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Ideals and Practices in the Study of Law*

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The union of law and social science is not very old. Indeed in the history of human scholarship, no social science is very old. The marriage with law, however, is more recent than the application of social science to other aspects of social life. This brief existence has been characterized by an uncertainty in the relationship and a periodic need to examine the premises of a sociology of law. In response to such uncertainity and the present need to examine our premises, this paper offers the following proposition: Despite the broad interest of social scientists in law and the legal system as a recognizable set of practices, much research in this area suffers from congenital idealism. This idealism takes several forms and all are antithetical to the premises and assumptions of a scientific study of law.

The sociology of law, I envision, is consistent with the two great traditions of social scientific inquiry following Marx and Weber (Weber, 1946; 1954; 1978; Cain and Hunt, 1978). Although

often opposed, both these traditions reject idealism and claim to be scientific studies of society, which has meant seeking patterns of social organization through empirical examination of social practices and institutions. Furthermore, a sociology of law focusing upon social practices, as I propose, suggests a method for bridging divergent perspectives, the poles of rabid empiricism and unverifiable interpretation, dividing social scientists and students of law. The paper discusses some forms of idealism troubling the sociology of law before turning to consideration of law as social practice.

I. FORMS OF IDEALISM

All forms of idealism presuppose a fundamental dualism distinguishing ideas or forms from material objects and actions; all communication is committed to at least this type of inescapable idealism. Nevertheless, idealism can become problemmatic and lead to reification of the words and ideas to communicate when it takes the form of Platonic idealism, or essentialism, and aspects of liberal reformism.

Natural law. Natural law philosophy in both its classical and modern incarnations is a version of Platonic idealism, a view which adds to the dualism between ideas and the material world the notion that only the ideas are real. Plato distinguished the world of being (the spiritual and nonphysical) from the world of becoming which includes everyday objects and interactions of physical and material existance. The distinction is most popularly recognized in the allegory of the cave, where Plato identifies the human project as an effort to see and enter the world of being, to get out in the sun rather than live in the cave of shadows. For Plato, our physical and material existence is merely a mirror or representation of the world of pure light, of IDOS, which we translate as ideas or forms. The only reality is in the sun, that reality is the idea or form that constitutes the essence of what is shared by different actions or things that are treated as similar in the physical world.

Natural law theory stipulates that there exists a set of universal, eternal, and immutable principles of social action and order that guide human interaction. These knowable patterns describe the essential character of human life. Although for some time, it was understood that natural justice was distinct from law, and insufficient in and of itself for the governance of human societies, it eventually evolved into a standard by which to measure man made law.

Roman law recognized a vast domain of local law of various peoples, *ius gentium*, in which one could discern a degree of commonality which might represent a limited conception of justice; the *ius civili*, on the other hand, the law of the Roman people,

covered a narrower terrain, did not necessarily apply to strangers, and sought to achieve conceptions of justice and reason not always evident in the *ius gentium*. As classical natural law theory developed, however, it began to view law as synonymous with justice and morality and transformed the study of law into a search for these absolute values. The use of natural law as a standard for civil law is thus a modern manifestation, primarily from Acquinas and Grotius, and finds its American version in the Constitution as discussed by Edwin Corwin (1967). Here, natural law is something to which law passed by legislatures is accountable.

Contemporary versions of natural law, found for example in the work of Lon Fuller or Philip Selznick, play down the absolute authority of natural law and suggest that the law which they describe is an ideal type which man made law approximates and to which it aspires. They find the authority of law not in its morality, but in its conceptual clarity. Selznick elaborates the ideal of legality, by looking beyond "what is given and immediate to what is latent and inchoate" seeking to yield and uncover something in nature which is more permanent and more universal than the transitory judgments of the hour or the epoch" (1966:154). Here, there is an emphasis upon law as a distinctive mode of discourse and action, and as a method of peacekeeping. Much attention is given to the forms of legal reasoning and rationality which reflect the distinctive purposes of law, peace and reason.

Despite Fuller's anti-positivist claims, systematic pragmatism, and his insistence that law is a practical art, he also described law in terms of guiding purposes. Fuller claimed that certain procedural purposes "must be honored for a system to qualify as a system of law rather than a mere regime of arbitrary and patternless exercises of state power" (Summers, 1984:28). He eschewed, generally, efforts to distinguish valid law from non-law, a subject that preoccupied positivists, and spoke of the purposes of law as aspirations rather than all encompassing criteria. Nevertheless, this attention to governing purposes and ideals links Fuller and Selznick to the natural law approach.

Formalist approaches to law share with the natural law a preoccupation with the forms, purposes, and ideals in law rather than with practices and actions. Schools of formalism associated with John Austin and Hans Kelsen, devoted themselves to the study of legal reasoning, and emphasized the functions and virtues of consistency. In Austin, consistency is similar to Fuller's aspirations while for Kelsen consistency is simply a feature of procedural law. From natural law approaches through the formalist schools, there is a thread of understanding that holds law to ideals located within the spheres of reason, logic, and abstract or formal rationality.

Some contemporary critical legal scholars reflect this sort of formalism by attending exclusively to doctrinal analysis and ignoring material or behavioral substance in favor of a professional discourse

which they treat as the entirety of law. In this way, many critical legal scholars confuse the rationalizations and argumentation of appellate courts with legal practice. Munger and Seron describe this tendency as follows:

> Doctrinal analysis assumed that neither the political origins of rules or the way in which a decision may ultimately redistribute benefits or burdens has any relevance in a legal decision. . . . Legal scholarship is focused primarily on problems of rational extension and reconciliation of rules and policies which are present within cases. (1984:260)

Traditional formalist approaches and contemporary critical legal scholarship takes the law - cases, rules, statutes - as non-problematic, when they are just the opposite. The essence of recent law school trashing, as it is called, is to say, "Hey! You, judges?" (There is no attention to anyone but judges.) "You are not what you claimed to be or what we were taught you are. You are not consistent and inescapably logical. Now, we've got you, you are exposed for being the powerwielders that you are." (See Sumner, 1979:266-277) By the 1980's, this portrait of legal indeterminancy is not a particularly original observation. The limits of doctrine and form were carefully delineated at the beginning of the twentieth century, albeit without the language of ideological hegemony, mystification, and reification associated with critical legal studies.

It is not surprising, however, that legal scholarship remains formalistic and textual despite the unmasking of the rationalist ideal because much of legal practice involves the creation of a discourse which is based in cases and analysis of cases.

> "There is no doubt that [legal discourse] contains sufficient internal complexity for us to imagine that its internal dialectic is purely ideological, purely a matter of continually reconciling concepts and doctrines. It most certainly provides an interesting game for lawyers to play with, and part of its magic must surely lie with the fact that it provides a mass of principles, concepts, statutes and case decisions all relating specific issues and needing to be sifted and applied to the present situation." (Sumner, 1979:274).

Legal practice has validity as discourse and this discourse has become a science unto itself, "worthy of study by itself by students of contemporary culture" (Sumner, 1979:270). Consequently, the deconstruction of the rationalist claims of legal ideology has rested upon the discovery of logical incoherence and indeterminancy, encouraging critics to focus upon the minutia of the discourse, without reference or attention to its social construction (social determinancy). This kind of attention to the formal discourse, distinct from action and practice obscures its connection to external social structures.

From the point of view of the dualism posited at the outset of this essay, the distinction between phenomenon and concept is an aspect of communication that abstracts symbols from materiality.[1] Although all communication involves some abstraction, there is a tendency in legal scholarship to pay such close attention to the forms of communication in words and symbols (concepts, ideas) that we often lose the connection to the thing being described or studied. In one sense, we reify the concepts; in another, the forms of communication develop into an independent activity. Legal research is such an activity where the study of legal studies replaces the study of legal practice.

Realism. Today, there is a chasm in legal scholarship between the study of legal doctrine, located in the law schools and some parts of political science, and the study of legal behavior, located in the social sciences, and some law school teaching. Legal realists and students of sociological jurisprudence reacted to what they characterized as a mechanical jurisprudence and, wedded to this study of legal discourse, began to examine what took place in law offices, courtrooms, and judges' chambers. Out of this work a view of 'law as political activity' developed which treats legal institutions as another arena for the display of interest and the search for advantage and control. Following this view, critical legal studies scholars point out that doctrine is merely rationalization, a transparent cloak for avarice, interest and power. For empirical or behavioral scientists in this tradition, law is often a matter of personal preference and the calculation of strategies and outcomes for winners and losers. The view of law as politics and doctrine as rationalization, is one of the dominant interpretations today.

Yet, empirical and behavioral approaches share a number of characteristics with natural law and formalist approaches. They all seek to discover the fundamental characteristics of legal behavior and legal systems. And, when those engaged in empirical research ascribe to legal ideas and practices some essential status or necessity rather than contingency, they reveal a form of Platonic idealism. Behavioral research of this kind often treats the critical elements delineating particular concepts as if these existed independent of and prior to our creation of them. Here, social scientific study is devoted to discerning patterns in the activities of rulemaking, judging,

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[1] The recognition of the abstraction inherent in all communication need not challenge descriptions of a socially constructed reality; both physical and social phenomenon cannot be experienced, or 'known', independent of human intervention and conceptualization.

enforcement, or teaching. These patterns don't stand as surrogates for law, they become the law. To quote R.C. Lewontin, "Metaphor becomes reality" (1983:34).[2] Thus, behavioral science too is idealist when it fails to make problematic, or see as problematic, just that which is under study: the existence of law, the 'idea' of law, the ideal of law, the study of law, and the dialectical tension between these.[3]

Since the realist movement discovered 'law-stuff' (Llewellyn and Hoebel, 1941) and challenged formalist and natural law conceptions, researchers have emphasized the discrepancy between theory and practice, creating yet one more variation of legal idealism. Thus, police practices are not merely described, but described in terms of their consistency with the ideal of the rule of law and democracy; case processing in courts is not merely detailed but measured by the idea of due process. Much empirical research examines what Malcolm Feeley (1976) identified as "the 'gap' between the ideal of law and the actual practices flowing from it" (see also Sarat, this issue). However, the relevance and saliency of the criteria of evaluation are rarely made contigent. Because the legal goals and ideals are assumed as self-evident rather than demonstrated, the empirical status of the struggle between the ideal and practice is somewhat unclear. Nevertheless, dealing with the 'gap' or struggle between ideals and practice seems to become an essential element in legal practice; we marshal resources to close it. For example, Nader's *No Access To Law* (1980) begins with explicitly delineated ideals. The research is then a study of the gap between the idealized legal system and the behavior of existing grievance handling mechanisms. Nader begins with an a priori definition of an ideal complaint processing system and is indignant when she does not find one.

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[2] In a discussion of biological determinism and the prospects of 'liberatory biology', Lewontin suggests, with an illustration from a classical rabbinical tale, the powerful hold art has on science: A fool questions the wisdom of a sage who claims that life is like a bagel, and so, "the timely intervention of a naive mind saves us from a metaphor. We do not have to live our lives as if they were seamless circles without beginning or end, firm at the exteriors but soft within, substantial around the periphery but the center empty. We are not always so fortunate, however. Every philosopher does not have a divinely appointed fool to keep nature from mimicking his art. On the contrary," Lewontin writes, "our view of the world is so dominated by powerful metaphors that we often turn similies into identities. Life ceases to be like a bagel and becomes one" (1983:34).

[3] Karl Popper described the distinction between idealism, as it has been used here, and what he called nominalism as follows:

Moreover, the movement toward behavioral studies of law--the law-in-action--has been reformist, seeking to use knowledge to make things better.[4] This approach accepts a priori the value and definition of procedural justice, legal equality, and the rule of law. It examines legal practice in light of these ideals and identifies deviations which need to be addressed in order to realize the ideal of law. The discrepancy between ideal and practice is a problem in itself rather than informing us about the nature of either ideal or practice. Furthermore, attention is frequently technocratic, seeking

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> "Instead of aiming at finding out what a thing really is and at defining its true nature, methodological nominalism aims at describing how a thing behaves in various circumstances and especially whether there are any regularities in its behavior. . . . The methodological nominalist will never think that a question like. . . . "What is an atom? is an important question; but he will attach importance to a question like. . . . "Under what conditions will an atom radiate light?" And to those. . . . who can tell him that before answering the "What is?" question he cannot hope to give exact answers to the "How" question, he will reply, if at all, by pointing out that he much prefers that modest degree of exactness he can achieve with his methods to the pretentious muddle which they have achieved with theirs." (Popper, 1962: 34). Popper's argument raises a crucial point, however, about the "intellectual division of labor" (Flanagan, 1984:232) which needs to be highlighted in order to avoid a just rejoinder that my argument, too, is idealist. Different approaches to social and scientific inquiry may not necessarily reflect significant philosophical commitments but merely different research agendas. For example, attention to legal reasoning and discourse rather than litigation practices need not imply that the formal abstraction, 'legal reasoning,' is translated smoothly into practice. In addition, the behavioral scientist, as Popper suggests, may claim that she certainly understands the problematic nature of law but is just not examining its contingent status at this time. The charge of idealism falls not upon a reasonable and necessary division of labor but upon reification within conventional scientific research, where the concepts created to describe phenomenon become confused with the phenomenon being described.

[4] It is possible to argue that while the Legal Realists and many of the founders of the sociology of law sought to use knowledge of law to reform our society, and thus merely represents the agenda of democratic liberals to bring the nation closer to its ideals (cf. Macauly, 1983:2), it is also possible to regard "the sociological movement in law" as a rationalization for the status

appropriate solutions and useful practices (Harrington, 1982).[5] We are aware, however, of the dilemmas and unanswered questions attached to such efforts: useful and appropriate for whom, according to what criteria, and to the benefit of what interests and groups. Often, the resolution has been the sanctification of a seemingly neutral procedural ideal, or rational calculus, for mediating moral and social conflict.[6]

A sociology of law can be described in contrast to this latter example. Research on ideals and practices need not be idealistic; it could be a sociological enterprise. The ideals can be taken as data themselves, revealing aspects of culture or social structure. Any discrepancy can be interesting, in a totally non-evaluative sense, in that it raises questions regarding how discrepancies arise, how they are justified or rationalized, and perhaps routinized or institutionalized. Of course, much research in these areas would fall prey to liberal reformism, but much would not. What makes some criminology not idealistic is that laws are taken not as ideals but for particular research agendas as givens, and for other research as the problematic.[7]

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quo (Hunt, 1978).

[5] Technocratic perspectives accept the aims, assumptions, perspectives of the people and organizations being studied as THE "appropriate aims, assumptions and perspectives of the researcher (and thus of the analysis)". Within the technocratic perspective, there is a disposition "to develop and phrase questions as matters of relative technical efficacy and efficiency. The argument that collective choices are always and intimately political, value, and moral choices is shunted aside. Whatever the social world under scrutiny, . . . [it is presented] as a stable structure of social givens, a solid backdrop against which humans move with certainty (except concerning quite narrow questions of technique)." (Lofland and Lofland, 1984:119)

[6] The procedural ideal raises the state and the law as its principal instrument to the supposedly unlofty position of umpire; its minor shortcoming, according to this view, is that the state and liberal politics is sometimes a shortsighted and astigmatic umpire. However, it is usually asserted that increased study and professional development may provide solutions for this problem as well.

[7] The study of white-collar crime often violates this sociological premise. I am greatful to Patricia Ewick for pointing out this entire line of analysis.

II. LAW AS SOCIAL PRACTICE

All forms of idealism import to descriptions of social action categories and criteria external to those actions. I propose instead the study of law as a social practice stripped of these intrusive and mystifying idealisms. Alasdair MacIntyre advances the concept of practice in *After Virtue* (1981:175) as any social activity "through which goods internal to that form of activity are realized in the course of trying to achieve. . . . . standards of excellence" that define and characterize that activity. At the same time, practices extend generally human abilities.[8]

The Character of Legal Practices. The concept of practice, as applied to legal action, is used in contradistinction to abstract modes of analysis and rationality, and particularly to 'logically' developed criteria of rationality, action, truth, knowledge, whatever. It identifies a sphere of rationality that is neither the formal-rational law described by analytical jurisprudence and associated with western capitalism, nor the radical incoherence of critical analyses (Kennedy, 1973).

Rather, law is located in concrete and particular circumstances where the relations of ends and means are governed by situational rather than abstract or general criteria. Rationality as a systematic relationship between means and ends is not abandoned however; instead the concept of social practice identifies situationally determined rationality. Social practices and institutions as the context for rationality do not require external criteria which would have to be justified by yet some other system of ideas or concepts, leading to infinite regress, and idealism. (I will mention below a different form of regress involved in the study of social practices.)

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[8] MacIntyre's full definition reads as follows: "By a 'practice' I am going to mean any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve those standards of excellence, and human conceptions of the ends and goods involved, are systematically extended. Tic-tac-toe is not an example of a practice in this sense, nor is throwing a football with skill; but the game of football is, and so is chess. Bricklaying is not a practice; architecture is. Planting turnips is not a practice; farming is. So are the inquiries of physics, chemistry and biology, and so is the work of the historian, and so are painting and music."

The concept of practice rests upon an understanding of the sociological construction of self, institution, and society. Drawing upon but rejecting the existentialism of Sartre and the role-playing but 'liquidated' self of Goffman, MacIntyre bases his notion of practice upon the understanding that human activity is neither reductionist nor understandable in reductionist terms (MacIntyre, 1981: 108-110; 190). The justification of human activity, whether moral or simply intelligible, always "requires the context of a tradition" (1983: 447).[9] A practice, especially in law, is understandable ONLY within the context of its tradition, its internal goods and external consequences, associated relationships, and technical skills. The goods internal to a practice are the key to differentiating practices from skills and techniques, because these goods cannot be had in any way other than participating in the practice, and can be specified only in terms of that practice or activity. Consequently, the goods, or values and criteria, internal to a practice, (e.g. the pleasures and rewards of playing chess or the crafting of a remarkable brief or opinion), can be recognized only by those experienced in the practice.[10] Those without the relevant experience would lack the ability to judge internal goods. "A practice involves standards of excellence and obedience to rules as well as the achievement of goods. To enter a practice is to accept the authority of those standards." . . . (MacIntyre, 1981:177).

Moreover, practices are distinguished from institutions whose organization serves specific interests or norms (cf. Berger and Berger, 1972). "Institutions are characteristically and necessarily concerned with . . . external goods" (MacIntyre, 1981:181). Instead, "institutions are the bearers of practices," and "no practice can survive for any length of time unsustained by institutions"

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[9] Onora O'Neill describes MacIntyre's conception of rational intelligibility this way: "Human activity is not composed of basic actions, each intelligible in isolation; human actors are not composed of sets of roles, each with separate goals and standards. Intelligible action requires a setting of practices and institutions. Such settings themselves have histories without which agents' various intentions are unintelligible" (1983:388).

[10] MacIntyre writes: "Behavior is only characterized adequately when we know what the longer and longest term intentions invoked are and how the shorter term intentions are related to the longer . . . we are involved in writing a narrative history" (MacIntyre, 1981:193). The concept points to the validity and authority of experiential knowledge and craft. One might look, for example, to classic studies of police behavior to identify the elements of a particular legal craft. (Skolnick, 1967; Bittner, 1967, 1970, 1974).

(MacIntyre, 1981:181). For example, courts are institutions through which law is sustained and supported; marriage and the family are institutions that sustain reproduction and child-rearing. The law may serve basic social functions, it may provide conflict resolution, it may redistribute power and prestige, but the consequences of law, or any practice, do not fully describe that practice nor capture the way in which it produces external goods.

Practices have histories as well, and are not immune from criticism; "nonetheless, we cannot be initiated into a practice without accepting the authority of the best standards realized so far" (1981:177). Practices never have goals and ends fixed for all time, "the goals themselves are transmuted by the history of the activity" (1981:181). Unlike collections of technical skills marshalled for the achievement of external goods, things which can be and are the possession of some, the goods internal to practices, the virtues and history associated with the activity, are available to any who participate in it.

The Relevance of Practices to a Sociology of Law. The relevance of practices for organizing discussions and research on law should be clear. Practices bridge apparently conflicting literatures and approaches to legal phenomena: the research in the sociology of law tradition describing law as a system of interaction relying upon ordinary non-legal categories, and the jurisprudential literature identifying law as a unique mode of action and thought different from ordinary action. One could incorporate both law as politics (experiential and consequential) and law as technique (a unique form of rule-following) within a law as social practice.

For example, Edward Levi (1949) suggests that legal practice entails a special kind of reasoning characterized by a process of marking similarities and differences between cases and circumstances. According to Lon Fuller (1964, 1969), fidelity to this peculiar logic creates an 'inner morality'. Here, legal practice can be understood as a technique, where technique is the abstraction of method, legal reasoning, from the context and goals which organize its development (cf. Bittner, 1983). Marking similarities and differences involves the creation, or discovery, of the rules or algorithms which are thought to propel legal development.[11] Here,

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[11] A caveat: one would not want to overstate Levi's description of reasoning by example; he certainly describes and provides a basis for a changeable internal substance of law. Although one could argue, following his analysis, that legal reasoning can involve the discovery of a logic, algorithm or rule defining the similarities and differences between series of cases, so that the line of decisions and development of legal precedent is apparently explained, Levi specifically stated that "it cannot

law is similar to other activities focused upon technique or technology (i.e., the development and application of methods and rules for problem solving).

However, like research in the tradition of the legal realists, law-in-action, or critical legal studies, has shown that these activities, although often described as such, are not fully explainable nor understandable as the discovery and application of rules or received bodies of knowledge. When framed by the conception of law as the development and application of rules, the activities of legal actors appear chaotic, irrational, possibly indeterminant, or driven by personality and socially determined needs and interests. Law is political.

In contrast to both these perspectives, law as technique and law as politics, research in fields such as management, medicine, engineering, philosophy, and family mediation, suggests the emergence of a third perspective which distinguishes instrumental rationality from situationally and contextually determined rationality. For example, Schon (1983) describes the special competence of professionals as adjustment and responsiveness to variable situations, what he refers to as "reflection in action". The concept of practice seems especially appropriate for organizing, and possibly resolving, the disparate tensions within instrumental rationality, represented by the following of instructions or rules, and the pursuit of interest, which some suggest are a particular product of modernity and modern consciousness (Berger, Berger and Kellner, 1974). Practice synthesizes these perspectives into a new conception describing law as a particular form of situationally rooted rationality which is inaccurately described as merely rule following or simply politics. Thus, the concept of social practice brings together the observations of law as a socially constructed process with the recognition that although containing and drawing upon the categories of ordinary social intercourse, law is, nevertheless, different from shopping, medicine, or politics.

Law as Social Construction. Some consequences of the realist vision and the projects of sociological jurisprudence must remain part of the sociology of law. The law must be viewed as a socially

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be said that legal process is the application of known rules to diverse facts" (1949:3). In addition, it is well documented as Llewellyn taught that opinions were justifications for a court's decision. The opinion, or justification, will "'prove to be inadequate if taken as a description of how the decision really came about or what the vital factors were which caused it" (1930:39). Nevertheless, the importance of the discovery of indeterminancy and incoherence rests upon an assumption that legal reasoning as an internally coherent system ought to be or pretends to be rule-following and predictive.

constructed system of action.[12] Four general propositions from social research on law elaborate this understanding:

(1) Legal action involves decision and procedures of an extra legal nature. For example, the response to crime by authorized officials involves decisions and procedures nowhere authorized or described by law (Sudnow, 1965).

(2) Legal action and the legal system reflect and reproduce the encompassing social structure. The responses and behaviors of legal actors are consistent with and reflective of a wider array of social forces than the facts of specific particular incidents and reflect class, ethnic, and gender differences.

(3) The characteristics of legal work inhere in the organization of the particular tasks, not the personalities of the actors. For example, the characteristics of the police as a socially divisive, tainted occupation, imposing pre-emptory solutions on complex problems, are structual determinants of the task rather than products of the personnel who occupy police positions. (Bittner, 1974)

(4) Law is a resource, used by legal actors for handling situations, solving problems. In litigation, police work, defense, prosecution, or judgment by judges or juries, the outcomes are frequently determined and then appropriate or applicable legal procedures invoked (Silbey and Bittner, 1982).[13]

Initial observation of the social processes of law were evident in Holmes' statements that the law "is not a brooding omnipresence in the sky. . . . . "(*Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222

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[12] Humans are the authors of all social arrangements, including law and the study of law, although after they are created such arrangements come, perceptually and psychologically to have an existence of their own and to seem wholly other and out there (Berger and Luckmann, 1966:61).

[13] Stewart Macaulay (1984) suggests additional and more specific observations of law as a socially constructed process: (1) Law is not free. There are barriers to the legal system. . . . (2) Law is delivered by actors with limited resources and interests of their own in settings where they have discretion. . . . (3) Many of the functions usually thought of as legal are performed by alternative institutions, and there is a great deal of interpenetration between what we call public and private sectors. . . . (4) People, acting alone and in groups, cope with law and cannot be expected to comply passively. . . . (5) Lawyers play many roles other than adversary in a courtroom. . . . (6) Our society deals with conflict in many ways, but avoidance and evasion are important ones. . . . (7) While law matters in American society, its influence tends to be indirect, subtle and ambiguous.

(1901), but predictions or prophecies of what the courts will do (Holmes, 1897). The idea that the law is what the judges say it is and the analogy of law, especially in trial courts, to a sporting game have become common (Pound, 1906; Frankel, 1975). Along with Holmes and many sociologists of law, I too believe that the law is what the judges say. But unlike the cynical eighth grader or the most ardent legal realist, I do not believe that the judge can get away with saying just anything he or she wants to say. There is power and politics in the legal arena, but the game is not the case as politics in congress, or in the council chambers of cities and towns. What goes on in the district courts, or the Supreme Judicial Court of Massachusetts, or the United States Supreme Court, is played by a different set of rules. And, although those rules are not found simply by reading the statute books or the opinions of judges, they will not be found without some reference to these sources.

In *Civil Liberties and American Democracy*, John Brigham writes that a view of law as social practice requires that we realize that "politics is not the ONLY reality...Law is not just a tool" (1934:30); it is a resource, to which costs are attached. You can do all sorts of things with a tool, many of which cannot be anticipated.[14] Nevertheless, there are limits. And while the law may be a resource, a tool available for all sorts of uses, the ways in which it is put to use are constrained by sets of practices, conventions, ways of doing things that relate to courts, lawyers, litigation, claims of right, precedent, evidence and judgment, not to ballet dancing, playing chess, or running for office.[15]

In other words, while the law is more varied than a formalistic and mechanical view would have us believe, the variation is neither indeterminant nor completely and solely determined by external variables. The way law is practiced, or what is done in the name of law is constrained by a world of its own creation, that interacts with itself, its ways of doing things, so that the world of what is possible is limited. This is what MacIntyre means by the internal goods attached

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[14] Llewellyn's *The Bramble Bush* (1930), which is a collation of his introductory lectures to law students attending Columbia University in 1929 and 1930, begins with the following poem:

> There was a man in our town and he was wondrous wise: he jumped into a BRAMBLE BUSH and scratched out both his eyes--and when he saw that he was blind, with all his might and main, he jumped into another one and scratched them in again.

[15] This argument is developed further in an analysis of consumer protection enforcement practices in Silbey and Bittner, 1982.

to practices, and what E.P. Thompson meant when he described law as a mediating instrument reinforcing and legitimating, masking and mystifying class rule:

> "class relations were expressed, not in any way one likes, but through the forms of law; and the law, like other institutions which from time to time can be seen as mediating (and masking) existent class relations. . . . has its own characteristics, its own independent history and logic of evolution." (1975:262)

Thompson adds that he is not star-struck nor converted; he simply wishes to make a simple point: that there is a difference between arbitrary, naked power and the rule of law. Although both may mediate and mask class relations, they will do so differently (1975:266). The difference is what is interesting for students of law.

Legal practice is limited in part by doctrine--legal discourse--which while it is not all of law, can be a map of the legal world. Richard Flathman (1976) referred to this when he wrote that rights are most usefully understood as practices--those ways of understanding by which we get around in the legal world. Moreover, it is what is meant when law is described as ideology, as "a body of conventional understandings that determine what is possible in politics," and practices as maps of what is possible in the legal arena (Brigham, 1984:27).

The description of doctrine as symbol or artifact created by legal processes and politics, the acting out of roles, constraints and socially determined demands, (the legal realists view), is insufficient. And, the description of doctrine as the ideology of law, that "body of conventional understandings that determine what is possible in politics" is also insufficient; it implies a determinism of ideas without material interaction. Taken together, however, these aspects of law constitute a social practice.

Ideology; A Residual Idealism. A sociology of law as social practice would study the devices by which people find their way in the world, in particular the legal world. It is the examination of how actors make sense of those taken for granted aspects of existence which provide the contexts of practical reasoning.[16] Research

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[16] This may sound a lot like approaches described under participant observation and taking on the perspective of the actor, which seem sort of fashionable these days. I mean much more than that; specifically, I mean to make the actor's perspective the object of inquiry rather than the standard for research. This is a distinction between a technocratic and a critical or sociological approach.

must use the perspective of the actor "as THE topic of analysis." (Lofland and Lofland, 1984:119). Thus legality is of interest, not to achieve it, but to examine, critique, transcend its taken-for-grantedness. This perspective treats law as ideology by recognizing and delineating the ways in which legal behavior becomes ordinary, taken-for-granted, and thus legitimate.[17]

Alvin Gouldner called this process of discovery and transcendance a democratic enterprise in which "all claims come under scrutiny" (Gouldner, 1979:59), in which the world is political rather than necessary. The objectification of social arrangements, such as the law, is perhaps the most fundamental form of mystification. But it is the task of a social science to transcend this, to engage in what Gouldner called "the culture of critical discourse," to examine what is taken for granted (including our own study of what is taken for granted). We study "not only the present," according to Gouldner,

> "but also the anti-present, the critique of the present and the assumptions it uses. . . . In other words the culture of critical discourse must put its hands around its own throat, and see how long it can squeeze. Culture of critical discourse always moves on to auto-critique, and to the critique of that auto-critique. There is an unending regress in it, a potential revolution in permanence." . . .

A social science of law on this foundation, "embodies that unceasing restlessness and (indeed) lawlessness that the ancient Greeks firstcalled anomos and that Hegel called the bad infinity" (Gouldner, 1979:59-60), and which denies and challenges any form of idealism.

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[17] cf. "The key to understanding any ideology is to be able to see what is taken as given" (Brigham, 1984:36).