

LAW AND THE BEHAVIORAL SCIENCES: IS THERE ANY THERE THERE?

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Despite tremendous growth in the field, there have been many challenges to law and the behavioral sciences. The most colorful expression is Abel's charge that "questions and answers have begun to sound a comfortable, but rather boring 'clackity-clack.'" On one hand, the achievements of the field cannot be ignored by those who want to think about law seriously. On the other hand, all approaches to the field are flawed and are likely to remain that way. Help in solving the problems of the field might come from a thorough interdisciplinary approach, calling on the contributions of all social sciences while recognizing the limitations of each; knowledge of a minimum amount of law and legal method, but with full awareness of how legal thought may distort definitions of problems; and knowledge of the questions posed by broader social theories in light of an empirical refining of their large explanations.

Gertrude Stein said that the problem faced by those from Oakland, California was that "there isn't any there there." Since there were people, streets, and buildings, she must have had in mind some intangible there of importance. After several decades of work in law and the behavioral sciences, I have some ideas about whether there is, or could be, any there there. I propose to examine the problem of "thereness," and, insofar as the field lacks the right stuff, offer some suggested directions.

What is the nature of the concern? In one sense, there is plenty of there there. Many people here and abroad work in the field. It is difficult, if not impossible, to keep up with the outpouring of books, journals, and conference proceedings. The area even has that ultimate badge of respectability—its own program at the National Science Foundation. Moreover, those seeking to influence policymakers often wave empirical studies in their faces as rationalizations for programs, and courts and other legal agencies frequently cite social studies of law.

At the same time, many have challenged law and the behavioral sciences. A major premise of the founders of the field was that their work would prompt needed reform so that our society might come closer to its announced ideals. Critics of various persuasions have objected to this focus: on the one hand, conservatives often see law and behavioral science as but a rationalization for the agenda of the Democratic Party's liberal wing; we should not be surprised that they object to having the thought they hate dressed in the clothes of neutral science. On the other hand, those more familiar with the field, perhaps paradoxically, see its actual

impact as rationalizing the *status quo*; its true function may be to promote a resigned cynical tolerance since the work could be read as suggesting that reform cannot work and radical changes will be impossibly inefficient. First, those in the field debunked the society of the 1950s, and then we trashed the efforts of the 1960s and 1970s to deal with racism, sexism, environmental pollution, consumer problems and the like. Our message is tragic: this is the best of all possible worlds.

If our work will not serve as the basis for much successful social engineering, can we at least offer understanding of the place of the legal system in society? Some have their doubts. They see the field as reflecting a faith that heaping up piles of instances will somehow—perhaps by magic—yield knowledge. Rick Abel (1980b:826), a former editor of the *Law & Society Review*, and long an active member of the Law and Society Association, expressed his concern this way:

Social studies of law have reached a critical point in their development. The original paradigm is exhausted. Until new ones are constructed, scholarship will be condemned to spin its wheels, adding minor refinements to accepted truths, repeating conventional arguments in unresolvable debates.

He continues by saying that (p.805) "I sense that our field is running so smoothly along familiar tracks that the questions and answers have begun to sound a comfortable, but rather boring, 'clackety-clack.'" Abel's phrase vividly expresses something troubling many of us.

I'll begin on a high note and talk about what's right with law and behavioral science. However, Alan Freeman (1981:1230) has gained lasting fame as the author of the proposition that "trashing is fun," and so I'll follow his lead and look at some of the gloomy conclusions of Abel and others. Finally, I will try to add some class to this act by turning to larger questions of social theory. As part of this discussion, I will look at some of the potential relationships between work in law and the behavioral sciences and that of the Conference on Critical Legal Studies. Perhaps even those unwilling to convert to the Critical Legal Studies faith can find new and promising directions in this work and negative reactions to it.

I. ACHIEVEMENTS OF LAW AND BEHAVIORAL SCIENCES

At the outset, we must recognize the achievements of the past two or three decades of law and behavioral science research. Whatever telling criticism might be made, anyone looking at this body of work seriously should see that it has changed thought about law and legal systems. Those who would ignore it are, too often, prisoners of ideologies, fools, or both.

Sometimes we forget how far we have come in two or three decades. Perhaps most of what has flowed from law and social science was available earlier (see Schlegel, 1979, 1980), but there was little awareness of it in mainstream thought about law. This has changed. Marc Galanter and I walked home from work one evening, and we talked about the changes in

perspective during our professional careers. We attended different law schools with some claims to excellence at the same time. Yet in our classes we never heard about police discretion, plea bargaining, personal injury negotiation or alternatives to litigation. Law schools then dealt with Restatements, balancing interests, and the first excitement prompted by Hart and Sacks, Fuller and other reactions to realism. Almost all of this thought involved legal rules or judgments about the appropriate roles of legal institutions deduced from their "nature."

Marc and I met as Bigelow Teaching Fellows at the University of Chicago Law School in 1956. The Ford Foundation had made major grants to Chicago's jury and arbitration projects, and Hans Zeisel, Fred Strodbeck, Harry Kalven and Soia Mentschikoff were trying to learn how to study the actual operation of legal institutions. However, most of this activity existed at the margins of the school's classrooms, except, perhaps, in those taught by Max Rheinstein. Afternoon tea, attended by both faculty and students, was then an institution at the school. Scholarly interest there, however, turned far more to Brainerd Currie's theories about Conflict of Laws than the jury or arbitration projects. Other elite law schools could not even offer major projects at the margins of their activities; at best, one or two of their faculty members wrote essays calling for the integration of law and social science, but leaving the work to someone else. I can also testify that a young law professor interested in answering this call in those days would have been disappointed by what appeared in the major social science journals. Apart from criminology, law and legal systems just did not seem to concern economists, sociologists and psychologists. Anthropologists did write about law but they did not study modern industrial societies. Political scientists were just beginning to embark on predicting the results of Supreme Court decisions from the application of social science methods.

As recently as fifteen years ago, when Lawrence Friedman and I (1969) were trying to fashion the first edition of our teaching materials, social science and law was largely unexplored territory. There were a few classic articles known to and cited by all. There was no *Law & Society Review*, *Law & Policy* or *Journal of Legal Studies*. Law reviews occasionally did print articles with some description of the legal system in operation, but they were hard to find since they were buried among the endless variations on conventional legal themes.

The volume of work in law and social science exploded during the late 1960s and 1970s. The decades of reform and counterreform provoked much of the work. Both reformers and researchers assumed, or hoped, that social science would support their causes. Evaluation research, however, often was disappointing. Again and again, it showed a gap between the promise and performance of the American legal system, although it seldom tried to explain why laws remained on the books but were not put into action. In spite of the disappointing results, the river of

policy-related research flowed on, getting wider and wider. Today political leaders of all persuasions cite research useful to their causes. Social scientists from all the major departments in most universities turn some attention to the legal system, and it would be a most primitive law school that allowed its graduates to pass through without ever hearing of police discretion, plea bargaining, and the games played by insurance adjusters and plaintiffs' lawyers.

This flood of social science and law has washed up a few shining nuggets. Any list would be arbitrary. However, I think anyone reviewing the accomplishments of the past few decades would conclude that we are far more aware of many or most of the following ideas:

1. *Law is not free.* There are barriers to access to the legal system which some people can jump far more easily than others. Most simply, few can afford to invest the substantial sums needed to hire lawyers, investigators and experts, run risks of retaliation and injuries to reputation, become emotionally involved in a cause, and diverted from alternative uses of their time to participate in a process where they may lose totally or recover what so often are inadequate remedies. Moreover, some people can afford to run up the costs of participation to run poorer opponents out of the game, and the threat that this may happen deters many from entering the contest. (See Galanter, 1974). Thus, many people are left to lump it, whatever their legal rights. When we turn to social regulation, we find that it involves costs which some can pass along to others. It usually is fruitful to ask who benefits from and who pays for any type of legal action. Often we will find that regulation operates as a kind of regressive taxation, burdening the have-nots far more than the haves.

2. *Law is delivered by actors with limited resources and interests of their own in settings where they have discretion.* "Street-level bureaucrats" (Lipsky, 1980) such as police, assistant prosecuting attorneys, case workers, clerks of court, those handling intake at administrative agencies and many more, have discretion although no one planned it that way. This is true for a number of reasons. Policies conflict and the rules may be unclear. As a result, those who deal with the public may have a choice of goals to pursue or rationalizations for whatever they want to do to serve the public or their own self interest. Those who do the day-to-day work of a legal agency often are hard to supervise because they control the official version of events by writing reports in the files. Resource constraints often make it impossible to "go by the book" since officials cannot do everything mandated. If those enforcing a law cannot carry out all their duties, they must choose which of them under what circumstances they will attempt to implement. Those choices of "street-level bureaucrats" are unlikely to be random or neutral in their impact. They will be affected by folk wisdom or bias, reward and punishment structures, and self-interest. (See Handler, 1979; Macaulay and Macaulay, 1978).

3. *Many of the functions usually thought of as legal are performed by*

alternative institutions, and there is a great deal of interpretation between what we call public and private sectors. We live in a world of "legal pluralism" where rules are made and interpreted and sanctions imposed by many public and private governments which are only loosely coordinated. Some conduct is entirely within the jurisdiction of one government or another; sometimes units are complementary and support each other; often they are rivals and compete for influence. Examples of private governments range from the Mafia to the American Arbitration Association. Trade associations, sports leagues, church groups, neighborhood organizations and many other "private" units such as business corporations exercise what are, effectively, legal powers. They make rules by constitutions, charters and standard contracts; they interpret them in their day-to-day operations; they offer benefits on certain conditions; and they may suspend or expel members, associates or employees as a sanction. Indeed, in many instances these sanctions may be more powerful than any the law has to offer. Also, those who regularly interact in valued long-term relationships usually form semi-autonomous social fields (Moore, 1973) which regulate a great deal of behavior. For example, both business people who deal regularly and those plaintiffs' and defendants' lawyers who specialize in personal injury work in a community are subject to the rules and sanctions of their social fields. Moreover, at all levels of society, public government tends to exist at the margins of long-term continuing relations, usually affecting but seldom controlling behavior. Indeed, distinctions between public and private arenas tend to disappear in practice. (See Macaulay, 1983). Police, prosecutors, clerks of the court, judges, field officers of administrative agencies, mayors, governors, legislators and other public officials and their assistants often are enmeshed in long-term valued relationships with those they purport to regulate. Problems are transformed, filtered and channelled into and out of the public legal system and systems of private regulation as part of complicated processes. Lawyers and others often play critical roles in assigning problems to the jurisdiction of one or another norm-defining-and-sanctioning system. One cannot understand legal action without understanding the collaborating and rival institutions in a society. (See Galanter, 1981; Fitzpatrick, 1983).

4. *People, acting alone and in groups, cope with law and cannot be expected to comply passively.* Many people are able to ignore most legal commands, or redefine them to serve self-interest or "common sense," and live with a vague and often inaccurate sense of the nature of law and legal process—all without encountering serious problems. There is great opportunity for evasion in a society that values privacy, civil liberties, and limited investment in government. Coping with the law can become a game that offsets any sense of obligation. Many participants in social fields and networks pass along techniques of evasion, legitimate breaking the law, honor the crafty, and even sanction those who would comply. The law is frequently uncertain and plausible arguments can be fashioned to

rationalize much of what many people want to do. This means that there is great opportunity for bargaining in the shadow of the law (see Mnookin and Kornhauser, 1979) or in the shadow of questionable assumptions about the law. Thus, people's views of the likely legal consequences of action at best affect but do not determine their behavior. Sometimes, however, the command of the law rings loud and clear and has direct impact on behavior. In short, the role of law is not something that can be assumed but must be established in every case.

5. *Lawyers play many roles other than adversary in a courtroom.* Lawyer self-interest, and their view of what is best for a client, often dictates that litigation should be avoided, and lawyers seek other ways to provide service to clients. (See Macaulay, 1979). They tend to know who makes decisions and what kinds of appeals, legal and other types, are likely to be effective. They know how to bargain and how to manipulate situations so that accommodations can be reached. Often they serve as coercive mediators, acting in settings where their profession itself is a tacit threat of trouble if people do not behave reasonably. Instead of pursuing only their client's immediate interest, lawyers often act as what Justice Brandeis called "counsel for the situation," seeking what they see as the best long-term solution for all concerned. Often lawyers, with more or less success, seek to transform clients' perceptions about what is just, or at least tolerable. Often they deal with bruised egos and manage public relations far more than they vindicate clients' rights. As Marc Galanter observes, these professional practices tend to breed distinct bargaining arenas where veteran players know the going rate for, say, breaking and entering with one prior offense, a whiplash injury in a rear end collision, and the like. The "hired gun" battling for a client to the limits of law and ethics is found only in a limited set of situations. The development of these less adversarial roles explains why we find those aggrieved being offered a deal more often than we see rights being vindicated. This may be of concern if we think that rights ought to be clarified and vindicated to serve social purposes. Also, the wide variety of roles played by lawyers is a factor in making the functioning of social institutions far more complex than formal descriptions assume. For example, many lawyers' stock in trade includes their contacts with officials, knowledge of acceptable rhetoric, and awareness of mutually advantageous possibilities. Thus, they are able to cut through formal channels and get things done. When this happens regularly, behavior in a corporation or a public agency no longer follows official procedures. If we think those procedures serve certain functions, this activity by lawyers, or others playing similar roles, will undercut them.

6. *Our society deals with conflict in many ways, but avoidance and evasion are important ones.* At times we mobilize social institutions in the service of values and interests: we fought a civil war; the army has enforced civil rights laws; the FBI has suppressed what its leaders saw as radical causes; and the criminal process has jailed people seen as threats to the

safety and privileges of those who count. More often, however, we honor principled behavior in words but practice accommodation. We may pass symbolic laws declaring the good, the true and the beautiful, but we leave enforcement to local option. We find social consensus at a high level of abstraction and so keep our doctrines ambiguous or contradictory. This avoids the costs of definition and of deciding that some interpretations of values are right while others are wrong. Thus, a simple means-and-ends view of law should be suspect. Moreover, while some may be fooled by the gap between law's announced promises and the system's performance, others are well aware of what is going on. (See Galanter, 1974). Whether law is supposed to solve social problems is always something to establish rather than something that can be assumed.

7. *While law matters in American society, its influence tends to be indirect, subtle and ambiguous.* It is easy to find gaps between the promise and performance of our law. Americans are selectively law abiding: some refuse to register for the draft as a matter of principle; some cheat on their taxes or redefine their obligations under those laws in questionable fashion; many drive while intoxicated. Businesses pollute the environment, distribute dangerously defective products, and bribe public officials. Nonetheless, law matters in a number of ways. For example, many ideas that are part of our common normative vocabulary are crystallized in law, and they both help rationalize action and affect our expectations about the social world. Indeed, even the sports pages of our newspapers more and more resemble law reviews as a legal vocabulary is appropriated to explain players' relations with teams, teams' relations with cities, and the like. While the ability of the legal system to prompt social change that is unwanted by a large or powerful minority may be limited, often law can add gasoline to an already burning fire. The struggle to gain legal rights can be the focus of a social movement, forcing reformers to define goals and to select means to obtain them. Even failed reform efforts may influence the behavior of both proponents and opponents. Moreover, law can restrain power in many situations. For many reasons, those with power hesitate to exercise it too crudely. The effort to cloak an exercise of power with a mantle of right or to cover up abuses are costly exercises which, at times, deter action. Law and lawyers have helped gain accommodations for some of the less powerful by using legal symbols and procedures. In this culture even the counter-attacks by the powerful have to be rationalized in legal rhetoric. This effort may affect both the form and substance of the way such battles are fought and resolved.

The picture formed by connecting these seven points cannot be ignored by a reformer or theorist who wants to act through or think about law in this society. While fantasies may be lovely things if they are recognized for what they are, romanticized views of social life are not always innocent. One who would act or theorize apart from something resembling an empirical picture of our legal system in action probably is engaged in a con

game. For example, consider all the proposals to "solve the crime problem" by simple solutions such as easing the rules concerning search and seizure; curbing the insanity defense; increasing sentences for those convicted; and ending plea bargaining. Whatever else one can say for such proposals, they appear to be cheap. If crime were caused by words in a Supreme Court opinion or a statute, then crime could be ended by paying a printer to set new text. No new taxes would be imposed. No extra services would be required. All that would be needed would be to muzzle lawyers and judges. However, few conversant with law and society literature see these kinds of proposals for fighting crime as much more than the wares of one more snake oil salesman.

Similarly, Marc Galanter (1983) criticizes the frequent assertions that our legal institutions are overwhelmed by a flood of litigation prompted by the excessive litigiousness of Americans provoked by greedy lawyers. He finds instead that there is little persuasive evidence of a litigation explosion and that modern patterns of disputing are a conservative adaptation to changing conditions. The argument that there has been a serious problem created by increasing litigation "displays the weakness of contemporary legal scholarship and policy analysis" as "theories were put forward without serious consideration of whether they fit the facts."

Much the same can be said for theoretical literature that attempts to explain rules of law in terms of promoting efficiency without considering how, if at all, those rules are implemented. This kind of writing may have value as a study of ideology, but sometimes it seems to have a kinship with W. C. Fields conning a mark. Writers in this camp often neglect their own teachings. They fail to consider the costs of moving from what they view as a messy and inefficient welfare state to the brave new competitive world. Since they are not interested in distributional questions, they can ignore those left behind. Perhaps the trip is worth the price, but the true price must be assessed before this judgment can be made. We always must ask who benefits and who pays how much to reach any utopia; the social study of law should make it clear that such questions must be asked of any reformer or revolutionary.

II. WILL SCIENCE SAVE US?

When Columbus sought to test his theory that the world was round, he sailed west and discovered the new world. He showed that sailing beyond the horizon did not lead to falling off the edge of the world. However, as we know, his theory led him to err: he mistakenly called those who had discovered the Americas long before him, "Indians." As time passed, simply sailing west from Spain became less and less likely to yield new and significant knowledge about the shape of the world. Better ships and navigational aids made the trip easier, but they alone did not add much to what had been learned from the voyages of the first hundred years or so.

Rick Abel (1980a; 1980b) sees the situation in our field as much the same

as work on the round world theory after the first voyages. He asserts that the "original paradigm [of social studies of law] is exhausted." He continues, (p.429)

[r]ecent scholarship often seems stagnant, further demonstration (or falsification) of a well-established (or generally discredited) hypothesis, one more entry in a sterile, and ultimately unresolvable, theoretical debate—a by-product of the demands of tenure-review committees rather than the expression of any real intellectual engagement.

He argues (1982:795) that the "central flaw is the insistence upon explaining law only as an instrumental means to a material goal . . . [this] has long impoverished social studies of law." Law, he reminds us, "can also be expressive, mystifying, or legitimating; it can provide an arena for status competition."

My own reading of the record leads me to support Abel. At the outset, I see two major problems in the field: (1) the functioning legal system is difficult to study, and (2) all the common approaches to the social study of law are flawed in some way and likely to remain so. However, having said that, I will offer some cautions about throwing out babies with bathwater.

While other areas may be even more difficult for social scientists to study, the functioning legal system poses hard-to-solve problems for researchers. Legal topics involve privacy and the interests of the powerful. There are sanctions which may be used to retaliate against those who talk too much. As of right, we cannot observe anything but on-stage behavior; yet much of the action takes places back-stage. Actors who know what is going on may mislead us. Truth for the sake of science may be outweighed by an urge to keep one's job or loyalty to a group. Even those eager to cooperate may have fooled themselves about how often they do what and why.

Also, law is pervasive, but we can seldom do more than narrow case-studies. When we try to work with available sets of macro-data, we find that they are suspect. For some purposes it may prove useful to treat the legal system as relatively autonomous, but in most instances there is a great deal of interpenetration between legal and other social systems. Legal problems usually are aspects of much larger events so that a focus on, say, sentencing is likely to overlook or distort our view of what is happening in a larger context.

In addition, the units we describe and analyze often are not tangible things which can be measured in ways which all would accept. Commonly, the stuff of law involves social constructs that reflect translations, transformations and distortions of "events in the real world." And then research removes us another step away from this world. Counting what we define as "events," finding associations, and other data manipulations may produce a picture with little resemblance to the perceptions of those who participated in the events or to some underlying reality we assume exists:

Of course, we could narrow our work and count only tangible things. But even if we accept that there are enough tangible "things" involved in law to matter, Roberto Unger (1976; 56-57) reminds us that,

To treat . . . understandings and values as mere shams is to assume that social relations can be described and explained without regard to the meaning . . . [that people] . . . who participate in those relations attribute to them. This . . . would be to blind oneself to what is specifically social about the subject matter . . .

A major problem in the social study of law is "scientism." The goal of some may be as much to promote the status of their field as to learn something significant about the legal system in operation. Many researchers bring the tool-kit of methods fashionable in their social science and look for problems where those methods can be used. It sometimes proves necessary to distort the nature of existing problems so that preferred methods can produce answers. Research techniques may be impeccable, but a rigorous answer to a silly question is still a rigorously silly answer. The alternative is not sloppy research. Rather, we must choose methods appropriate to questions worth asking about legal systems in their full social context. Sometimes, as I will show, a little bit of all kinds of methods may be called for to deal with what our theory allows us to see as an important problem.

All the common approaches to the social study of law are flawed. While each may be improved, all are likely to remain less than reliable recipes for producing objective truth. Without getting bogged down in arguments about social science method or debates about whether positivist social science is but an illusion (see Dandeker, 1983; Hekman, 1983), I can note several examples of problems in studying the legal system.

Some researchers have attempted to recreate legal phenomena in a "laboratory" to overcome secrecy in legal processes and to control the mass of variables interacting in the actual legal system. Some suggestive work has emerged, but much misses the mark badly. (For a criticism of this work, see Loh, 1981). My *bête noire* is most, but not all, research based on simulated trials before mock juries. The classic objections to this research are well recognized: it is difficult to recreate the essential features of the legal process without an expensive investment in theater—the interactions among judges, lawyers, litigants and defendants, architecture and symbols, procedures and the like are hard to capture in less than a full dramatization. Furthermore, people in these experiments are playing the role of "subject" rather than making decisions that count. While they may become involved in their experimental task, they never confront someone who may be hurt by their decisions and at some level they know that they are playing a game. They are not socialized into the role of juror. (See Balch, Griffiths, Hall and Winfree, 1976). It has been suggested that if one is testing a theory, this artificiality does not matter. Yet learning that a theory holds true in an artificial context does not establish that it will work in any

other context. This defense is just a variation on the "all other things being equal" ploy so often used to defend suspect work.

There are other objections to jury research which are not so well recognized. Because of the filtering, funneling and channeling of cases in the criminal justice system, only rare cases go to juries; most are diverted to juvenile justice systems or handled by plea bargaining. If this is true, we should ask whether the experimental cases used in mock jury research are like those which might ever get to a jury. Cases actually tried probably have unusual features or pose dilemmas that would try the wisdom of Solomon, but, typically, research is not focused on such situations.

Also we find a great deal of confusion lurking in this body of research, about what it is that jurors are supposed to do. (See Broeder, 1954). The author of one research proposal argued that jurors are supposed to be "as calculators with a cleared memory." Yet the whole idea of a jury of one's peers is that jurors will bring with them the "folk-wisdom" of the community. Is the "bias" so often studied in jury research really the experimenter's term for what he or she sees as bad folk-wisdom? Social psychologists often use the term "bias" with a different meaning than lawyers, and jury research at times involves a confusion of definitions.

Researchers seem to assume that we want a scientific judgment from jurors—that an adversary trial by jury and a controlled experiment are just alternative ways of seeking truth. Yet are jurors supposed to apply law to facts in a coldly rational scientific process? We may want jurors to refuse to apply what they see as unjust laws. Anne Bernays, the novelist, commented in a recent *New York Times Book Review* (1983:13) that "[c]ourts are places where well-intentioned people attempt to make sense of the irrational." Juries may exist to decide cases which are impossible to resolve with any assurance on the evidence. Jurors who have not understood a judge's instructions about the law may actually search for the best available solution to a real dilemma. Perhaps the assumption that all human problems can be resolved satisfactorily in a scientific fashion is the most irrational position of all.

Recently jury researchers have attempted to cope with many of these problems (see, e.g., Borgida, 1981). Some of this work has been done by social psychologists who actually have seen many criminal trials and know something about the entire process.¹ (See Hastie, Penrod and Pennington, 1983; Penrod and Borgida, 1983). Yet even their work can be no more than suggestive. (See Greenwood, 1982). As the best of these researchers take pains to warn us, they cannot capture the essential elements of jury trials in their simulations because they cannot be sure what elements are essential. In some instances, the most valuable part of jury research is the effort invested in thinking about jury process apart from any data collected in an experiment.

Another common approach to the social study of law has been regression analysis. It is a powerful but limited tool. Its use, too, has been

subject to criticism. Abel (1980b:819) notes that,

[s]tatistical correlations, which tend to be the foundation of criminal justice research, need to be accompanied by qualitative observations of institutions at work. We know virtually nothing about the mechanisms underlying these correlations, we are often uncertain about the causal direction, and we tend to work with a simplistic utilitarian model . . . [W]e need to take seriously the possibility that the criminal justice system really has very little to do with crime rates one way or the other.

Berk and Ray (1982) point out that regression analysis may yield highly misleading results if the data are the product of "selection artifacts"—that is, if they are too far from a random sample of some defined population. However, a good deal of work in our field must be based on just such data. Often we are lucky to find anyone who knows what is happening who will talk us to, much less a respectable sample of actors.

Wildavsky (1982:903); too, has little faith in regression analysis. He asserts that to believe in multiple regression one would have to "believe that the study controlled all the factors that made a difference to the results." This would be such a leap of faith, in his view, that "[i]f we believe in multiple regression at all, this is because we want to rely on something rather than nothing. Always the danger is that a spurious precision will replace an insightful guess." He insists that "matters of taste and judgment inform virtually every step of the process of estimating social effects due to social interventions . . ."

Wildavsky's attack is particularly apt when regression analysis is applied to macrodata gathered by public agencies. Too often these data are a mess. (See David and Robbin, 1981). Sometimes items are recorded or omitted for political reasons; sometimes inconsistent definitions of categories are used by officials in different cities or states when they report a table of numbers; the coding may be consistent but the categories used may lump together very different things. Cochran (1980:123, 124) reminds us that "[d]ata may have an aura of authenticity even when they are inaccurate or false Certainly, it is the case that all things that are important cannot be quantified equally well." In short, an informed consumer would approach studies relying on multiple regression cautiously because too many researchers apply the technique mechanically without concern for its limitations.

In my experience, those who know the most about regression analysis are the most hesitant to use it inappropriately and are the most careful in spelling out assumptions and limitations. Just as simulation studies, the major contribution of regression analysis of large sets of data often is to suggest areas for further study. For example, Unnever (1982) studied sentencing in drug cases tried in Miami. He contrasted defendants with privately retained attorneys and those represented by public defenders, asking which were sentenced to prison more often. He found (p.220) that "defendants with private attorneys were significantly less likely to receive a

prison sentence than those who had public defenders. The odds of incarceration were nearly halved if a defendant had a private attorney." On one hand, we could object that the category "private attorney" may involve lumping together the most competent tigers of the defense bar with the dregs of the profession. On the other hand, as Unnever says (213, n.2), "[f]uture research is needed to empirically determine what the components of successful legal representation are" It seems unlikely that *all* private lawyers do better than *all* public ones. My guess is that a select few private attorneys who specialize in drug cases involving wealthy clients account for most of the difference. If so, I would be prompted to move to an in-depth study of their practices to explain this success. Whatever the appropriate questions, answers will not be found in tables of numbers. Rather, one must learn a great deal about the Miami drug scene, the nature of the defendants, narcotics officers, prosecutors, court personnel, and local politicians as well as more about defense lawyers. (Compare Adler and Adler, 1983). For example, one would have to rule out the possibility that the difference found by Unnever reflected the willingness of some private lawyers to bribe some judges, a practice in which public defenders do not engage. Regression analysis, alone, is unlikely to suggest or rule out this explanation.

If laboratory simulation and regression analysis are flawed, we must also recognize that soft-data case studies—which are typical of both anthropology of law and legal history—come with their own problems. (See Van Maanen, 1981; Britan, 1979). Both historical records and what an outsider can observe and ask about social relationships tend to serve as a kind of Rorschach test. The data may function as ink blots in which researchers may see clouds, sheep, class domination or creative dispute resolution. We always risk finding what we go looking for since we tend to see and hear what we are prepared to notice. Historical approaches are always affected by the process of creating and preserving records and anthropological approaches tend to yield stories which, at best, are true for a particular time and place. We, and our readers, tend to be influenced unduly by atrocity stories; yet what makes these stories vivid should make us suspect that they are atypical. Still, just as with the other methods discussed, these approaches can be suggestive, yielding knowledge which is important even though provisional.

After saying all this, I should make clear that I am not arguing against continuing the entire enterprise. There is still, in Gertrude Stein's terms, some there there which cannot be ignored. It is unlikely that some new paradigm demanding new questions and answers is waiting in the wings. Most existing criticism of the social study of law debunks without substituting much concrete in its place—we are told, for example, to substitute dialectic reasoning but not much more about what that is or what it might produce. (See Marenin, 1981). We may be past the point where we can expect to repeat the exciting discoveries of the first days of a new field,

but there is still value in filling in uncharted territory. We may find that what we think is a general phenomenon is limited to the kinds of situations in the places we have studied so far. As more details become clear, parts of the picture may change. Even if we assume that all big discoveries have been made, we still may be brought up short when we consider the picture as a whole. Any grand new approach to the study of law and society will have to deal with the marginality of legal activity to most of life, plea bargaining, cost barriers to the use of legal process, mass processing and organizational explanations and all the rest of the ideas in my introductory list of what the social study of law has uncovered so far.

Furthermore, even if we believe that timeless truth about law and society cannot be produced by mechanical application of what are called scientific methods, those methods at least embody an ideal which might curb the excesses of know-nothing legal analysis and what Medawar (1982) calls the "literary syndrome in science." This syndrome involves a "combination of high imaginativeness with a relaxation of . . . the critical process . . . [a] style which at first intrigues and dazzles, but in the end bewilders and disgusts" (p.59). We need some defense against "the undisciplined exercise of the imaginative faculty to produce hypotheses held true because of their inspirational origin" (p.61).

The ideal, and at least some of the practice, of science teaches us that one begins with an idea or story that seems to explain something. It is not enough that it is plausible; it must be tested. One must be skeptical about one's own inspirations and fantasies as well as the works of earlier great minds. One must look for and credit evidence that fails to support or disproves one's position. One must be aware that we can find data that seem to prove the earth is flat. It is risky to generalize from a few cases, and we have to ask whether it is likely that any example of our position is typical. We must be concerned with multivariate interactions; single cause explanations where the influence runs only one way probably are wrong. Critics of conventional social science would also insist that we be aware that our own bias may affect every step of a study—it can color the questions asked, how they are worded, how abstract concepts are "operationalized," what subjects perceive that experimenters want them to do and say, and how data are summarized and interpreted. The researcher is part of the society or social group under study. Objectivity is a worthy goal, but those who think they have attained such a lofty disinterested state probably are fooling themselves if not others. There are, after all, rewards for having research come out the "right way" and penalties for failing to get publishable results. Social science researchers can never assume that they have uncovered natural invariant patterns of social action rather than just contemporary phenomena that will change as social perceptions, social structures or other factors change.

The ideal also teaches that we must be modest about what we claim; truth in packaging ought to apply to those who study the operation of the

legal system as well as manufacturers of consumer goods. We may fool ourselves as well as others when we clothe ourselves in the image of the scientist in a white coat neutrally pursuing objective truth. If we accept the norm that one should not knowingly or negligently do harm, we must be concerned about how our work is likely to be appropriated in the service of which interests, classes or individuals. We cannot dismiss this concern with the conceit that all we are doing is reporting the facts as they "exist" out there.

However, a careful but limited study usually is an advance beyond what Meehl (1971) calls "fireside inductions" about legal problems. Usually, what we gain from the social study of law is provisional knowledge based on the best we could do under the circumstances. If we do not claim more, and work to see that others do not distort our work by ignoring all the qualifications, we can be proud of gaining this much. (Compare Eriksson, 1978).

While it would be hard to claim that all social study of law exemplifies the scientific ideal, there is enough there so that we can examine claims about law and reform better than we could just a few years ago. Indeed, insofar as we have true interdisciplinary work, we do tend to be aware of our assumptions and recognize the limited claims we can make. Any new approach offered to recharge the field ought to be subject to a skeptical reception insofar as it departs significantly from the demands of what I have sketched as the scientific ideal.

III. THEORY TO RELIEVE THE DISTRESS CAUSED BY CLACKETY-CLACK

Practitioners of the social study of law can get swept away in the clackety-clack of computer output. They may be refining methods to answer the wrong questions or only some of the right ones. A predictable response to an excess of data crunching is a call for theory, preferably theory originally written in German or French and imperfectly translated into abstract or newly created English words. The social study of law has been charged with mindless empiricism, covert use of a powerful but implicit theory which serves a political ideology, and neglect of questions posed by radical theories. Some argue that empiricism guided by assumptions of positivist social science is so flawed that it deserves to be dismissed as trivial or as merely clothing liberal pluralism in the garb of science. Others argue that only what they see as correct social theory will yield knowledge about the place of law in society. (See, e.g., Thompson, 1978; Nield and See, 1979; Warde, 1982; Turk, 1979; Ayre, 1982; Turk, 1982; Hund, 1982; Marsden, 1982).

Cain and Finch (1981:116) reject such extreme positions, but argue that "[i]t is the responsibility of every researcher to be a theorist." The two most developed theories that might serve to guide research are structural-functionalism and the many varieties of Marxism. Cain and Finch tell us that data are not collected or found; rather they are created by researchers

who play an active part in the process. (Their position reminds us of the attacks of the legal realists on the conceit that judges only find the law rather than make it.) They continue by explaining that data are produced when sociologically inert entities are combined with a researcher's implicit or explicit theory. At times, researchers' theoretical outlooks cause them to neglect to report what they ignore as irrelevant; other times they see situations through lenses that transform inert entities into indications of dominance, social integration or something similar. A Marxist, for example, will look for indications of the impact of class; a liberal-pluralist will see a compromise of multiple interests that produces stability. To avoid misrepresentation, Cain and Finch say that both theory and method must be described so that readers can look for the transformations, the overlooked information and the bias behind interpretations. If this is not done, they warn, one is not doing science but engaging in propaganda.

While granting most of Cain and Finch's case, I want to look at what may be involved in calls for theory. I think that a great deal of the writing advocating theory reflects matters of intellectual style and politics, but these matters cannot be dismissed because style and world view do make a difference in the way we work and what we write. Then I will ask what might be produced in law and social science by a more explicit consideration of social theory. I will argue that both existing theories and empirical work would benefit if theorists and empiricists paid more attention to each other.

Johan Galtung (1982), the Norwegian sociologist who has worked in many areas of the world, suggests that there are distinct styles of social science, and I think we can find three in the international community of scholars interested in the place of law in society. Galtung has identified what he calls the saxon, teutonic, and gallic intellectual styles. He uses these names because while Germany may be the home of the teutonic style, German scholars may pursue saxon work and Americans may become more teutonic than the Germans whose work they borrow. As might be expected, the style we adopt influences the questions we ask, what we do to answer them, and what we see as answers. Each has advantages; each has disadvantages. Some combination would appear to be ideal, but experience teaches that successful syntheses are rare.

Galtung tells us that the *saxon style* pictures science as a flat plain of data on which can be found many small hills representing "theories of the middle range." The preoccupation is with data, documentation and method. There is great worry about overly broad generalizations and abstractions not tied to specific instances. Moreover, if a middle range theory is not totally true, it is at least a start toward a partial explanation of what has been observed. The basic urge is to harmonize all kinds of work; one draws eclectically from theories and findings to stitch together one's story. There is an ecumenical approach seeking to find something of value in everything that used approved methods. Saxon work tends to be

sloppy in concept but rigorous in technique.

In contrast, the two continental styles "speed off into outer space, leaving a thin trail of data behind" (p.849) to the dismay of saxon scholars. *Teutonic theory*, Galtung says, seeks a "potential reality," (p.828) free of the noise and impurities of everyday experience. It is represented by a grand and impressive deductive pyramid. The best feature a contradiction at the top to provide dynamic force. Research is guided by a desire to draw out the implications of a pyramid and to find examples to shore up foundations. A pure teutonic intellectual risks seeing a whole pyramid fall to pieces if any part of the foundations is shown to be wrong. In light of this risk, debate is warfare. Those who adhere to different pyramids tend to avoid each other for they know that discussion will not produce a productive interchange. Debaters have well-developed techniques to ward off the impact of seemingly contradictory findings. Indeed, a counter-attack on empiricism is one of the best strategies to preserve a pyramid in the face of inconsistent data—that the world does not seem to conform to theory only shows the difficulties in perceiving truth.

Gallic theory, according to Galtung, assumes that a totality cannot be shown by precise definitions, rigorous deductions or statistical techniques. A totality must be hinted at. One has to dance around it, viewing truth from many angles until in the end ideas are counterpoised between two poles. Most importantly, truth must be expressed with style and elegance. For example, Galtung quotes Foucault's assertion that "the soul has become the prison of the body" (p.851, n.19).

These styles have consequences. Saxon research often is guilty of the sins of naive empiricism, answering trivial questions with an imposing technical apparatus. Debates over method can overshadow reflection about why we want to know the answers to our questions. Research produces more than anyone wants to know about, say, bias in sentencing in Atlanta, Chicago, Miami, San Diego and Denver without yielding generalizations about the criminal justice system, the legal system, the place of law in society or much else. The ecumenical search for harmony may produce a saxon synthesis of interpretations of the ideas of Weber, Durkheim, Marx and the lyrics of last year's punk rock hits (compare Levine and Stumpf, 1983), but only at the cost of ignoring very real differences.

The continental styles tend to be what we could call "theories of adhesion"—one converts to the faith and then the theory just seems right; if a theory "rings true," it will then explain everything. Almost all experience can be transformed and translated into it, and so what would seem to be common sense counter-examples are "transcended." Teutonic theorists tend to assume that if their deductive pyramid were only implemented in its pure form, major beneficial changes in the world would follow. Here, too, style can have consequences. It is a short step from the

academic hall to the political platform, and teutonic intellectuals claim to seek the unity of theory and practice.

What might the social study of law gain if writers in this tradition were to look to broader theories? At the outset, we must remember that there is a powerful, if often latent, theory underlying most of the work in law and the behavioral sciences. If we were concerned with theory, we could examine this view of the world and understand its influence on past and future work. One leg of this theory is provided by what Trubek and Galanter (1974) call liberal legalism—roughly a collection of ideas crystalized in the rule of law, constitutionalism, and the Bill of Rights. In part, this is a normative theory with a long history, but it also is a descriptive theory about the way government works in many western nations. Few would assert that it is a perfect description of any government in operation, but many write as if they assumed that it offers a roughly accurate picture, with perhaps a little slippage here and there.

The other leg of our conventional, but often tacit, theory can be labeled Mertonian latent-functionalism. There are two versions, one angry and another seemingly sophisticated. The angry approach brings to bear the fine American tradition of muckraking, with Thorstein Veblen as the patron saint. The muckraker shows that a particular law or part of the legal system is all a fraud hiding the interest of someone or some small group. The cool version finds latent functions in the failures and partial successes of the legal system. Gaps are rationalized. For example, we have a constitutional right to trial by jury, but the reality of our criminal process is plea bargaining. A true cool latent functionalist would point out the benefits of plea bargaining in reaching rough justice as compared to the caprice of actual juries whose composition and performance often is far from ideal.

This kind of social theory affects much law and social science research in the United States. Gaps between the law on the books and law in action are discovered because most researchers here carry in their heads and hearts a kind of high-school civics model of the American legal system. Any observation of police, courts, lawyers, administrative agencies or people interacting in public or private organizations is likely to show that things do not work "the way they should." On one hand, many see a normative imperative to close any gap they find. Here arises the instrumentalism that Abel sees as the major problem in the field—one who sees law primarily as a kind of social engineering will assume that adjustments are both necessary and possible when goals are not met. If a machine is not working as designed, one who loves machines will want to fix it. On the other hand, some engaged in such debunking may be content to expose a gap as a kind of scandal or as an indication that they know the true inside story. A latent functionalist, however, may even assume that a gap between promise and performance must be serving some important social function. These theories easily lead to an overly simple technocratic

posture or to the cynical pleasures of the exposé. Yet they do not often seem to prompt questions about power, status, class and the like. Symbolic and other functions of law are overlooked as is the power of some people to resist enforcement or to change or sabotage laws that they dislike.

If those engaged in legal studies were to turn to more explicitly developed social theories, they might find a mutually profitable interchange between the social study of law and attempts to generalize about societies as a whole. On one hand, large social theory points to important questions overlooked or underemphasized in law and society research. On the other hand, an empirical view of legal systems in operation suggests that these theories rest on too formal a view of law and legality. Here, I cannot review all of these larger social theories and their attempts to account for the role of law. However, structural-functionalism, and Marxist-derived theories make similar suggestions about the role of law capitalist societies. (See Lamo de Espinosa, 1980; Koch, 1980). Generally, all of this social theory assumes that law is instrumental for capitalism: private property is protected both by criminal and civil law; contracts are enforced so that planning is supported; the market is protected and regulated by anti-trust laws, prohibitions against unfair competition and tariffs; private activity is channelled in certain directions by control of the supply of money and credit and by tax incentives; and public investment establishes communications, transportation and the rest of the infrastructure while using these and other means to offset the economic cycle. Of course, structural-functional and Marxist-derived theories differ sharply about whether this activity produces stability or the contradictions of capitalism.

These theories usually tell us that law also affects attitudes and assumptions of some or all of the citizens about the propriety of particular decisions, particular social norms that are restated in the form of law, the legal system itself, or the entire social system. Liberal theorists talk of legitimacy or value clarification. Marxist-derived theories stress false consciousness and mystification. While one can distinguish these ideas, their assumptions about the process whereby law affects attitudes which then affect behavior are similar.

There are problems with these theories that might suggest new directions for research. Our empirical work suggests that private governments, social fields and social networks perform many of the instrumental functions these theories attribute to law. At best, the formal legal system operates in a limited class of cases, serves as a threat operating at the margin of social interaction, and functions indirectly to affect bargaining. For example, large corporations may run their own police forces as well as their own intelligence services which may even carry out a private foreign policy. "White collar crimes" usually are dealt with by what has been called "the second criminal justice system." (See Cole, 1978). A large corporation does not have to worry about proof beyond a reasonable doubt or *Miranda*

warnings. One suspected of, say, embezzlement from an employer may be just fired or moved to another job without possibility of promotion. The threat of prosecution in the first criminal justice system may be used to gain some measure of restitution. The second system works without the benefits and burdens of constitutional rights and is under the control of large corporations rather than local or national politics. Moreover, a corporation can buy the state of the art in wiretapping or lie detector equipment which probably would be out of the reach of any police department budget.

We have learned that rules for conducting business tend to be made privately, either by trade associations or by standardized contracts with customary terms and conditions. Long-term continuing relationships are highly valuable, and parties hesitate to act in ways that might jeopardize particular relationships or their reputations. Such reputational sanctions are, in many instances, far more powerful than anything the law has to offer (Macaulay, 1963). Furthermore, important business leaders tend to influence how legal officials at all parts of the system exercise discretion. Public governmental and private business units often are interpenetrated by long-term continuing relationships so that distinctions between public and private spheres are blurred and indistinct. Law's autonomy from power in a society is only relative and never should be overestimated.

Empirical work also leads to questions about the realism of theories of legitimacy and mystification. (Compare Useem and Useem, 1979). By and large, people know little about their legal system, and what they know tends to be distorted or wrong. There is little proof that law affects attitudes which then affect behavior, and it is unlikely that people are motivated by something they have never heard of or know little about. Indeed, it is just as plausible that law is largely a private language for an elite with little impact on the larger society. (See Macaulay, 1977; McBarnet, 1982). Rather than looking to norms for behavioral guidance, it is possible that we act and then we rationalize. We may draw on a number of vocabularies in this process, and law seems to be only one of them. Perhaps most of the legitimating or mystifying comes from a vague and general assumption that one's society has a legal system in place, and that while abuses can occur, generally it is a tolerable or even good system. Whatever the truth, law's impact on attitudes and behavior likely is subtle and indirect.

Some refining of both structural-functional and Marxist-derived theories seems called for by these empirical views of the legal process. First, the assumption that law is directly instrumental for capitalism is contradicted by our findings about many other social institutions serving these functions in ways that overlap and even conflict with law. One could expand these social theories so that instrumental functions were assigned to something called the "state-apparatus." All private law-making, law-applying and sanctioning could be merged into the concept of the state, broadly conceived. But this could produce a theory where importantly different

things were lumped together. Does it matter that a social function is carried out by a city's police force rather than the security department of a large multinational corporation? Is bargaining in the shadow of the law just a variant of the application of codified norms by a public court or are there differences with consequences? Does an interpenetrated regulatory system with multiple relationships between regulators and regulated differ from one that is relatively autonomous and controls the regulated through formal procedures?

Alternatively, one could modify or qualify social theories to mesh with empirical findings. Niklas Luhmann (1981), a leading systems theorist, has examined findings about legal pluralism in advanced capitalist societies and adjusted his theory. Luhmann sees the public legal system playing an integrating role that contributes to the stability of social systems, and he finds allocations of functions away from public institutions towards private ones to be dangerous. He warns that a trend toward viewing social problems as no longer matters of right may "lead to a kind of drying up of the legal system, and so leave the regulation of conflict to other mechanisms—e.g., morality, ignorance, class structure, or the use of force outside the law—whose structural compatability may be problematic" (Luhmann, 1981:247). Whether or not Luhmann is right, this is an example of data prompting an adjustment in theory.

Second, theories about legitimacy and mystification through law also need to be rethought. Different kinds of people know different things about law, and much of this knowledge is distorted. Rather than assuming that law affects attitudes in some uniform way, this is a question for study. One might begin by examining the images of law and the legal system found in textbooks and schools, mass media and fiction. One might also study the perceptions of groups with different religious, cultural and vocational backgrounds. Before researchers asked whether, when and how attitudes about law affect behavior, they would have to offer a plausible account of a process whereby perceptions and attitudes were affected by experiences with and attempts at communication about the law. One would have to study how people interpret messages they do receive about law to fit their experiences, preconceptions and self-interest. Some writers argue (see Ray, 1978; Stack, 1978), on the basis of at least a little evidence, that members of disadvantaged social groups are not mystified by ideological images of law as some Marxist-derived theories would have it. Rather their contact with law provokes a great deal of cynical awareness of how things really work and who really benefits. Those mystified may be the more well off who wish to justify their privileges.

Instead of talking of legitimation and mystification, an adequate theory must deal with instances of indifference, resignation, illegitimacy, and cynical awareness as well as mystification and legitimation. (See Holmes, 1982; Held, 1982; Richter, 1982). I think it unlikely that we will find law having a broad impact on attitudes and behavior. People may see most law

as irrelevant to their immediate concerns or a matter for experts. When they must, they go along even with laws they view as senseless as the easiest way of avoiding trouble. However, it is hard to make even a plausible case for the idea that people comply with laws they see as irrational and cutting against their interest just because these commands are labeled law. (See Hyde, 1983).

Nonetheless, there is reason to think that there may be something to the idea of legitimacy or mystification. At the very least, people sometimes talk as if they thought that passage or repeal of a law would affect attitudes. All kinds of organizations appropriate symbols of formal legality for some reason—private police wear what most recognize as police uniforms; private action often mimics legal action, complete with rules of evidence and a version of due process; people do claim a right of free speech in private social interaction, although they are not always successful in gaining it; and all kinds of nongovernmental organizations make policy and allocate positions by elections. Perhaps all this is just rationalization and ritual with little impact, but enough of it takes place to caution us against assuming that it does not matter. However, in spite of theoretical and empirical work to date, we do not know how much and why this mimicry of legal action matters to whom.

The themes of law serving instrumental functions for capitalism and providing legitimacy or mystification are a bridge to much of the work of the Conference on Critical Legal Studies. In the late 1970s, a group of law professors, legal historians, activist lawyers and others came together to form the Conference on Critical Legal Studies. Some of those involved were Marxists, but most drew eclectically on aspects of Marxist writing, European critical sociological theory, the work of Gramsci (see, e.g., Femia, 1983), perspectives of the new left of the 1960s, and the like. They were united by friendship networks and their opposition to current fashions in legal scholarship; most were dissatisfied with social conditions in the United States and attempts of liberal reformers to remedy the plight of those on the bottom of the society, attempts which were seen as largely cosmetic and ineffective. Many of those involved were opposed to empirical social science or found it largely irrelevant to their concerns. With a few important exceptions, the focus of the Conference is criticism of liberal legal thought. It is difficult to find descriptions of alternative social institutions, except in the most general terms, or analyses of the process by which it might be possible to move from the present situation to a closer approximation of the ideal of human community shared by most members. The writing tends to be abstract and to involve special vocabularies, not easily read by outsiders. Most who are comfortable with saxonian style in social science will be put off, at least initially.

At first glance, critical legal scholarship seems either opposed or irrelevant to concerns of law and behavioral sciences. However, on closer examination, both the work of the Conference and the thrusts of its critics

suggest possible directions for work in the social study of law which will widen its view and avoid some of what Abel calls clackety-clack. I cannot describe here all of the work of those associated with the Conference, report all of the criticism, and offer my own appraisal of the positions advanced. Rather, I will rely heavily on attempts of others to synthesize and criticize the many strands of thought involved. (See, e.g., Trubek, 1984; Gordon, 1983; Munger and Seron, 1984; Unger, 1983). I will ask what those accustomed to empirical work might gain from critical legal scholars without converting to their point of view. (Whether empirical social scientists *ought* to convert and adopt both the intellectual style and political stances common to critical legal studies is a topic for another and very differently argued paper.)

Trubek (1984) has made a major effort to harmonize the empirical work of law and behavioral sciences with that of critical legal scholars. He tells us that critical legal writing seeks to discover and analyze "legal consciousness," the view of the world held by members of a society or groups within it concerning what is tolerable, necessary and just. World views give meaning to human interaction and thereby, critical scholars tell us, "constitute" social relationships. World views are crystallized into law and its applications but often are at the level of unarticulated background assumptions. Critical legal scholars tend to see capitalist legal doctrine as incoherent, contradictory or both. However, these very flaws open the door for what Unger (1983) calls "deviationist doctrine." A critical scholar can find liberating strands of thought in liberal doctrine and build upon them. For example, American contract law tends to honor individualism and self reliance, but there is also the concept of fiduciary obligation which, if pressed toward the limits of its logic, could promote a far more altruistic legal response to problems in continuing relationships.

Unlike social scientists who claim neutrality and objectivity, most engaged in critical legal studies see themselves as involved in a form of transformative politics. They see their decoding of legal doctrine as exposing mystification in the service of those who rule. World views rest on claims of truth, at least in part. Thus they can be challenged by showing that the underlying truth claims are false. In the strongest view the process is somewhat like that of a new insight in Freudian analysis which, under certain conditions, will prompt a personality change. Once scholarship rips aside the blindfold of liberal thought, people may see how they have been fooled or have been fooling themselves. They then will be free to fashion new world views. Critical thought will help form these new world views in a liberating direction.

Most critical legal studies work is written in a way almost guaranteed to provoke counterattack, and the targets of the critical approach have returned the fire. Let me emphasize again that my purpose is not to take part in the debate between critical legal studies and its opponents. The question here, rather, is whether this debate suggests ways around some

problems in law and the behavioral sciences. First, I will look at some of the objections that have been, or could be, made to critical legal studies. Then I will point out some of the implications of both critical work and the attacks against it for the social study of law.

Attacks on critical legal studies can be aimed at the plausibility of some common assertions found in this writing and at the emphasis given to decoding legal material. At the outset, consider what Trubek tells us is the basic assertion: consciousness or world views "constitute" social relations. In one sense, this seems unobjectionable. Socialism as practiced in Eastern Europe, for example, involves an elaborate normative vocabulary concerning social relationships, and this world view certainly is enshrined in the law of these countries. Markovits' (1978) analysis of the legal systems of the two German nations stresses the contrast in world view between socialist and capitalist versions in a situation where language, history and culture are much the same. (Compare Bowers, 1982). On the other hand, it is possible to have a formal statement of world view very much at odds with the actual assumptions of citizens. The world views declared in law are abstract and subject to conflicting translations and applications. While we would expect, for example, the world views reflected in the law of the German Democratic Republic and Poland to be similar, there is reason to think that the actual consciousness of citizens in the two "socialist" nations might be very different. Law probably always will be out of phase with at least some parts of a culture: there will be an official consciousness—"a party line"—and the actual world view held by people in the society which only partially tracks with the formally announced one. For example, "the" American world view involves a tension, or rough balance, between rugged individualism with its focus on striving and defeating others in competition and altruistic obligations towards at least certain other people. Our contract law, however, focuses on one aspect and largely neglects the other. At least in earlier times, judicial opinions recognized this by drawing a distinction between what one was legally obliged to do and one's higher moral duties.

Much of the work of critical legal scholars involves decoding world views hidden in law and legal writing; the legal historians in the group, of course, feed a broader range of material into their decoding machine. However, decoding texts always risks the problem of David Macaulay's (1979) "The Motel of the Mysteries." In Macaulay's book, North America was destroyed in 1985, by a flood of junk mail which, when all of the pollution in the air suddenly settled, formed a hard crust over the continent. A century later, archeologists explore and interpret American culture of the 1980s. Macaulay's archeologist finds a motel. There he discovers a skeleton lying on a bed facing a dresser on which are the remains of what we know to be a television set. He decodes his discovery as a strange religious rite: the dresser, he decides, is an altar with drawers in which were placed offerings to the gods of TV, and the set itself is a sacred object. The toilet

seat, the archeologist assumes, is a ceremonial collar worn around the neck on occasions when the ritual shower cap is placed upon the head. The humor turns on getting things just a little wrong.

Decoding texts may tell us more about the politics and consciousness of the translator than about the materials themselves. One would be a poor lawyer if he or she could not fashion a plausible argument supporting some link between broad cultural assumptions and appellate cases, or, say, between these assumptions and episodes of *Mork and Mindy* (see Goldman, 1982), professional sports (see Galtung, 1982) or the structure of elite law schools. The problem is what is overlooked or misinterpreted. I do not know whether any critical scholar has ever overlooked a matter of importance or misinterpreted a text. Most members of the group are intelligent and imaginative people so that their decoding seems highly plausible. Yet the point is that we cannot be sure that their accounts are more than just plausible exercises of the imagination; nor can they be sure if all they do is apply their intellect to a text. The left critique of empirical social science—that positivism leads scholars to discover what they have built into their questions and accept as answers—may apply to decoding texts as well. After all, we must concede that there is enough of a parallel between watching television and religious ritual that the interpretation in "The Motel of the Mysteries" is plausible even though not quite right.

Even if we assume that a critical scholar has properly decoded a text, we can still question the likely impact of the exercise. Critical legal studies involves a not-always-spelled-out theory of the influence of ideas on social change. Critical scholars claim to be engaged in transformative politics, sometimes to the annoyance of radical lawyers. Somehow articles in law reviews, books, and lessons offered law students by a minority of their professors are expected to change the world for the better. In some unstated way, steel workers, migrant laborers, clerical employees, Native Americans, Hispanic Americans, and blacks of both sexes all will benefit if assumptions hidden in liberal law are exposed in communications directed to a very select and limited audience.

But will articles in elite law reviews and the *National Law Journal* affect the views and conduct of those with power to make or provoke change? Comfortable traditional ways of thinking continue in the face of brilliant analyses showing them to be incoherent, contradictory and against the interest of many who hold these beliefs. Indeed, in times of crisis, attitudes often turn toward world views that critical scholars loathe. Watts (1983) sees critical legal studies as a version of what he calls cultural Marxism and subject to many of its difficulties. Cultural Marxists, he says, "in the hopes of democratically changing the culture . . . are forced to accept the existing unenlightened culture as the final arbiter of their attempt" (p.34). But when elite culture champions racial equality, women's liberation, gay rights, alternative life styles, conscientious objection to military service and a new morality, there is likely to be a backlash. (See Rhode, 1983). Watts

suggests that when there is a breakdown of traditional life styles and economic dislocation, people are likely to turn to "paranoid-style movements" which "have placed in motion their bid to 'demodernize their consciousness' by restoring a past of romantic simplicity" (p.44). Right-wing movements are the result of democratic participation of people "as they now exist" (p.46). Calls for a revival of fundamentalist religious belief, attacks on the decisions of the Warren Court, covert attempts to reverse the limited amount of desegregation achieved in our society since the 1950s, and scapegoating the poor are likely to have more power than advocacy of a radical utopia in which ends are stated but the details of getting to the promised land are left to be worked out. So far critical scholars lack a plausible sketch for a theory of how to make "the times right" so that their ideas "will be in the air" and become the new common sense of those who can affect the process of change.

To their credit, critical legal scholars, perhaps without exception, are opposed to coercing people to accept their vision of the good society. Yet this poses a dilemma. If one is unwilling to accept the solution of a vanguard party with power to coerce others to its consciousness, one has to offer some plausible link between the consciousness of a small elite who reject the common sense of most members of their society and that of all those others whose world views must be transformed before there can be progressive social change. As van den Berg (1983:1265) comments, perhaps "deep inside all of us there is a single, authentic human nature and . . . if we could eliminate all the exogenous 'distortions' of that nature we would freely agree on what is right and what is wrong." Yet in the here and now distortions exist, and one cannot just ignore them. One cannot assume, for example, that anything taught law students will affect their views when they become lawyers or that lawyers with progressive views will affect business clients, political leaders, writers for intellectual journals, or those who plan television programs. Sometimes ideas current at, say, the Harvard Law School become popular enough in the right circles to influence legal action or even to gain attention from the mass media, but the process is neither automatic nor direct. While ideas matter in complicated ways, we must ask when and how what kind of thought will influence whom.

What are we to make of this debate? Both the writings of critical legal scholars and the criticism I have reported suggest that the social study of law might profit from more attention to the roles of ideas, attitudes, basic assumptions and common sense in affecting what happens and does not happen in the legal system. This is not totally unexplored territory, particularly by legal historians. Speaking generally, however, social scientists looking at law tend to treat world views, culture and background assumptions as little more than noise in the system which masks more "real" factors that explain action. Of course, appeals to patriotism, religious truth, constitutional and legal norms, and what is called common

sense actually may be but rationalizations we use to fool ourselves and others. Furthermore, methods that can capture the impact of such factors tend to be "soft" rather than "hard," and their use threatens the uneasy status claims of the social sciences. Nonetheless, without careful examination it would be unwise to dismiss the influence of people's perceptions of what is tolerable, necessary and just. In the early days of American sociology, Thomas (1928:572) observed that what people think is so, is in fact so for them. No new breakthrough suggests that he was wrong. (See Ball, 1972, and compare Bach, 1975).

At a more concrete level, the social study of law would profit from attention to the significance, impact, influence or functions of legal doctrine on social action. One of the key insights of American legal realists was that we could not take doctrine at face value, but this observation does not warrant ignoring doctrine. Friedman has offered the best analysis of the functions of cases, statutes and jurists' writings about rules. In one paper (1967), he cautioned that rule skepticism had gone too far; he reminded us that where there is an interest in mass processing, we should expect to find, at some level, decisions being based on an unsophisticated application of simple rules. For example, when judges must deal with crowded dockets it is easiest to sentence all those convicted of a particular offense on the basis of the "going rate" for that offense for those who have a given number of prior convictions. The going rate at least will be influenced by what is said in the statutes and cases about the seriousness of the offense. In another work, however, Friedman (1975) described what he sees as the limits of the power of doctrine on the operation of the legal system and society. Law, he says, can have a "short run" impact on social action. It "provides a structure for aggregating interests, for expressing demands, for converting demands into rules and decisions" (p.156). He notes what critical legal scholars would call mystification: "People accept the federal system and act accordingly, because they do not find anything else really conceivable. Structure becomes, in short, custom or habit. This means that the threshold of skepticism, or rebellion, is that much higher" (p.158). However, Friedman (1975:155) sees law, "in the long run," melting away as a casual factor in social action. He tells us that,

[w]hat keeps old-fashioned laws alive . . . what hinders enactment of strict controls over noise and smoke, what preserves the class structure, and what maintains a brutal prison system is not the legal system itself, not structure, not the network of legal concepts, but real forces, real people—the concrete opposition of interest groups expressed *through* or *in* the legal system.

Friedman's analysis raises important questions. One can say, for example, that from roughly the turn of the century to the mid-1930s, legal ideas played some role in blocking the creation of elements of a welfare state in the United States. Doctrines such as substantive due process were asserted as rationalizations by concrete interest groups, or a dominant class, expressed through and in the legal system. In "the long run," however,

when the depression eroded public toleration of traditional social and economic arrangements, the Supreme Court and many political leaders converted to a new faith, adopting ideas justifying government intervention in the economy and limiting the role of the Supreme Court in reviewing regulatory legislation. In a true crisis of capitalism, doctrine gave way to real forces.

It seems unsatisfying, however, to leave matters merely labelled by vague phrases such as long and short run. I would expect Friedman to be the first to insist that more was involved than just the passage of time. We can ask whether delay and the rhetorical demands of law affected the long run outcome of the New Deal. (Compare Skocpol, 1980). Critical scholars suggest that they served to shape the programs of the New Deal toward reformism rather than toward the more radical moves which some had advocated—one could sell regulation and collective bargaining, both subject to procedural due process, far easier than nationalization of industry. Can we generalize meaningfully about the role of doctrine from this experience beyond saying that it is easier to persuade judges, lawyers, writers and others who care about legal rules to accept change when it can be packaged in conventional terms? Teubner (1983:249) argues that needs and demands external to law “are selectively filtered into legal structures and adapted in accordance with a logic of normative development . . . [B]roader social developments serve to ‘modulate’ legal change as it obeys its own developmental logic.” Given the flexibility of much legal thought, how much modulation takes place? Would the answer differ, say, in Germany and the United States? We can offer examples, but we cannot really answer the question. (See, however, McBarnet, 1982).

E. P. Thompson (1975:265) observed that the rhetoric and rules of a society may “[i]n the same moment . . . modify, in profound ways, the behaviour of the powerful, and mystify the powerless. They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions.” This passage is often quoted since it expresses an appreciation of the rule of law by a distinguished historian with left wing views. Yet we should remember that the key word in the quotation is “may”; the rule of law has failed to stop a great deal of torture and murder in the twentieth century. My colleague, Leonard Kaplan, reminded me of Costa Gavras’ film, “Z,” in connection with both Friedman’s and Thompson’s positions. As you will recall, in “Z” an idealistic young judge enforced the law against a ruling elite responsible for the murder of a political opponent. But the lesson of the film is that if an idealistic, and perhaps foolish, judge did try to apply the law against the powerful, the tanks would roll and a constitution would be destroyed “in order to save it.” Whatever the trappings of legal order, those with power control the guns, the means of production, the press, and, thus, the legal system “in the long run.” While Thompson might suggest that those in power pay a price for imposing military rule, the film supports Friedman’s assertion that

those with power will not allow legal doctrine and procedures to hurt their interest substantially. Nonetheless, if Costa Gavras were to follow the practices of law book publishers and offer new pages to update his script, he would tell us that the military in Greece, the thinly disguised setting of “Z,” was itself overthrown and parliamentary democracy restored. We can only speculate about what part, if any, legal ideals played in this whole process and the degree to which, if at all, those with power there were inconvenienced by the whole affair.

We can offer many examples that suggest that legal ideals at least affect the exercise of power, but in each case the magnitude of the effect is debatable. Even repressive military dictatorships such as those ruling much of the Southern Cone of Latin America attempt to appropriate the symbols of liberal democracy. They order new constitutions written to support their rule. They use an uncertain legal process to try some of those they wish to repress, and when they forsake this legal route and torture and murder their opponents, they try to hide or deny their responsibility. (See Ietswaart, 1982). We can wonder, but cannot explain very well, why repressive *juntas* bother with constitutions, courts and trials. Just what audience do these generals think will be fooled by these exercises? This is not to say that a veneer of legality has no impact. In one American administration we had a “human rights policy” that at least inconvenienced these generals (see Bloomfield, 1982; Cohen, 1982). The policy was abandoned by the next administration, and we saw the United States Ambassador to the United Nations giving General Pinochet of Chile a present and calling him “agreeable, firm, and honorable” despite his government’s record of killing opponents both in Chile and on the streets of Washington, D.C. We do not know whether Pinochet’s rehabilitated respectability mattered within Chile. Perhaps this denial of history was designed for American rather than Chilean audiences. Even if this were the case, we can only speculate about the effect of the gestures on those Americans who care about events in Latin America. To recall Gertrude Stein once again, there is some there there, but our understanding of it seems far too simple. When and how does lawful behavior matter to whom?

Furthermore, understanding what difference doctrine makes in this narrow sense is not enough. The reality of any legal system is discretion, the rules and sanctions of social fields, and power apart from the law. Friedman (1969:34) says we must understand “the legal culture” to understand the operation of any legal system in its social setting. He tells us that the legal culture is composed of,

the values and attitudes which bind the system together, and which determine the place of the legal system in the culture of the society as a whole. What kind of training and habits do the lawyers and judges have? What do people think of law? Do groups or individuals willingly go to court? For what purposes do people turn to lawyers; for what purposes do they

make use of other officials and intermediaries? Is there respect for law, government, tradition? What is the relationship between class structure and the use or nonuse of legal institutions? What informal social controls exist in addition to or in place of formal ones? Who prefers which kind of controls, and why?

In short, "legal culture" is everything that makes a difference besides rules and structures.

This concept is not without difficulty. It has been offered more often as a catch phrase to label everything inexplicable by other factors than as something established by research. (See Grossman, Kritzer, Bumiller and McDougal, 1981. But, compare, Greenhouse, 1982). Of course, it is not easy to design a research project to capture the kinds of attitudes and perceptions listed by Friedman. These are likely not only to vary from group to group and from place to place, but any individual could hold inconsistent and contradictory views. Most of the time, law is not sufficiently salient to people to make their grasp of legal culture meaningful. Reactions to a questionnaire administered by a stranger in an artificial setting and full of seldom-considered problems are unlikely to be a good measure of views held deeply enough to affect behavior in everyday life. But perhaps the most serious problem is that there is no reason to believe that there is a discrete "thing" which we can isolate as legal as distinct from general culture. At the least, we should suspect that there are no sharp boundaries between legal culture and general views about what is tolerable, necessary and right.

Still, there may be some perceptible there there. The lesson is that we have to take seriously the idea of law *and society* rather than using it only as a slogan. If we narrow our focus so much that we only see how the leaves grow on the trees and never look at the forest, we may forget that we had intended to talk about forests. The point can be made by oversimplifying the history of the study of law: legal scholars began by looking at rules found in appellate cases and trying to arrange them in rational patterns which they reported in grand treatises. Eventually, it became apparent that scholars had to articulate principles or policies that were only implicit or poorly recognized in the appellate cases. Once they saw that principles and policies could be contradictory, it became clear that judges as well as legislators were making choices and not just finding the law. This prompted scholars to look at how judges made decisions. Choice necessarily is influenced by context, and an important part of the context of appellate decision making is what comes forward from the trial record. A later generation of scholars finally began to examine trial courts and found, as Lenny Bruce observed, that "in the halls of justice, the justice is in the halls." The legal system in operation turns out to be one of bargaining, rules of thumb and advantage, all only indirectly influenced by formal rules and procedures. Eventually, scholars came to see that bargaining in the shadow of the law takes place both inside and *outside* legal agencies.

Lawyers may settle matters without ever filing a complaint, and most disputes are dealt with by parties who never see lawyers. Law may play a role as a bargaining entitlement or as a vague threat, and it may affect expectations and the normative vocabulary of the parties. At the same time, however, discrete transactions and disputes may be barred from the legal system by cost and other barriers.

Again, serious scholarship must push outward beyond the "boundaries" of what we call the legal system if the goal is to describe and analyze the place of law *in society*. The marginality of the legal system to most human interaction does not mean that life is lived in a state of anarchy: social fields and networks regulate a great deal of behavior in any society; we are all subject to many private governments where the influence of the public legal system is unclear. Long-term continuing relationships have their own norms and sanctions, often far more powerful than anything the legal system has to offer. Sometimes individuals and groups seek to affect the balance of power within these private governments by appeals to courts, administrative agencies and legislatures. At the same time, however, we see people suffering great disadvantages who never take any action. They do not organize and lobby, they do not bring lawsuits, and they do not rebel or engage in guerilla warfare. We can explain this glibly as the result of repression or false consciousness, but these are labels, not explanations. Part of the answer probably could be found in systems of belief about what is tolerable, necessary and just.

Sabel and Stark (1982), for example, seek to explain the fragile successes of workers' movements in Eastern Europe, such as that of Solidarity in Poland, in the face of official opposition. Great efforts have been made to convince workers that the socialism practiced in their nation was for their benefit—these are supposed to be workers' governments although led by a vanguard party. At the same time, the governments of these countries have guns and the powers of arrest and control over employment opportunities, and it is clear that they are willing to use them. In spite of all this, workers in many of the countries have achieved some real gains.

How did this come about? Sabel and Stark point out that as a matter of ideology these societies have "solved" the problems of unemployment by creating jobs for all. This leads to labor shortages in many vital sectors because there are no market mechanisms to channel workers to areas of greatest need. Moreover, planners and managers are judged by the success of the plan, and so they have a personal interest in the rate of production. All of this gives workers the possibility of some measure of bargaining power. Sabel and Stark (1982:443) say that,

[i]nstead of seeing society as divided between the all-but-omnipotent powerful and the all-but-impotent, malleable weak, we . . . emphasize the ways the strong and the weak must depend on each other in order to pursue their separate ends . . . Even twisted, unequal cooperative exchanges and temporary, cynical alliances, we will argue, can render the powerful surprisingly vulnerable to the weak.

But the weak must act. They must see a situation as intolerable, unnecessary and unjust. What people in Eastern Europe endured in the postwar years as a kind of natural calamity was unacceptable after several decades of building socialism. The very ideology of socialism itself could be used as rationalizing rhetoric by these workers' movements. Leaders have come forward as workers organized; the state was called upon to make good upon its promises, and repression was seen as carrying high costs.

One would be foolish to argue that repression never works. Matters may be viewed as intolerable, unnecessary and unjust, but the price of action may seem too high in light of the chances of success. Sometimes the disadvantaged in whole nations seem to tolerate terribly burdensome conditions for a long time, but rebellion may be occurring at hidden levels. Those who are dissatisfied may evade and cope with the situation covertly, perhaps engaging in absenteeism from work, working as slowly as possible, making mistakes that produce scrap or doing other kinds of hard-to-catch sabotage. They may attempt to bring about change through the use of formal process or political action such as strikes or taking to the streets. Sometimes they are crushed by tanks; sometimes they win partial victories.

Understanding when what kinds of people take what action and with what results is a part of the business of law and society research. It seems plausible that there is a legal culture that affects action and response. However, it also seems plausible that answers to such questions will turn on the critical legal scholars' "world view" or "consciousness" concerning what is tolerable, necessary and just. Indeed, legal culture can be viewed as a more specific version of a world view. Insofar as critical legal scholars signal those in law and behavioral sciences to use a very wide angle lens that takes in the shape of the forest as well as the patterns of the leaves on the trees, those in critical studies are saying something important. It would be dangerous to dismiss such things as "consciousness," "world views," and "culture." Moreover, if we accept that these things exist and matter, we also should ask how they change.

We may indeed, for example, be skeptical of claims that a set of law review articles by radical professors and liberals responding to them creates more than a tempest in a teapot. Yet we can point to examples of academic ideas that have played a role in public affairs in the past. Many novel ideas are appropriated in part when they serve to rationalize what reformers or governmental officials and those seeking or holding elective office want to do. Much of what our grandparents thought radical is seen as conventional today. In the first part of this century, professors who advocated such things as labor unions and regulation of working conditions generated passionate disputes on university campuses and those with influence in the society sought to have such radical professors dismissed. Even during the New Deal era, many law professors who were fashioning what we now see as conventional labor law were called communists by those who directed large corporations and who were fighting unionization

of their employees. On the other hand, we can also produce a fascinating catalogue of academic ideas that failed to take hold.

We do not know why certain ideas were "in the air" or were advanced when the "times were right." Where did the prevailing world views about what is tolerable, necessary and just come from? How do they change, and how do they affect both the formal statement of law and the actual practice of those playing roles in the legal system and those who are supposed to comply with particular laws? These are major questions in the social study of law, and we have barely begun to answer them.

IV. CONCLUSION

I have an answer to my question: the problem of law and the behavioral sciences is not that there is no there there. On the contrary, there may be too much there there for any one person to master. In order to understand the place of law in society, we have to understand law, society and the relationships of one to the other. We must understand economic theory and Habermas, the dangers of regression analysis and participant observation, political philosophy and the meaning of particular sections of Article II of the Uniform Commercial Code, as well as jurisprudence and bargaining in the shadow of the law. If this were not hard enough, it is only the beginning of a complete list.

A division of labor seems appropriate but then we run the danger of compartmentalization—I do my thing and I am ignorant, if not contemptuous, of yours. Even at our early stage, the social study of law needs more participants who read across scholarly boundaries. While reading research proposals for the Law and Social Science Program of the National Science Foundation for three years, I was struck by the rigidity of boundaries of established social science fields. Psychologists who do eyewitness testimony studies, for example, could avoid some embarrassing moments if they knew more about criminal law as well as both sociology and anthropology of law. Economists might learn something, too, if they could bring themselves to approach psychology and sociology sympathetically and so on. Those who would study the legal system must understand something of the nature of modern legal doctrine—citations to *Black's Law Dictionary* are only a little more naive than talking about precedent without recognizing the extraordinary flexibility, as well as the limits, of what is possible in legal argument. Moreover, social scientists cannot take the position of any jurisprudential scholar as given without regard to conflicting views that may blow the great figure of the elite law school out of the water.

Empirical work also would improve if those who do it were more critical of the assumptions of liberal legalism about the role of law in capitalist society as the Conference on Critical Legal Studies urges. Our political heritage teaches us that law is open to change by the will of the people, and individuals have rights which they may vindicate before legal agencies. We

know that often this is not the case. Trubek (1981:743) has argued that legal doctrine and our system's processing of particular types of disputes "not only transforms the various individual conflicts: in so doing it 'transforms,' so to speak, a raw conflict of interest into a social process with limited possibilities. The disputes that do emerge are those in which basic economic relationships are not challenged: all other possibilities are filtered out." This hypothesis is worth the attention of anyone trying to understand the actual functioning of the American legal system with its claims of equality counterposed to the high degree of inequality in society. The hypothesis is a product of both Trubek's experience as an empirical researcher and his participation in the Conference on Critical Legal Studies. Perhaps others could have formulated something similar to "Trubek's law" in complete ignorance of critical legal studies, Habermas or even Marx, but critical legal studies prompts useful skepticism about liberal assumptions concerning the role of law in capitalist societies. Critical legal studies writers may be criticized for sending their messages in a form usually accessible only to believers already converted to the faith. They also may have more to learn from empirical work than they wish to believe. I need not resolve these issues here. What is clear is that any theory that tells us to watch those with money, status and influence cannot be all wrong, and any theory that tells us that these factors are all there is to law cannot be all right.

Whatever our source of inspiration, we need to be provoked to replace a narrow view of the social study of law with a wide angle lens. "Consciousness" and "culture" are part of the project of taking seriously the idea that we are studying law and society. Even those who find Parsonian structural-functional theory more to their tastes than Marxist-derived thought will recall that in systems theories the legal subsystem is related in some way to all other subsystems. Earlier, I quoted Luhmann (1981), perhaps the leading systems theorist writing today. He suggests that whether and how the legal system will play the integrative role assigned to it by theory is uncertain. There are "thematization thresholds" serving as barriers to transforming problems that arise in other social contexts into legal questions. There are good reasons in many situations to avoid invoking legal norms—by openly confronting others with the question of whether they are acting legally, one shatters the comfortable consensus that normally is assumed in a social relationship. Yet the threshold is crossed sometimes. It seems likely that internalized norms concerning what is tolerable, necessary and just play a part as well as do social sanctions and structures. Thus, we are brought back to the idea that the point of our effort remains the study of law and society.

We do not have to worry about there being any there there in law and behavioral science. We have come a long way in a short time, and what we have found cannot be ignored by anyone with any pretense of thinking about law seriously. On the other hand, self-congratulations are prema-

ture. When Gertrude Stein was a young girl living in Oakland, she worried about what she would do when she had read all the books in the Oakland Public Library. She was relieved when she realized that she never could read all the books available. The same relief is open to those engaged in legal studies. We can never master all the relevant materials, and we will not soon work ourselves out of a job. We still have a long way to go.

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NOTES

1. Some psychologists rely on advice from law professors or use law students playing the role of lawyers to provide realism in their experiments. Given the isolation of law schools and law professors from practice, this would be funny if it were not so sad.