistance efforts.

11. Merillat, supra note 5, at 77.
13. Programs aimed at achieving legal education reform were funded by agencies of the U.S. government and U.S. foundations throughout the 1960's. SAILER (Staffing of African Institutions For Legal Education and Research), begun in 1962 with support from the Ford Foundation, sought to improve African legal education by exporting American law graduates to African universities for the purposes of teaching and aiding in research. The program gained subsequent additional financial support from both the Rockefeller Foundation and the Peace Corps. CEPED (Center For Study and Research in Legal Education), started in 1966 with funding from AID and the Ford Foundation, contemplated reform of Brazilian legal education. The Center was established to teach Brazilian lawyers with the use of such U.S. teaching techniques as the "Socratic" discussion of cases, texts and legislative materials, the problem method, and study of the social sciences. The developers of CEPED hoped not only to give young Brazilian lawyers an understanding of new developmental legislation, but also to eventually affect the Brazilian law schools by creating both materials to be used in their curricula and a new breed of law teachers to utilize those materials. Education reform projects were launched in other Latin American countries: in Costa Rica in 1965 by AID, in Chile in 1967 by the Ford Foundation, and in Colombia in 1969 by Ford and later supported through funding by both agencies.
and to conduct further research on these matters. At the same time the developers became aware that law might hinder or hamper their activities and took some interest in academic efforts to probe the mysteries of law and development.\textsuperscript{14} Thus, these assistance efforts and their immediate by-products encouraged self-conscious law and development writing. Moreover, the assistance effort helped create an atmosphere that encouraged a number of scholars to attempt to establish a "law and development" specialty that would parallel economic development studies in economics and political development studies in political science.\textsuperscript{16} Such studies would, the scholars felt, have policy significance and access to funding.

The effort to institutionalize law and development studies drew on many strands in United States academic life, attracting a much broader group than the early scholar-reformers, and looking far beyond policy prescription in defining the scope of law and development research. Scholars from at least five separate areas came together in an effort to create law and development studies. These included, in addition to the scholar-reformers: (1) comparative lawyers; (2) area specialists interested in Third World countries; (3) legal anthropologists and other social scientists engaged in social research on law in the Third World; and (4) social theorists of law concerned with developing comprehensive theories of the role of law in social change.

Given the political and intellectual climate of the time, it is no wonder that these disparate interests coalesced around the examination of the role of law in development. "Development" was in the air: liberal America was excited by the prospect of harnessing American knowledge and resources to the developmental task.\textsuperscript{16}

\textsuperscript{14} The International Legal Center was created in 1966 as a specialized agency for legal development assistance. Although the ILC is principally an assistance agency, it has also funded research on law and development. In 1969 the Agency For International Development gave a $1,000,000 grant to the Yale Law School to support a Program in Law and Modernization. This was followed in 1971 by a $750,000 grant to the Stanford Law School for a study of law in Latin American development.

\textsuperscript{15} This mood was reflected in the initial proposal and reports of the Yale Law School Program in Law and Modernization, which stated that the Law School Program would be conducted in cooperation with the Departments of Economics and Political Science, and that Yale was particularly well suited for a legal development program, in part because of the University's encouragement of studies of the developing countries by the social sciences. \textit{Yale Law School Program in Law and Modernization, Final Proposal for Aid Institutional Grant Support}, 1-2 [hereinafter cited as \textit{Yale Proposal}].

\textsuperscript{16} Justice William O. Douglas caught the mood of the times and showed how lawyers could fit into the developmental decade:

These newly developing nations need our help—not only our money and machines and food, but also the great capital of knowledge accumulated by our professors . . . . Refrigerators and radios can be easily exported—but not the democratic system. Ideas of liberty and freedom travel fast and far and are contagious. Yet their adaptation
Moreover, the theme had something for everyone. The comparative lawyers saw in "law and development" a way to break out of the rather sterile comparison of legal rules which had dominated comparative law studies.\(^{17}\) The social scientists and area specialists saw the theme as a way to relate their traditional disciplinary interests to broader social needs in Third World countries.\(^{18}\) The social theorists of law saw Third World nations engaged in massive use of law to carry out rapid changes of society, thus presenting a fruitful area for theoretical inquiry into the role of law in social change.\(^{19}\) And the reformers sought a set of ideas that would both guide and justify their projects. Moreover, all saw the theme of "law and development" as one that would promise increased support for academic and action work, for it was hoped that scholarship would demonstrate to action agencies that legal research and reform would further their goals of fostering Third World development. Action agencies such as the Ford Foundation and AID responded, supporting the law and development scholars and recruiting them to man reform projects in developing nations.

The several scholarly groups never really coalesced into a field or discipline. There were efforts to organize law and development studies and to create the unity of focus and method and the degree of structure that might make law and development into a "field" rather than a "movement."\(^{20}\) But before the separate strands of the law and development activity were unified, law and development studies confronted the crisis we have described. This crisis has blocked further efforts at scholarly organization.

to particular societies requires trained people, disciplined people, dedicated people. It requires lawyers.


20. See, e.g., Law and Development, supra note 2, at 71. In the late 1960's, there were a flurry of meetings, conferences, and panels which addressed the intellectual and institutional problems of the law and development enterprise. Among these were: a week-long Conference on Modernization and Legal Development in Asia held at the East-West Center in Honolulu in June, 1967; a two-day meeting on Legal Culture and Social, Economic and Political Development held at the Center for Intersocial Studies at Northwestern University on April 19 and 20, 1968, sponsored by the East-West Center, the AALS and the Law and Society Association; a panel on the same topic at the meetings of the Association of American Law Schools in New Orleans in December, 1968; a two-day conference on Law and Modernization at Yale Law School in March, 1969.
Law and development studies were never well integrated or monolithic. But at a very general level most of the scholars and some of the developers shared, in the early years, some rather fundamental notions about the nature of law, and the character of development. These assumptions told the scholars how to orient their research, and gave them confidence that their scholarly and assistance efforts were morally worthy. The crisis constitutes a collapse of faith in many of these basic assumptions.

C. Excursus on Some Functions of Social Theory

Before we turn to a detailed description of the present situation, we must explain our view of the "basic assumptions" of a body of social theory and the cognitive and normative functions which they serve. Basic assumptions in social thought contain a cognitive map of relations among social phenomena. They provide a lens through which phenomena are perceived, and establish criteria for arranging and evaluating these perceptions. Accordingly, such assumptions tell us what are important questions and what are suitable answers. But at the same time they speak to normative concerns. Implicitly or explicitly, they explain social life in terms of some set of values. Thus they serve to justify or criticize both existing social relations and the research that explores them. We shall use the term "paradigm" to refer to this set of shared basic assumptions.\(^2\) We believe that the presuppositions that form the "paradigm" of a scholarly field are rarely visible and explicit. Rather, they form a set of tacit understandings and assumptions which are only infrequently brought to consciousness. And paradoxically, we suspect that it may be the very invisibility of these features of social thought that account for their power. It is because we rarely even think about them that these assumptions so effectively channel and orient our intellectual work.

Indeed, it may be that these fundamental assumptions are most likely to reveal themselves in times of crisis. Thus it may be that a body of social thought tends to become most self-conscious when the cognitive relations and normative assumptions which underlie it have been subjected to challenge. Social theory, Gouldner reminds us, functions to explain the goodness or the potency of some feature of social life,\(^2\) and we are more likely to develop explicit theories that justify existing social relations when those relations are being challenged than when they are taken for granted. The Owl of Minerva may not fly only at twilight; but when we hear the rustle of her wings we must ask if the sun is not setting.

\(^2\) We emphasize that the paradigm need not be articulated as theory. Rather, we suggest that it functions as the tacit theory in most untheoretical legal research.

II. LIBERAL LEGALISM: THE ORIGINAL PARADIGM OF LAW AND DEVELOPMENT STUDIES IN THE UNITED STATES

A. Making Presuppositions Into Propositions

In the early years of the law and development movement many scholars and assistance officials shared a tacit set of assumptions about the relationship between law and development. In this section we shall set out the basic presuppositions of this paradigm—which we shall call "liberal legalism"—in the form of a series of propositions about the role of law in society and the relationship between legal systems and development. Only by making the tacit assumptions explicit can we understand and examine the ideas that shaped the early law and development efforts. The task of turning presuppositions into propositions, however, is a difficult one. Although the basic elements we seek are fundamental, they are also hard to uncover. The analyst must strive to make them clear and explicit, without at the same time distorting or caricaturing them.

The difficulties are exacerbated by the very nature of the presuppositions. The elements of social thought we seek are rarely made explicit precisely because they are fundamental. They are rarely subjected to factual scrutiny because they are more than mere statements of what is true, and they usually elude normative analysis because they are treated as more than mere statements of what would be desirable. Rather, they establish the inherent and proper shape of social reality and thus require neither explanation nor investigation.

To state these implicit presuppositions in propositional form is, frequently, to say things the writers themselves did not. Thus one can never be certain that all members of a given "school" adhere to all the tenets the analyst sets forth. It is inevitable that there will be distortion and oversimplification. It is equally inevitable that some will disavow many of the assumptions imputed to them, and few will admit holding all elements in the model. But these are unavoidable problems, and despite them it is possible to develop a model which expresses what is or was both most fundamental and most widely accepted in a perspective or field. That is what we mean by a paradigm, and is what we strive for in the model of liberal legalism that follows.

B. Liberal Legalism: The Basic Model of Law in Society

Liberal legalism in law and development studies contained two

23. The paradigm of "liberal legalism" is based on previous work we have done on the assumptions of legal and developmental thought. Trubek, supra note 3 carried out an analysis of law and development thought. The basic law in society model was discussed in Galanter, The Future of Law and Social Science Research, 52 N.C.L. Rev. 1061 (1974), and M. Galanter, Notes on the Future of Social Research on Law (unpublished paper on file with the authors, 1973).
basic elements: (1) a general model of the relationship between law and society, and (2) a specific explanation of the relationship between legal systems and "development."

Stated in propositional form, the components of the paradigm include the following. First, society is made up of individuals, intermediate groups in which individuals voluntarily organize themselves, and the state. The state is the primary locus of supra-individual control in society, and thus state action involves coercion of individuals. But at the same time "the state" is seen as a process by which individuals, principally through their membership in relatively permanent voluntary groups, formulate rules for mutual self-governance. Neither the state nor the intermediate groups are ends in themselves, but are instruments by which individuals pursue their own welfare. And since individuals consent to the state, including its coercive features, state control furthers individual welfare.

Second, the state exercises its control over the individual through law—bodies of rules that are addressed universally to all individuals similarly situated. The state coerces those who violate the rules, and refuses positive aid to those who fail to comply with conditions placed by rules, but it does either only in accordance with rules by which the state itself is constrained.

Third, rules are consciously designed to achieve social purposes or effectuate basic social principles. These purposes are those of the society as a whole, not of limited groups within it. Rules are made through a pluralist process which enables all individuals to secure rules favorable to them, while at the same time insuring that rules respect the vital interests of all others. The prime actors in this pluralist rule making process are intermediate groups which aggregate individual interests. All or most individuals have access to and a voice in one or more of these groups, so individuals are more or less equally represented in the rule making process. No single group, either a minority or majority, dominates the process of formulation of legal rules, and no special characteristic of individuals or groups, such as wealth or race, gives them systematic advantages or disadvantages in rule making.

24. See Freidman, supra note 9, at 30–31, 38–40; Karst, Law in Developing Countries, 60 LAW LIBRARY J. 13, 17 (1967).
Fourth, when the rules made through this process are applied, they are enforced equally for all citizens, and in a fashion that achieves the purposes for which they were consciously designed.27

Fifth, the legal order applies, interprets, and changes universalistic rules. Promulgation and change functions are typically performed by legislatures; interpretation and application may be performed by "executive" bodies. But the courts have the principal responsibility for defining the effect of legal rules and concepts on individual and group behavior and thus normally have the final say in defining the social meaning of the laws. Thus, in a sense, the courts are the central institutions of the legal order.28

In performing their functions, courts employ a system of reasoning and justification that is both independent of and yet related to the immediate goals and aims of the rulemakers.29 Thus, the basic, typical, decisive mode of legal action is adjudication (i.e., the application of rules by courts or court-like institutions); adjudication proceeds from and produces authoritative rules and bodies of doctrine; these authoritative rules and doctrines restate social policy, principles and purposes in an autonomous body of learning. It is this body of learning, not the policies themselves, or extraneous considerations, which determine the outcome of adjudication.

Finally, the behavior of social actors tends to conform to the rules:30 officials are guided by the rules, not by personal, class, regional or other bases of decisionmaking; a large number of the rules will be internalized by most of the population. To the extent that they are not internalized, official enforcement action will guarantee behavior in conformity to the rules.

Viewed through the lens of this paradigm, a legal system is an integrated purposive entity which draws on the power of the state but disciplines that power by its own autonomous and internally derived norms. With some slippage and friction, social behavior is aligned with and guided by legal rules. Moreover, that behavior can be consciously modified by appropriate alternations of these rules.

27. See Karst, supra note 24, at 14-15; König, Legal Development in Developing Countries, 1969 PROCEEDINGS OF THE AM. SOC'y INT'L L. 91, 98.
28. See David, supra note 26, at 203; Karst, supra note 24, at 19; Linowitz, Lawyers and the Development Process, 1968 PROCEEDINGS OF THE ASS'N OF AM. L. SCHOOLS (Part Two) 97, 98; Mendelson, supra note 26, at 226-29. In the period in which the liberal legalist model of development took shape, domestic American legal thought retained its primary focus on the work of the courts. This "court-centeredness" was under attack, however, and interest in other agencies of legal action grew over the period we chronicle here.
29. See Friedman, supra note 25, at 37; Galanter, supra note 19, at 155; Karst, supra note 24, at 19; König, supra note 27, at 95-96; Mendelson, supra note 26, at 226-29; Seidman, supra note 25, passim.
30. See D. TRUBÖK, LAW, PLANNING, AND THE DEVELOPMENT OF THE BRAZILIAN CAPITAL MARKET, 10 (Yale Law School Studies in Law and Moderni-
C. Liberal Legalism: The Relationship Between Law and Development

This model, which derives from liberal American thought on law, is a familiar one. The most fundamental question that early law and development theorists had to confront was the relationship between this model of law in society, the concept of development, and the problems of the Third World. As is often the case, questions of this scope and normative significance were not directly faced, yet answers to them were implicit in much law and development work. Although these assumptions rarely surfaced in explicit discussions, analysis of the questions that were asked and the matters that were discussed permits us to uncover some of the basic presuppositions scholars employed.

Development was assumed to involve an increase in man's rational capacity to control the world, and thus in his ability to improve his material well-being. But "development" offered more than increased rationality and material satisfaction; it also promised greater equality, enhanced freedom, and fuller participation in the community. As an ideal, therefore, "development" held the promise of a life that would be richer in all ways for all Third World people.

"Law" was seen as both a necessary element in "development," and a useful instrument to achieve it. "Law" was thus "potent,"

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31. See Karst, supra note 24, at 15; Koenz, supra note 27, at 95; Mendelson, supra note 26, at 227-29; Seidman, supra note 25, passim.
32. See Koenz, supra note 27, at 94; Seidman, supra note 25, at 315.
33. See Linowitz, supra note 26, at 99; Mendelson, supra note 26, at 238.
34. See Karst, supra note 24, at 14; Koenz, supra note 27, at 96; Linowitz, supra note 28, at 106-07.
35. This is exemplified in the following which also displays both the self-confidence and the ardent embrace of Third World power holders that so often characterized law and development programs:

Today, particularly in the developing world, the importance of studying the relationship of law to social and economic change is widely recognized. Social engineering demands at least three levels of expertise. There must be social scientists capable of advising policymakers in formulating overall macro-goals. There must be engineers and managers capable of implementing plans at the project level. In between, there must be professionals with the necessary skills to translate the macro-goals of the policy-makers into rules—i.e., institutions—with a high chance of inducing the sorts of behavior desired. Law and Development aims primarily at studying this intermediate level. The wide-spread dismay at the prevalence of 'paper plans' in the developing world attests to the need.

Specifically, what is required is a study of the ways in which rules supported by the authority of the State can induce behavior, and the extent to which social, political, psychological, and other factors external to the normative system of the legal order itself limit the ability of the law to induce behavior. The proposed institute is
and because legal development would foster social development and improve human welfare it was also "good." Law implied impersonal governance through universal rules, and governance through law would lead to more inclusive and more equal treatment of all citizens. Accordingly, the development of legal institutions was seen as a way of increasing equality and widening participation. Law was seen as a technique for curbing arbitrary government action, and as means of both protecting individual freedom and ensuring greater governmental responsiveness. Legal development would enlarge the sphere of liberty and simultaneously guarantee that governments would act in accordance with the wishes of the citizens. Moreover, law was also associated with rational, instrumental action to secure greater material well-being and other developmental goals. Law was one of the tools that could be used by planners consciously seeking to enhance human welfare. If law became more effective, the planners' powers would grow.

D. The Research Agenda of Liberal Legalism

A paradigm underlies but does not constitute a research agenda. The research agenda consists of the questions which appear relevant in light of the researchers' basic presuppositions. The research agenda of liberal legalism focused on several themes, the most pervasive of which was instrumental research designed to ascertain the legal changes needed to achieve some specific developmental goals. There were, however, more general essays and studies, which frequently either demonstrated the positive relationships between law and development—and thus justifying "legal development" efforts—or documented "problems," which frequently turned out to be perceived discrepancies between the ideal model of law

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designed to study these factors as they exist in the context of the developing world.

University of Wisconsin Law School Summer Institute in Law and Development, Prospectus 1 (1971). Cf. David, supra note 26, at 188-89; Friedman, supra note 25, 14, 29-33; Könz, supra note 27, at 94-96; Linowitz, supra note 28, at 98; Mendelson, supra note 26, at 234; Merillat, supra note 5, at 73-74; Rosenn, supra note 31, at 254.

36. See David, supra note 26, at 203; Karst, supra note 24, at 18-19; Könz, supra note 27, at 96; D. Trubek, supra note 26, at 80. D. Trubek, supra note 30, at 69-71.

37. See Karst, supra note 24, at 17; Könz, supra note 27, at 95; Linowitz, supra note 28, at 99; Mendelson, supra note 26, at 227-31; D. Trubek, supra note 26, at 80; D. Trubek, supra note 30, at 53-55.

38. See Könz, supra note 27, at 95; Linowitz, supra note 28, at 107.

39. Karst, supra note 24, at 18; Linowitz, supra note 28, at 98; D. Trubek, supra note 26, at 10. With hindsight, it is easy to see that there are contradictions between liberal legalism's model of law as a body of rules, and law as an instrument of power. But it was characteristic of liberal legalism that it did not confront this tension. Even when the analyst focused principally on the instrumental value of law, he assumed that by "law" was meant a system of rules, not merely commands backed by force. See text accompanying notes 48-50 infra.
in society and the apparent legal realities of Third World nations.

As many early researchers were closely tied to the assistance efforts, so much of the early research agenda was ultimately linked to the task of guiding and justifying legal development assistance. As examples of the effect of the liberal legalist paradigm on assistance and of assistance on the paradigm, let us look at some typical studies and projects. The research activities we wish to examine are studies of the role of the legal profession in development; the projects are efforts to reform legal education and expand legal assistance to the poorer citizens in Third World societies. The paradigm of liberal legalism focused attention on certain aspects of these activities but at the same time it blinded the scholars and developers to alternative possibilities.40

The legal profession studies started from the assumption that a strengthened legal profession would foster development.41 Accordingly researchers focused on specifying the deficiencies of existing professions in the developing countries, and examined methods by which their role could be expanded and their performance oriented more directly to "development" tasks. These studies concluded (possibly in justification of a prior policy decision) that reform of legal education would be the most effective way to further the "development" of legal professions.42 The legal development scholars produced critical appraisals of the law schools in Asia,43 Africa,44 and Latin America,45 arguing that by training lawyers to think more instrumentally, the schools could initiate change that would narrow the gap between the present performance of the legal profession and its developmental possibilities.46 Thus it was proposed that law schools study and explain the relationship between specific legal rules, doctrines, and procedures on the one hand, and national developmental goals on the other, urging their students to work

40. For a discussion of the role of "background" and "domain" assumptions in deliberately formulated social theories see A. Goulder, supra note 22, at 29-35.


42. See S. Lowenstein, supra note 41, passim; von Mehren, supra note 41, at 1185; Paul, supra note 41, at 193-95; Rosenn, supra note 31, passim; Steiner, supra note 41, at 70-82. But see Steiner, id., at 86-90.

43. See, e.g., von Mehren, supra note 41.

44. See, e.g., Paul, supra note 41.

45. See, e.g., S. Lowenstein, supra note 41; Rosenn, supra note 31; Steiner, supra note 41.

46. S. Lowenstein, supra note 41, at 177-98; von Mehren, supra note 41, at 1181-82, 1186-87; Paul, supra note 41, at 195-200; Rosenn, supra note 31, at 273; Steiner, supra note 41, at 77-79.
to reform those laws and institutions that failed to further the goals.

The scholars assumed that the growth of an instrumental perspective would generate "legal development," which would in turn foster a system of governance by universal, purposive rules, and would accordingly contribute to the enhancement of liberty, equality, participation, and rationality. The assumptions of liberal legalism, however, blinded law and development researchers to a very different set of results that might flow from expanding the role and the instrumental orientation of the legal profession. The research agenda ignored such questions as whether an expanded and modernized legal profession might not increase social inequality and reduce participation in decisionmaking. In societies where legal services are allocated by price, improved education could raise the costs of legal services and thus strengthen the "haves" vis-à-vis the "have-nots." Moreover, increasing professionalization of legal services could lead to greater formalization of legal decisionmaking, thus making it more, rather than less, difficult for the have-nots effectively to express their views.

A second ignored question was whether a more instrumental orientation to law might not weaken, rather than strengthen, legal guarantees for individual rights. In authoritarian regimes where technocratic elites define what constitutes and furthers "development," a bar which had abandoned traditional formalistic modes of thought for an instrumentalist orientation might be less, rather than more, able to resist efforts to erode traditional guarantees of freedom.

A third question which should have been asked was whether improvement in the instrumental skills and general professional capacity of lawyers might not hamper rather than foster the success of development projects. Since in many societies the best trained lawyers will represent the better off, and since the better off may resist programs which, like agrarian reform, are designed to benefit the entire society and especially the more marginal groups, an upgrading of the skills of the legal profession may merely enhance the capacity of those better off to delay, distort, or halt developmental efforts.

A similar analysis may be made of the projects designed to improve systems of subsidized professional legal assistance to the poor of the developing countries. These projects, designed to foster the developmental values of social equality and greater participation in decisionmaking, started from the premises that access to courts is essential for equal justice and that the availability of legal services determines access. Rule application involves discre-
tion and the party with access can affect the exercise of discretion. Courts also engage in rule making and the party with better access can persuade the judicial legislator to favor him. Legal services are essential to secure access, but the distribution of wealth determines the distribution of legal services. Therefore, the better off will have superior means of access to the courts and thus will systematically benefit from the legal order. Because this situation is a denial of equal opportunity to secure favorable rules, it conflicts with the ideal model of law in society. The legal assistance projects proposed to fill this gap by providing subsidized legal services to the poor.48

There are obvious parallels between the ideas underlying the legal assistance projects and those that oriented the legal education efforts. Both use the liberal legalist model as a tool for diagnosing the ills of Third World legal systems and proposing appropriate changes. Each focuses on one area of legal life in the Third World, measures it against the liberal legalist model, and, when this feature is found wanting, proposes that this particular aspect be modified so it conforms to the conditions specified in the ideal model. Thus, the legal assistance projects are primarily aimed at increasing access to existing formal court structures through subsidized provision of professional legal services.49 This prescription makes sense only if we assume that courts are the primary sources of rule application, and that the rules themselves are neutral towards or favorable to poor citizens so that access to adjudication will, ipso facto, eliminate inequities. It also requires us to believe that it is really possible to equalize the availability of professional skills, that the lawyers hired to work for the poor will work for rule changes, that courts will make rule changes, and that specific decisions by courts will affect other decisions and channel social behavior.

All these things are taken for granted by liberal legalists; liberal legalism assumes that all the aspects of the model either exist or are about to come into being, so that the reformer is warranted in proposing one move towards the ideal conditions without considering whether all changes necessary to achieve this model will occur.50 Thus, to one with this perspective, it makes sense to propose one policy change—subsidized professional legal services—without considering all the other changes which would be needed before this one alteration in the system can lead to the basic developmental values that the project seeks to further. This perspective makes it difficult to imagine that there may be very different

48. Metzger, Legal Services to the Poor and National Development Objectives, in LEGAL AID, id., at 15-16.
49. Id. at 7-14.
50. See R. Packenham, supra note 16, at 123-29 for a discussion of the assumption within the American liberal tradition that: "All Good Things Go Together."
paths to development more appropriate to the actual conditions in the Third World.

Once again, this is clear in the legal assistance area. The authors of these projects failed to ask themselves such questions as whether equality and participation would not be more effectively fostered by efforts to deformalize or deprofessionalize dispute settlement. Liberal legalism's basic presuppositions have made it relatively insensitive to the widespread interest in popular justice and popular tribunals, which offer a radically different response to the problems of access to legal institutions.51

The reformers failed to consider whether the structure of courts and the allocation of legal services are such that no degree of increased access can improve the output of justice for the poor. If courts and lawyers are biased and remote, if available funds for subsidized lawyers offer only token equalization of access to professional skills, or if decisions favorable to disadvantaged groups are ignored in practice, legal assistance projects based on liberal legalism's law-in-society model may be at best a palliative and at worst a mask to shield continued exploitation.52

Furthermore, the reformers should have asked whether the interests of have-not groups can be furthered only through political, not legal, action. This would mean that the goals of greater equality and participation and increased well-being can be achieved only by organizing the have-nots for coordinated social action designed to make major changes in rules or rule making processes, and by instituting direct attacks on the basic structure of income distribution.53

Thus we can see how the basic assumptions structured research interests, and how they defined not only the questions to be asked but, as well, the nature of satisfactory answers.

E. Summary of the Liberal Legalism Paradigm

Before exploring the emergence of the crisis in law and development studies, it will be helpful to summarize the themes, assump-

51. Some societies, facing a perceived gap between professional courts and popular ideas and understanding, have tried to increase "access" by making it easier for lay persons to understand and participate directly in judicial procedure. Thus, instead of giving lawyers to the people, they have eliminated the professionally trained judiciary, conducted trials in local, informal settings, in vernacular language, etc. For a discussion of a variety of such "popular tribunals," see Berman, The Cuban Popular Tribunals, 69 Colum. L. Rev. 1317 (1969); N. Tiruchelvam, The Popular Tribunals of Sri Lanka, A Socio-Legal Inquiry, ch. 1, 1973, (unpublished Yale Law School Program in Law and Modernization Working Paper No. 27). Liberal legalists were, however, insensitive or hostile to informal processes of dispute settlement. See, e.g., Künk, supra note 27, at 96; Rosenn, supra note 31, at 255 n.9.

52. See, e.g., Knight, Legal Services Projects for Latin America, in LEGAL AM. supra note 47, at 109-11.

53. Id. at 111-12.
tions, and orientations of the early law and development literature. The literature stressed the centrality of the state: the state is seen as the primary agent of social control and change, which will use law as a purposive instrument to transform society and yet will itself be constrained by law.

It focused on higher agencies of the legal system and showed little interest in nonstate forms of legal or other social ordering; indeed, one detects a subtle bias against informal legal systems and customary law.

It manifested a pervasive belief in the ultimate efficacy of legal rules as instruments of social change. Paradoxically, this belief is underscored by the widespread awareness of the gap between law in action and law in the books. Where it becomes apparent that immediate rule changes will not affect social behavior, attention shifts to the institutional changes that will be needed to guarantee that this will occur. Thus when the literature discusses problems of “penetration” and legal “effectiveness,” its concern is to narrow the gap between law in action and law in the books. This gap is seen as symptomatic of legal and social “underdevelopment,” a malady to be cured by vigorous social engineering.

The literature assumed that changes of law would change behavior. This belief justified the great attention given to examination of the instrumental relationship between development goals and specific legal rules, as well as the stress on instrumental legal thought as a device to guarantee that rules are selected which will efficiently achieve social goals.

It further assumed that legal professions were, or could come to be, representative of the public interest (the interests of “development”) rather than agents of relatively narrow segments of the society.

Finally, it took for granted the existence of some natural tendency for legal systems in the Third World to evolve in the direction of the ideal model of liberal legalism. This assumption made it possible for analysts to focus on one small part of the legal system of a country, such as its technique of legal education or its delivery of legal services to the poor, and to recommend that changing that feature towards the ideal model would of necessity further the developmental values of freedom, equality, participation, and rational mastery of the world.

Because of the cumulation of these features of liberal legalism, this brand of thought led the assistance effort to focus on reform of formal rules, to work with the established professions, to believe that changes in the education of the professional legal class would ultimately produce desired social change and, above all, to assume almost automatically that any activity that was designed to change legal institutions of Third World countries to make them more like
those of the United States would be an effective and morally worthy pursuit.

III. Emergence of a Crisis: The Divorce of Goodness and Potency and the Unravelling of Liberal Legalism

A. Introduction

Law and development studies are in crisis because some scholars have come seriously to doubt the liberal legalist assumptions that "legal development" can be equated with exporting United States institutions or that any improvement of legal institutions in the Third World will be potent and good. They have come to see that legal change may have little or no effect on social economic conditions in Third World societies and, conversely, that many legal "reforms" can deepen inequality, curb participation, restrict individual freedom, and hamper efforts to increase material well-being.

These realizations have led to a reappraisal of the liberal legalist model of law in society, a search for a new research agenda, and the emergence of moral doubt about scholarship and assistance. The recognition that legal change may have little effect on development forces reappraisal of the earlier automatic assumption that law can be an effective instrument to reach developmental goals. At the same time, the realization that those legal projects which do have an effect can undermine developmental values makes it impossible to support some general goal of "legal development." And most significantly, these recognitions drive home the need to rethink the basic validity of the liberal legalist model, which now appears naive and ethnocentric and thus an inadequate guide to thought and action.

B. The Ethnocentric and Naive Aspects of the Model of Law in Society

The ethnocentric quality of liberal legalism's model of law in society is apparent. Empirically, the model assumes social and political pluralism, while in most of the Third World we find social stratification and class cleavage juxtaposed with authoritarian or totalitarian political systems. The model assumes that state institutions are the primary locus of social control, while in much of the Third World the grip of tribe, clan, and local community is far stronger than that of the nation-state. The model assumes that rules both reflect the interests of the vast majority of citizens and are normally internalized by them, while in many developing countries rules are imposed on the many by the few and are frequently

54. Trubek, supra note 3, at 34-37.
honored more in the breach than in the observance.\textsuperscript{56} The model assumes that courts are central actors in social control, and that they are relatively autonomous from political, tribal, religious, or class interests. Yet in many nations courts are neither very independent nor very important.\textsuperscript{57}

But beyond the realization of ethnocentricity, many have begun to doubt that the model accurately describes legal life even in the United States. If we look at the United States legal system, we find that the liberal legalist model of law in society does not describe reality very well. An example is the basic assumption that rules are made and applied to achieve general, social purposes. Many of the rules that make up the total corpus juris originate from, and primarily serve, specific groups within the society. Moreover, those who apply rules have substantial discretion, and this can be and is applied to favor certain groups and viewpoints.\textsuperscript{58} Finally, structural biases in the system can and do lead to systematic discrimination against specific groups.\textsuperscript{59}

Similarly, the idea of the centrality of courts is also largely mythical. Courts actually play a minor (or at least indirect) role in rule making and dispute settling in our society; the greater part of what courts do is not rule-oriented adjudication, but a form of administrative processing as in debt-collection, divorce, and traffic work or supervised bargaining as in personal injury, criminal, and commercial cases.\textsuperscript{60} Both regulatory activity and the promulgation of rules take place mostly in other settings and often do not involve courts at all.\textsuperscript{61} Where courts or other authorities do promulgate rules, the degree to which officials or the public are guided by them varies considerably.\textsuperscript{62}

Of course, each of the components of the paradigm is descriptive to some extent of some areas and strata of the United States legal

\textsuperscript{56} See, e.g., Rosenn, supra note 31, at 254.
\textsuperscript{57} Id.; Knight, supra note 52, at 111.
\textsuperscript{61} See, e.g., L. Friedman, Contract Law in America: A Social and Economic Case Study 98 (1964).
\textsuperscript{62} This has been amply documented in the voluminous literature on the "impact" of judicial decisions, conveniently summarized in S. Wasby, The Impact of the U.S. Supreme Court: Some Perspectives (1970).
system. But in view of the many areas that diverge from the model, there is little reason to assume that it represents the typical or normal case of legal regulation in this society. The gap between the law on the books and the law in action has been discovered innumerable times (in race relations, divorce, school prayers, and criminal justice, for example) but the implications of this discovery depend on one's picture of what is normal and typical in our legal system. Within the received paradigm, each instance of the gap tends to be dismissed as an exception—something atypical, peripheral, and transient.\textsuperscript{63} Awareness of such discrepancies does not induce professionals to relinquish their model of the legal system, for the persistence of the paradigm is powerfully supported by the training and intellectual orientation of the profession. Legal training provides elaborate categories for remembering and analysing rules but treats other elements of the legal process haphazardly, inducing a learned incapacity to perceive, recall, and analyze the system in actual operation. Legal scholarship concentrates on the work of precisely those levels and areas of the system which the paradigm fits best. Furthermore, the normative element in the paradigm reinforces its descriptive use by labelling each counter-instance as deviant and therefore "bad". These tendencies are reinforced by the practical orientation of the profession. As practical men we are in the "doing something about it" business; the discovery of the gap between norm and practice is taken as a spur to action rather than a cause for reflection on the model.

Thus the paradigm as applied to the United States permits uniformity of doctrine to conceal diversity of practice. By emphasizing rules and courts as instruments of social change, it diverts reform efforts to agencies and methods which are well suited to producing symbols of change and reform, but not necessarily capable of securing systematic changes in major social policies. It diverts scholarly energies to the top of the system and to the courts. In sum, the liberal legalist model may often hinder rather than help understanding of the social role of law in the United States. If this is the case in the society from which it derives, the model must be even more of a barrier to understanding legal life in the Third World.

\textsuperscript{63} Llewellyn observes that when notaries of conventional legal thought are presented with instances of the gap between the law-in-books and law-in-action:

any one of them will proceed to remodel his emphasis \textit{ad hoc}; he will, for a moment, fix his stress on the remedy, even on the effects of the remedy, as used, in life. \textit{But it is an ad hoc} remodelling. It is forgotten when the immediate issue is passed. It is no part of the standard equipment of investigation, discussion, synthesis; it is a part only of the equipment of defense. When used apart from combat . . . it flares like a shooting star, and disappears. Always the night of words will close again in beauty over the wild, streaked disturbance.

\textit{Llewellyn, A Realistic Jurisprudence—the Next Step, 30 Colum. L. Rev. 431, 444-45 (1930).}
C. The Possible Irrelevance of Law

Further examination of the specific assumptions of liberal legalism confirms the conclusion that it obscures Third World legal reality. Let us look first at the assumption of legal potency. The normative underpinnings of liberal legalism rested in part on the assumption that law reform could promote development, and that investments in the improvement of legal systems would yield high developmental payoffs. But experience has shown that law may have little effect on society. Substantial programs of legal reform have failed. Investments in legal education, designed to change the orientation and role of the lawyer, have yielded little change in either legal performance or social relations. These experiences have naturally given rise to calls for better programs, bigger investments, and a more scientific understanding of the techniques to improve legal effectiveness. But they have also led to doubts about the implicit assumption that legal change will lead to significant social change.

D. Intimations of “Badness:” The Appearance of the Negative Face of Law

The most serious challenge to the core conception paradigm comes from the recognition that legal institutions may serve social functions inimical to the values that the United States law and development community has espoused. Nothing has contributed as much to unravelling the liberal legalist belief as the growing awareness of this “negative face” of law.

Law and development scholars, somewhat belatedly, are beginning to realize that even in developed societies, and thus the United States, the formal neutrality of the legal system is not incompatible with the use of law as a tool to further domination by elite groups. The wealthy and more conservative groups in the society frequently have better access to the legal system. The legalization of areas of social life and the increased formalization of the legal process may increase the costs of protest, deflecting political pressures for social change without any corresponding gains in freedom or equality. Law may be used to justify and legitimate arbitrary actions by government rather than to curb or ban such excesses. The social structure and economic interests of the

64. The tendency for formal equality to be compatible with domination did not escape notice in M. WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 188-91 (1954) or E. EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 238 (1936) who noted that “[t]he more the rich and the poor are dealt with according to the same legal propositions, the more the advantage of the rich is increased.” For a recent development of this theme see M. Galanter, supra note 59.


66. Trubek, supra note 3, at 34-50.
legal profession may make it a natural ally of conservative groups, and an enemy of groups pushing for fundamental change. Legal changes ostensibly designed to reform major areas of social life and achieve developmental goals may in fact be a form of symbolic politics, the effect of which is not to cause change but to defeat it by containing demands for protest, thereby strengthening, rather than weakening groups committed to the status quo. And increased instrumental rationality in legal processes together with governmental regulation of economic life may contribute to the economic well being of only a small elite, leaving the mass no better, or even worse, off.

It would be misleading to suggest that there has been a neat historical evolution from liberal legalism to a critical perspective on law, or to imply that the early law and development scholars were totally unaware of the negative side of legalism. But it is fair to say that these features were never stressed and that the effect of the paradigm was to define such situations as atypical or accidental deviations from legal “normality.” And thus it was easy for law and development scholars either to downgrade the importance of this negative side of law, or to assume that legal development projects would eliminate such “distortions.”

However, many have come to question whether the negative face of law in Third World countries is either so atypical or so easily changed. Some scholars have come to embrace the view that the negative face of law is the more normal, typical pattern of law-society relations, and that the liberal legalist model is at best an unusual exception, and at worst a false utopia which diverts attention from harsh realities. Others have been less willing to assume that the negative face of law is any more “fundamental” than its positive side. But most have recognized that the negative aspects of legal systems, where they exist, are neither accidental nor transitory. It is becoming clearer that such features are deeply rooted in the social and legal structures of society and will not be transformed by surface reforms such as changing law school teaching methods or creating an occasional legal aid clinic. Thus even those who do not accept the “inherent negativity” of legal institutions have difficulty deciding how to eliminate the observed negative effects of legal systems in developing countries. These critical scholars must face the challenges to the liberal legalist model without any illusion that there are “automatic forces” which will purge legal systems of their negative features, and with full awareness that


69. See Trubek, supra note 3, at 40-49. See also G. Kolko, TRIUMPH OF CONSERVATISM (1963).
solutions based on the export of an idealized model of the United States legal system are inadequate.

The critical perspective is largely negative. It rejects liberal legalism, but does not provide any systematic map of legal and social relations that will permit scholars to relate empirical studies of and proposed changes in socio-legal arrangements to the moral values they espouse. Law and development scholars who accept this perspective confront a dilemma. They know that they can no longer automatically accept the inherent moral worthiness of either assistance or scholarship, but they lack clear guidelines to distinguish between what is worthy and what is not.

IV. CAUSES OF THE CRISIS

What explains the rise of a critical perspective on the role of law in development and thus the emergence of moral doubts about legal development assistance and scholarship? The causes of the crisis in law and development studies are complex and little known. To understand them fully, one would need to carry out a full historical study of assistance and scholarship since World War II. Such a survey would be of great use, but it lies beyond the scope of this essay. Here we can only speculate on the factors that seem to have been most important in generating the crisis.

A. The Origins of the Liberal Legalist Paradigm of Legal Development

One cannot identify the origins of the crisis without first understanding the origins of the liberal legalist paradigm itself. The liberal legalist model of law in development was the product of the intersection of a number of factors. These include the general international and United States foreign policy context in which legal development assistance began, the specific nature and needs of the assistance projects, and the experience and intellectual background of the scholars who initiated and maintained legal development research. In order to understand the source of changes in legal development thought, we must understand the nature and interrelationship of these forces.

Legal development assistance began in a period when Cold War rhetoric and Cold War policy were ascendent. The American elite

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70. See, e.g., J. GRIFFITHS, ON TEACHING LAW IN GHANA AND RELATED MATTERS 25-26 (N.Y.U. School of Law, Law Center Bulletin Vol. 21, No. 1, 1974).

71. James A. Gardner, of the Ford Foundation, has begun a comprehensive review of the law and development movement. His study is in draft, however, and since it is still an internal document of the Foundation, it cannot be cited. We hope that this document, which contains a comprehensive and thoughtful critical history of U.S. law and development studies and legal development assistance, and confirms many conclusions we reach here, will be made available to the public in the near future.
and policy makers saw the "rule of law" as one of the major features that distinguished the United States from Communist nations. It was understandable that in this context United States development assistance was pictured as furthering the rule of law, and that both lawyers and developers saw legal development assistance as one way for the United States to fulfill its pledge to further "freedom" in the developing countries.

The rhetoric of foreign policy and development doctrine encouraged potential legal reformers to try to persuade policy makers to support broad legal development assistance projects. But the response of the development assistance administrators initially was disappointing. While some projects were undertaken in the late 1950's and early 1960's, this period in legal development assistance was long on rhetoric but short on action. As a result, the would-be legal developers recognized that they would have to do more if they were to persuade the administrators that activity in the legal area would promote development.

We can only speculate on the reasons for the initial reluctance of the administrators. One explanation, surely, is that development doctrine was oblivious to law. Development thought in the period was heavily economic in orientation. Either development was defined in purely economic terms or economic development was seen as the most efficient instrument to achieve desired political or social change, so that direct action in the political and social sphere was deemed unnecessary or of low priority. And even when thinkers and policy makers expressed concern for noneconomic aspects of development, as in those theories and doctrines that supported direct aid for "political development," there was little interest in, if not hostility to, direct reform of legal institutions as such.

Thus the would-be legal developers recognized that if they were to secure funding for law and development projects, they would have to show that legal reform would promote what the administrators meant by "development." To do this they needed concepts of

75. See note 13 supra.
76. Merillat, supra note 5, at 74.
78. Id. at 195-226.
development that would include law and concepts of law that could be related to existing theories of development.\textsuperscript{79} One function of the liberal legalist model of law in development was to provide such concepts.

But the needs of the legal assistance community were more complex. For the would-be legal developers not only had to persuade United States and international development agencies to support legal development assistance, they also had to convince the governments and lawyers in developing nations that they needed such help. Legal development projects, after all, involve much subtler notions than most technical assistance or economic aid programs. It may be relatively clear to prospective steel mill operators in developing countries that production engineers from industrialized countries have something to teach them. It is not immediately apparent that the legal systems of these societies should be models for the Third World.\textsuperscript{80} Accordingly the United States reformers had to explain what constituted “legal development” and convince the Third World lawyers of its value in order to justify their role as foreign intervenors.\textsuperscript{81}

Once we understand the context in which the original law and development theories arose, and if we bear in mind as well that the creators of those theories were either legal educators from or graduates of elite American law schools, we can understand why the liberal legalist model took the form it did. The reformers needed a model of the relationship between law and society that would show the developers how law was potent in development. They needed a normative image of the role of law in society that would resonate with the “rule of law” rhetoric widely accepted in the foreign policy establishment and the philanthropic community. And they needed a theory of development that would both persuade Third World nations to accept the legal assistance offered by Americans, and explain the role of the foreign advisor who was designing and helping administer the reform projects.

\textsuperscript{79} See, e.g., Yale Proposal, supra note 15.

\textsuperscript{80} Friedman, supra note 25, at 12-13.

\textsuperscript{81} In many cases of course, third world lawyers were in their own view already proud possessors of a fully modern legal order. Leading Indian lawyers, for example, saw little reason for drastic change. See M. Sethanad, The Common Law in India (1960) and Law Commission of India, 14th Report, Reform of Judicial Administration (1958). Cf. Galanter, The Aborted Restoration of ‘Indigenous’ Law in India, 14 Comparative Studies in Soc’y & History 53 (1972). Needless to say, such views were not shared by visiting law and development scholars: “Compared with Western societies, India has a relatively poor understanding of law and of the potential role and contribution of law and of the legal profession to the society’s development and to its effective ordering.” von Mehren, Some Observations on the Role of Law in Indian Society and on Indian Legal Education, 3 Jaipur L.J. 13, 16 (1963). Cf. Galanter, Introduction: The Study of the Indian Legal Profession, 3 L. & Soc’y Rev. 201, 216-17 (1968-69).
The beauty of the liberal legalist model of law in development was that it did all these things. It explained how law could be an effective instrument in social change, thus satisfying the administrators’ demands for project cost effectiveness. It showed that law would foster the basic developmental values, thus cloaking the projects in the humanistic rhetoric of United States foreign policy. And it subtly suggested that any move towards the legal institutions of the United States would be a move towards development, thus telling potential skeptics in the Third World that legal development assistance would further their goals.

At this point, the reader may begin to wonder about the motives of those who developed, articulated, expanded, and defended the liberal legalist model of law in development. Were they cynical schemers, creating an elaborate tissue of myths to justify their arrogant interference in other societies and further their pet projects? If he reached this conclusion, the reader might well doubt whether such charlatans could suffer a moral crisis of any kind and thus he might question the central premise of this essay. But to think thus would be to misunderstand the true significance of the history we are tracing. For what is most important to understand about the liberal legalist reformers and scholars is that they—or dropping the objective mask for a moment, we—were sincere. We believed in the model. Liberal legalism was not a cynical sham hastily constructed to be palmed off on the world’s poor. It was, on the contrary, a clear reflection of the basic ideas about the relationship between law and society and between the United States and the Third World that prevailed in United States universities in the late 1950’s and 1960’s. It was a sincere expression of the American legal elite’s view of itself, of its society and of America’s relation to the Third World. That this view rested on a rosy picture of the role of law in America and involved misguided notions of the institutions and historical forces operating in Asia, Africa and Latin America there can be no doubt. Nor is there any question that its hope for liberal change in the Third World was excessively optimistic, and that its belief that U.S. foreign policymakers and Third World leaders were really committed to their rhetoric was naive. But these views were held honestly and unreflectively: liberal legalism may have been ingenuous, but it was not insincere.

Indeed, it is the fact that liberal legalist views were held strongly and sincerely that explains the present situation. Events and ideas have challenged many of the descriptive and normative aspects of the model and scholars have had difficulty readjusting to the newer and more critical views. These changes in ideas have created a crisis, rather than merely generating a shift in orientation, precisely because they challenge deeply held beliefs.

B. The Rise of a Challenge

But if these views were deeply held, why are they now being
questioned by many of the same scholars and reformers who developed the liberal legalist model of law in development? We think there are two basic reasons why law and development scholars have been reexamining the basic assumptions of the liberal legalist paradigm. First, the challenge has been very strong. Liberal legalism was an amalgam of ideas about law, America, and the Third World. While it might have resisted attacks on any one part of this "amalgam," the cumulative weight of the evidence contradicting all aspects of the model has been too great to resist.

But the attack on liberal legalism has succeeded not merely because the latter’s positions were exposed on both flanks; the critics have begun to prevail also because the positions were sparsely held and the defenders have failed to mount a vigorous counterattack. Law and development studies never succeeded in securing institutional status within the universities. Few if any scholars made basic career commitments to the area. Indeed, most saw it more as an avocation than as a major area of professional activity. Pleas for institutional changes that would permit genuine scholarly commitment and specialization in the area fell on deaf ears. As a result, there were few academics who developed a vested interest in the early export version of liberal legalism.82

At the same time, the legal development assistance agencies—who might have had more of a stake in the model—have been in a defensive posture in recent years. The cutback in bilateral United States assistance, the greater reluctance of international agencies to touch so politically sensitive an area as legal development assistance, the pullback of private foundations from the Third World, and the general economic crisis all have contributed to this defensiveness. Since the defenders of the liberal legalist model of law in development have been quiet, the critics have been highly visible.

C. The Sources of the Challenges to the Paradigm

In the foregoing sections we have described the growth of challenges to the liberal legalist model of law in development and indicated some of the specific criticisms that have been made of those ideas. Here we wish to identify the sources of the several challenges that have produced a critical view of law and development. We see four principal sources of that viewpoint: the improvement of empirical knowledge about legal reality in the Third World, the loss of faith that the liberal legalist model accurately reflects the role of law in the United States, the growing doubt that United States society can be a valid model for the Third World, and the realization that American and Third World policy makers may not, in fact, be committed to the basic values which the liberal legalists believed they were fostering.

82. The very failure of the early efforts at institutionalization thus helped make it possible for law and development scholars to reject the early models.
1. EMPIRICAL KNOWLEDGE OF THE THIRD WORLD

The first of these factors was the direct result of the tentative efforts to create a field of law and development studies. These activities were always geared towards creating a discipline that would be empirical, interdisciplinary, and international. Law and development studies were not to be the exclusive province of United States academic lawyers; rather the "field" was seen as bringing together lawyers, social scientists from all nations, area specialists, and reformers. Law and development research was to be based on the canons of social science research thus requiring substantial empirical and historical study. The principal centers of law and development research at schools like Harvard, Stanford, Wisconsin, and Yale were all to some degree interdisciplinary, international, and empirically oriented.

The atmosphere created in these and similar centers had a profound impact on American thought about law and development. The early ideas of liberal legalism had been created on the basis of little if any knowledge of legal life in Asia, Africa, and Latin America. This ignorance could not, however, be maintained once the American academic lawyers found themselves in contact with a group of social scientists and area specialists who had done substantial field research on law in the Third World. This latter group had both a better grasp of what was going on in these societies and a weaker commitment to the presuppositions of the liberal legalist model. Moreover, the contact with these empirically oriented researchers encouraged the lawyers to begin independent empirical research in Third World countries and thus to learn something about the subjects for which they had already theorized. Finally, the commitment to an international law and development community brought foreign scholars, including many from the Third World, into the research effort. Once again, in many cases these foreign researchers produced ideas and studies that challenged the early law and development assumptions. As a result of these influences, the lawyers were forced to become more self-conscious about their assumptions and more diligent in testing these assumptions against reality. As the lawyers developed a fuller understanding of the legal systems of the Third World, they began to recognize how glaring was the discrepancy between their implicit models and the reality they confronted.

2. LOSS OF FAITH IN LIBERAL LEGALISM AS A PICTURE OF UNITED STATES SOCIETY

Liberal legalist thought about development always recognized that there would be gaps between the model and legal reality in the Third World. Indeed, the purpose of the model was precisely

83. Merryman, supra note 17, at 101-03.
to allow the reformer to locate these gaps and design projects to fill them. Perceptions of these gaps need not, therefore, have caused any fundamental reappraisal of the paradigm. It was the recognition of another and more fundamental gap that opened the lawyers’ eyes to the shaky foundations of the liberal legalist concepts. This was the gap between the model of law in society and the legal realities of the United States itself. As long as the lawyers thought that the model reflected their own system, they were armed with moral faith in its rightness. As they came to wonder if the model were not largely mythical, they lost the shield of assurance.

The very effort to institutionalize law and development studies contributed to the emergence of doubts about the received wisdom on the role of law in American society. As we have noted, the atmosphere of the law and development research centers made the lawyer-scholars more aware of the implicit social assumptions in their thought. This awareness made them conscious of the possibility that these assumptions might not fit United States reality any more than reality in Brazil, Ghana, or India. Moreover, the atmosphere of the law and development centers made them more conscious than most legal academics of the need for empirical study, and gave them increased access to the burgeoning domestic law and society field.84

Law and development scholars did not, however, create the critical perspective on the social role of law in the United States; they merely responded to it. In recent years there has been an increase in critical studies, sometimes empirical, which challenge many if not all the tenets of domestic liberal legalism. Many of the law and development scholars became sensitized to the limitations of the paradigm through their efforts to apply it to the Third World. They were more receptive to these critical writings than were their colleagues in the law schools, and because of this they lost the armor of righteousness that had protected the early reformers.

3. DOUBTS ABOUT THE UNIVERSALITY OR DESIRABILITY OF THE AMERICAN EXPERIENCE

With the emergence of doubts that liberal legalism truly reflects our own reality has come another, totally different set of reappraisals. Liberal legalism’s call for legal development assistance was based on the belief that, at least to some degree, the United States could and should be a model for the developing nations. Today,

84. One measure of the recentness of the “law and society” movement is the fact that the Law and Society Association was founded in 1964; its journal, the Law & Society Review, commenced publication in 1966. The Law and Society section of the Wisconsin Law Review started publication in 1965. Of all descriptive monographs on the operation of the American legal system, by far the larger part are the products of the past decade.
the academic scholars in law and development studies have come to share with many of their fellow citizens serious reservations about such notions. Some wonder if the good things about the United States are not the result of a truly unique history, so that it is hopeless to assume that key features of our society can be copied even if other societies wanted to do so. And others ask whether there is much in our society worth copying anyway. Troubled by what Watergate reveals about the strains in our political system, disturbed by the senseless waste of affluence, concerned by the decline of community in America, they have abandoned much of the early faith that America is a beacon of freedom and a model for the realization of human welfare. From this perspective, the effort to export our legal institutions makes little sense.

4. SKEPTICISM ABOUT POLICY MOTIVES

Finally, we suspect that one of the causes of the malaise in the law and development movement is a loss of faith that most policy makers who administer or support legal development assistance are truly committed to the values held by the scholars. There has been disillusionment with the United States government and the governments and legal professions in many Third World nations. Scholars have come to wonder if the United States government's commitment to the "rule of law" is not mere rhetoric. The reappraisal of law and development studies is a post-Vietnam phenomenon. Whatever the total costs of that tragic event may be, one result of the long domestic struggle over our involvement in the Vietnamese conflict was a collapse of the liberal belief that United States foreign policy is really guided by its humanitarian rhetoric. If the real motives behind United States assistance are military security or preservation of economic interests, then government-supported legal-development assistance is at best a peripheral activity, and at worst part of a humanitarian mask concealing American real politik. To the extent that legal development assistance, whether supported by the government or privately funded, contributes to foreign policy goals it becomes suspect. And to the extent that future law and development research depends on support from governmental source or sources that are sympathetic to government policy, serious problems are created.

Moreover, legal assistance work and legal development scholarship involved trust not only in the advertised goals of United States foreign policy, but also in the avowed commitment of Third World governments to development programs that embraced democracy and legality. Law and development scholars assumed that Third World governments were beneficent, or at least sufficiently committed to their egalitarian and democratic espousals that they were

willing to permit programs that would increase liberty, equality, and participation as well as national power and economic growth. But experience revealed that, in spite of their democratic pretensions and avowed redistributive aspirations, Third World governments often in fact constitute or represent narrow and self-satisfied elites whose vital concern is to protect and augment their dominant positions. Moreover, the established legal professions in these countries more often than not are allied with these same elites and thus are primarily concerned with promoting narrow rather than general interests.

Faced with these realizations, the scholars were forced to reexamine themselves. They had to look again at the contribution their writings and assistance efforts were in fact making to the furtherance of liberty, equality, wider participation, and broadly shared capacity for rational mastery of the world. And so they have come to question their past, and in so doing, simultaneously have been forced to undermine their future as law and development scholars.

V. THE PRESENT: THE PERIOD OF COMPETING ARTICULATIONS

What has been the result of these multiple challenges? The reader might think that the result of the critique of liberal legalism would be outright rejection of the law and development paradigm. But that is not the case. It is, of course, extremely difficult to write contemporary history. But it appears that while the paradigm is in crisis, few if any scholars have been able to free themselves totally from it. What has happened instead is that a set of competing ideas about the nature of law and development scholarship has arisen, each reflecting some partial break with liberal legalist ideas, but none offering a new paradigm.

This is, of course, exactly the situation which historians of science have found in periods when a major scientific revolution impends. Thus, T.S. Kuhn observes that:

Confronted with anomaly or with crisis, scientists take a different attitude towards existing paradigms, and the nature of their research changes accordingly. The proliferation of competing articulations, the willingness to try anything, the expression of explicit discontent, the recourse to philosophy and to debate over fundamentals, all these are symptoms of a transition from normal to extraordinary research.  

It is of course dangerous to assume that principles drawn from the history of natural science apply to activities like law and development studies. And it may seem somewhat pretentious to treat the small and loosely structured group of law and development scholars as a "science" in Kuhn's sense. Nevertheless, when one ex-

86. T. Kuhn, The Structure of Scientific Revolutions 90 (1952).
amines the present situation in law and development studies, there are some features which resemble Kuhn’s description of a crisis in natural science. For the situation in this area today is truly one of competing articulation, experimentation, discontent, and reexamination of fundamentals. We have already spoken of discontent and reexamination; in this section we shall explore experimentation and competing articulations.

A. The Aspiration for Scientific Authority and Neutrality

First, however, we must look more closely at a feature of the law and development studies movement which has so far remained in the background of the essay. This is the relationship the movement saw between the “science” of law and development and the practice of legal development assistance. The idea that law and development studies could be a “science,” and that this scientific activity would further morally worthy ends, was an important feature in the thinking of some law and development scholars. And like so many other aspects of American thought on law and development, it has come under heavy attack in recent years.

The movement to institutionalize law and development studies included aspirations for a social science of law. Many law and development scholars believed that it was possible to create a neutral science of law and development, like the “sciences” of development economics and political development. This science would, ultimately, produce a systematic and universally valid set of propositions about the relations between law and society in the Third World. It was to be morally neutral, but its use would not be. The authoritative scientific data produced by the scholars would be used by the administrators of legal development assistance. Since it was assumed that the efforts to realize the liberal legalist model of law in society would further morally worthy ends, and that the administrators of legal development assistance were truly committed to the basic development values, the scholars were able to believe that their scientific activities would be part of a morally worthy venture.

This belief has been subjected to strong criticism. It has been attacked on epistemological, practical, and political grounds. Some have questioned whether it is possible to have any cross-culturally valid social knowledge, while others have simply doubted that such knowledge is possible in a highly culture-specific area like law. Others who accept the possibility of a comparative social science of law doubt that it is practically feasible given the present state

87. See, e.g., Yale Proposal, supra note 15; Friedman, supra note 9; Seidman, supra note 25; Trudeau, supra note 3.
88. See Yale Proposal, supra note 15, at 3-5; Friedman, supra note 9; Seidman, supra note 25, at 316-17; Trudeau, supra note 3, at 50.
89. Law and Development, supra note 2, at 54-55.
of law and society studies. The political critique of the aspiration to science has been especially disturbing. This critique finds its most virulent form in the "dependency" literature, which suggests that the effort by United States academics to create a science of development is merely a reflection of an overall United States effort to maintain political and economic hegemony over the Third World. In this view, United States development analysts have created a body of thought in which social change towards an idealized model of the United States is seen as both historically inevitable and inherently desirable. To the extent this model is accepted by thinkers in the Third World, it legitimizes United States assistance and discourages consideration of alternative paths to development. Since the dependency analysts see United States aid as a subtle tool of domination, they see development studies as the mask of imperialism.  

It would be misleading to suggest that most United States law and development scholars have accepted the dependency critique for American development thought. But this type of challenge has disturbed some. And a larger group share the doubts we have described about the necessary relationship between legal development and moral ends, as well as about the nature of assistance officials’ commitment to these ends. So it is understandable that most have become seriously troubled about the relationship between their aspirations to science and their moral views.

B. The Fault Lines of Liberal Legalism

These doubts have not yet led to rejection of the liberal legalist paradigm. But the cumulative challenges have generated competing articulations of the nature of the field and encouraged experimentation with new modes of scholarship and action. Disagreement about fundamentals surfaces more frequently. Some of the conflicting views reflecting firmly established positions have appeared in published articles or research reports. Others are more elusive, either because even though deeply held they are not reflected in published writings or because they are tentative and ultimately ephemeral. In this section we shall set out a few of the major “competing articulations.” We have included whatever seemed a firmly held view, whether traceable to a public source or not, for to do otherwise would be to leave out much that is important. We recognize, however, that the resulting picture may appear more fragmented than is actually the case.


91. If we limited ourselves to published views, we would omit much that seems important; if we treat all fleeting ideas about "new directions for law and development" as firmly held stances we would present greater fragmentation than actually exists. We have relied on more than published
We do not think the liberal legalist view of the law and development enterprise has broken into competing "schools," but we do detect the appearance of major fault lines in the synthesis of ideas that it represented. Liberal legalism amalgamated several ideas about science, policy, and moral action. There were, we believe, five central assumptions in this amalgam. First, it was assumed that law is inherently "good," in that legal development projects which bring about changes towards the liberal legalist model will necessarily foster basic developmental values. Second, law is "potent," in that legal reforms will implement desired changes in social relations. Third, legal development studies can be scientific, in that systematic, neutral research can uncover cross-culturally valid hypotheses about Third World legal life. Fourth, law and development inquiry is a morally worthy enterprise, in that scientific research on Third World legal systems by United States scholars will lead to knowledge that will further moral ends. Finally, the United States can make valuable contributions to the development of Third World nations.

In the period of critical reappraisal all these assumptions have been questioned, but law and development scholars have responded selectively, agreeing with the critics on some points but not on all. Instead of discarding the entire amalgam, scholars have rejected one or more of its components while holding on, perhaps with increased tenacity, to the others. And since the scholars disagree on which points should be retained, the resulting debate has uncovered competing articulations. As scholars abandon their commitment to one or more of the central assumptions of liberal legalism's view of the law and development enterprise and strengthen their dedication to the remainder, they come to disagree about the nature of the enterprise.

C. The Emergence of Competing Articulations

Some scholars continue to adhere to liberal legalism.92 For them, the "crisis" we describe does not exist, and the moral doubts we express appear as false problems. But for those who have been affected by the growth of a critical perspective, there are many possible responses. Two reactions involve a radical break with liberal legalist ideas about the role of law in development or the role of the American scholar in the Third World. The first of these, isolationism, may be the result of growing doubts about the possi-

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bility that Americans can make any valid contribution to Third World development. The "isolationist" has become convinced that his development work cannot further valid moral ends. He may still believe in law and science, and in the possibility of doing good, but he does not think he can help the Third World.

A rather different approach is one we shall call "a-legal developmentism." The a-legalist retains the view that United States scholars can make a valid contribution to the Third World, but he doubts that law is either good or potent, and thus he is indifferent to the science of legal development. He wants to stay in the Third World but withdraw from law and social research on law. He might, therefore, turn to normative evaluation of specific development policies or those aspects of decisionmaking processes (for example planning decisionmaking) that lie outside the center of professional, legal concern, but seem at the heart of the effort to secure greater participation, equality, and material welfare.

These three approaches are probably unsatisfactory to the majority of law and development scholars, who are prepared to reexamine liberal legalism, but not to withdraw totally from either law or development. Among this majority we can see at least three perspectives, each of which is an effort to justify continuation of law and development studies. These we shall call pragmatic problem solving, positivism, and eclectic critique.

1. PRAGMATIC PROBLEM SOLVING

This view rejects the assumption that legal development studies can be scientific and qualifies the idea that law and development inquiry is a morally worthy activity. The pragmatic problem solver abandons the search for theories of law and development, but argues that he still can play a useful role in the Third World. He accepts the goodness and potency of law, believes Americans can still make a contribution to Third World development, and proposes to put his abilities to work to serve some concrete need felt by "real people" in the Third World. He takes the position that if he works to help people in the Third World solve some problem that they perceive, he is engaged in worthwhile activity. He denies that his work involves any theory of law and development, or that his expertise is based on his knowledge of how a more "modern" legal system works. He reduces his role to that of a technician who takes his values from some outside source and he asserts that his acts are morally worthy if the values involved derive from the people in the Third World.

Pragmatic problem solving appeals to the strong practical and anti-theoretical streak in American lawyers. It justifies close contact with everyday legal problems in the Third World and it serves as a defense to allegations that law and development theory conceals ethnocentrism in the authoritative and neutral language of
science. It allows the law and development scholar to continue his association with the Third World and his participation in assistance and research related to assistance, free of charges that he is imposing his values on other people. But this freedom is bought at the price of abandoning scholarship as a quest for understanding. Pragmatic problem solving is a useful rationale for the scholar who wants to help in the assistance effort, but since it denies that a theory of law and development is possible, the scholar must admit that his work can make no contribution to any body of general knowledge.

2. POSITIVISTIC PURE SCIENCE

At the opposite extreme lies the move to pure positivistic social research on law. This perspective rejects the assumptions that law is inherently good or that it would normally bring about social change. It abandons—or at least relaxes—the belief that law and development inquiry is a direct way to further morally worthy ends. The positivist sees himself as conducting pure empirical research, which is presented as being devoid of any normative or immediate policy purposes.93 Since it only studies "the facts," it cannot be guilty of any implicit or explicit ethnocentric or normative bias. And since its task is explanation, not evaluation, the normative significance of the explanations are left for others to determine.

The positivistic approach has its costs. It draws the law and development scholars away from the concrete problems of lawyers in Third World countries. And it may lead to an even greater estrangement from U.S. law school colleagues, who may be even more dubious about the pure science approach to law than about pragmatic problem solving in the Third World. The latter can always be accepted as an exotic form of pro bono work; the former brings the law and development scholar into headlong conflict with accepted patterns of scholarship in law schools. But in compensation, pure social science brings him into close intellectual and professional contact with colleagues in the social science departments and thus makes him feel a part of a wider community of science, even as he breaks with professional colleagues and the Third World legal community. The positivist approach forces the scholar to abandon the claim that his scholarly work is directly contributing to the realization of developmental goals. But there is an independent moral impetus from the scientific endeavor itself. At one level, the positivist answers the challenge to the normative implications of liberal legalism by denying that his work has a moral dimension; at another level he relies on the moral worth of science to justify his research.

93. Merryman, supra note 17, at 103-04.
3. ECLECTIC CRITIQUE

Each of the reactions to the crisis we have described—internationalism, a-legal developmentalism, pragmatic problem solving, and positivistic pure science—is defined by its repudiation of one of the central assumptions of the law and development amalgam. Often, we suspect, this repudiation is accompanied by a more fervent embrace of the other assumptions. Another kind of reaction, which we shall refer to as eclectic critique, does not take the path of sacrificing one or more of the components. Rather it retains the whole of the vision that underlay the law and development enterprise, but shifts the nature of its commitment to that vision. Eclectic critique transforms the central assumptions underlying the law and development enterprise into critical standards. They always were this in part, but the belief that they were also factually descriptive involved the scholar in premature and uncritical commitment to particular institutions and policies. In eclectic critique, the assumptions are purified of the admixture of descriptive assertion; they are completely and self-consciously normatized.

What we here call eclectic critique is the exaggeration or full development of the “critical perspective.” We call this approach “critical” because it has transformed into critical standards what were previously assertions about the goodness and potency of law, the scientific character of knowledge about law and development, and the morality of policies applying that knowledge. We call it “eclectic” because, at the same time, it abandons the notion that in the real world tendencies toward these values will cluster coherently. This in turn is based on an abandonment of the notion that specific institutions (including academic disciplines and governments) necessarily are trustworthy and authoritative embodiments of these ideals. This lack of institutional loyalty frees the practitioner of eclectic critique to assemble his critical armory from diverse and disparate sources.

The assumption that law was both potent and good, based on a picture of law that we earlier called the paradigm, are treated

94. In developing the idea of “eclectic critique,” we found the following observation by Max Horkheimer extremely suggestive:
Again and again in history, ideas have cast off their swaddling clothes and struck out against the social systems that bore them. The cause, in large degree, is that spirit, language, and all the realms of the mind necessarily stake universal claims. Even ruling groups, intent above all upon defending their particular interests, must stress universal motif in religion, morality and science. Thus originates the contradiction between the existent and ideology, a contradiction that spurns all historical progress. While conformism presupposes the basic harmony of the two and includes the minor discrepancies in the ideology itself philosophy makes men conscious of the contradiction between them. On the one hand it appraises society by the light of the very ideas that it recognizes as its highest values; on the other, it is aware that these ideas reflect the taints of reality.

as inherently problematic. The components of the paradigm—the centrality of courts, the conformity of officials with rules, the role of adjudication—are seen not as the inherent if imperfectly embodied shape of legal reality, but as variables to be explored. It is not assumed that they naturally cohere, and the problematic character of the paradigm becomes a new agenda for research. By making the paradigm assumptions problematic while retaining the commitment to a holistic understanding of law and society, eclectic critique will approach differently the evaluation of action programs. Instead of evaluating single policies against the background of paradigm assumptions, it will look for the dynamics of interaction among all the features of law and society as they are. The assumption that legal development studies can be scientific is transformed into a standpoint from which to evaluate the present state of knowledge about law and society. The scientific aspirations of law and development are combined with skepticism of its own scientific credentials. Eclectic critique retains commitment to the Third World, but it combines with it a roving suspicion of both the United States and Third World government policies as vehicles of either development or legality which should command the loyalties of scholars. The assumption of moral worth becomes a standard to apply reflexively to effects of law and development activity including law and development scholarship.

In some ways eclectic critique is close to liberal legalism, in that it refuses to relinquish entirely any of the central liberal legalist assumptions. On the other hand, it is remote from liberal legalism because, while it has retained these assumptions as guiding aspirations, it has detached these aspirations from commitment to any institutions or policies. As the reader will have realized, this essay is an example of what we mean by eclectic critique.

VI. CONCLUSIONS: THE UNCERTAIN FUTURE OF LAW AND DEVELOPMENT STUDIES

If the history of revolutions in natural science were an apt guide to the future of law and development studies,95 we could predict that sometime in the future new perspectives on law in society and legal development in the Third World will emerge and become the basis for future law and development research. When that new paradigm appears, scholars could stop the present philosophizing, moralizing, and disputing and return to concrete research work and useful assistance activity.

But we fear that the natural science analogy is not entirely opposite in this area. It may well be that an intellectual revolution is necessary to resolve the crisis in law and development studies, but we doubt if it will be sufficient to guarantee a stable future

95. See T. KUHN, supra note 86.
for these activities. For the differences between law and development studies and natural science are profound and severely limit the validity of the analogy.

There are two differences that deserve particular mention. First, the natural science analogy assumes that the scientific field is relatively well institutionalized. But law and development studies have failed to secure any stable institutional base. Law and development activity still exists in several university centers but it has begun to decline. There are still few if any scholars who feel they can make law and development studies a major professional commitment. While a few years ago one could envision permanent institutional bases for law and development research in the United States, there now seems little hope that such centers will be supported. Funds for future research are extremely tight; the past seems brighter than the future.

Secondly, liberal legalist thought on law and development was always both more and less than science. It was both a form of scholarship that was linked inevitably to action, and a kind of action that used scholarship as its principal tool. Liberal legalism was a fusion of moral aspirations and cognitive assertions. The moral aspects of the current crisis are its most important feature; these can be resolved only by a change in moral views or in the behavior that has created moral doubts.

Accordingly, it will take much more than a new set of ideas to overcome the present crisis in a fashion that will realize the original aspirations for a scholarly community in law and development research. The malaise of self-estrangement will not disappear until scholars can either feel comfortable with their participation in the assistance effort or find a way to continue their scholarship without dependence on assistance agencies. Thus the crisis cannot be overcome unless the assistance effort changes, or a viable base of support can be found independent of the assistance agencies.

Yet neither of these conditions seem likely to be met. There is evidence that private foundations have begun to reexamine the assistance premise and priorities, and to recognize the need for a more discriminating approach to legal development assistance. But just as this change is occurring, the same institutions are drastically cutting their programs so that they may simply abandon their legal development assistance rather than reform it.

At the same time, there is little prospect of support for law and development studies outside the assistance area. The law schools have never been particularly interested in this type of work, even though they tolerated it when there was plenty of money to support

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96. For one study of this type see Law and Development, supra note 2. The study by James Gardner of the Ford Foundation, see note 71 supra, is another example of this stock-taking.
it. University programs in law and society or in area studies might be more intellectually sympathetic to this type of scholarship, but these centers have declining budgets and are unable to take on new types of activity. Accordingly, the most likely prospect is that the nascent community in law and development studies will gradually disband and the scholars will return to the several disciplines from which they came. They may, as individuals, continue to do some research on the Third World, and they may bring to their own fields insights gained from the interdisciplinary and international environments that flourished for a brief period in the law and development centers. But these environments will gradually disappear.

While this seems to us the most likely reaction to the present crisis, we feel that the disbanding of law and development studies would be a great loss. Law and development research has not only increased our knowledge of the Third World, it has also helped us to understand our own ideas about law and to see our legal institutions more clearly. The crisis itself and the malaise it generates has been of immense value in clarifying major issues in legal theory, social science, and public policy. Critical studies on the role of law have brought to light normative problems in foreign policy that might have remained obscure. Such studies remain valuable to clarify choices for United States' decisionmakers who, directly or indirectly, will affect Third World development.

There is a profound irony in the prospect that the malaise will destroy the field rather than moving it to a higher level of awareness and sensitivity. The malaise resulted from the critical perspective on legal development; this itself was the result of the effort to create interdisciplinary and international centers of social research on law. Critical thought was possible only because such centers were able to develop or absorb a set of ideas and a perspective that would have been impossible within the environment of the separate law schools, area study programs, or social science departments from which the members of the law and development movement came. It seems ironic that the first result of those ideas may be to undermine the conditions that are necessary for maintenance of the very environment that produced them.