The Pull of the Policy Audience

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Much research in the sociology of law seeks to play a role informing policy-makers about the effects of particular policy initiatives and to participate in debates about how to use law as an instrument of public policy. The paper examines the origins of policy studies in legal realism and describes the way contemporary law and society scholars selectively appropriate aspects of the realist heritage while ignoring others. Particular attention is paid to the ways in which those scholars separate policy from politics and operate as if policy focused research were not itself political. The paper traces the pull of the policy audience and the separation of policy from politics through a close examination of several widely respected examples of sociolegal scholarship. In addition, an effort is made to assess the impact that the desire to speak to the powerful has had in shaping what constitutes acceptable scientific practice and in shaping the domain of study. The paper concludes by arguing that the sociology of law would benefit from an effort to interrogate the basic premises which inform policy debate and that such an interrogation itself requires greater distance from the policy audience.

I INTRODUCTION

Recent debate concerning the state of sociolegal studies calls for critical self-examination. While there is shared acknowledgement that we have learned much about how legal systems work, there is considerable pluralism with respect to theoretical orientations, methods of research, and evaluations of the political import and critical potential of this work (Abel, 1980; Macaulay, 1984; Galanter, 1985; Sarat, 1985; Friedman, 1986; Silbey and Sarat, 1986; Trubek and Esser, 1987). Among the recurring themes in this internal debate is the place of policy studies in the sociology of law. For example, critics of so-called 'gap' research argue that policy studies are too complacent and too much influenced by official criteria and definitions of legal problems (Feeley, 1976; Abel, 1980; Nelken, 1981; Sarat, 1985). While the problematic relationship between research and public policy is not solely a concern for sociolegal studies (cf. Rule, 1978; Kolb and Van Maanen, 1985), it has been a repeated and special worry.

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In this paper we describe what we call the pull of the policy audience, locate its roots in the intellectual history of the sociology of law, show how it operates in sociolegal studies, and assess its consequences for empirical research on law. This is also an effort to think through problems we have confronted in our own research; as law and society researchers we have participated and continue to participate in scholarly efforts which assess the impact of particular enactments or of general categories of legal regulation, and which take up issues important to current policy elites (cf. Wheeler, Mann and Sarat 1988; Silbey 1981, 1984). Thus as we inspect and criticize the work of our colleagues in the sociology of law, we do not exempt ourselves from the reach of that criticism.[1] As we urge new directions and worry about lost opportunities, we are urging ourselves in those directions and urging ourselves to take up those opportunities.

We write with the hope of encouraging critical directions in law and society research; as a result, we identify oppositional tendencies and critical readings, as well as limitations, of work addressed to a policy audience. This effort challenges the liberal, instrumentalist vision of law which typically animates that work and the aspirations toward neutrality, objectivity and distance which are characteristic of its methodology. We join with those urging a reconceptualization of the relationship of law, science and political order (see Foucault, 1972, 1980).

We begin our exploration of the pull of the policy audience in sociolegal scholarship by distinguishing an address to policy makers from a concern for politics. It is, in fact, a prime strategy of work which speaks to policy elites to be silent about its politics or to deny that it has a politics. Section II explores how such silence and denial arises from the substitution, in traditional liberalism, of policy for politics and how it is encouraged by the Enlightenment view of rationality. However, this silence and denial has a more contemporary context. By drawing attention to American legal realism in the nineteen twenties and thirties and to the formation of the Law and Society Association in the nineteen sixties (sections III and IV below), we illustrate the context within which the major intellectual and political choices of sociolegal scholars have been made.

This paper identifies and explores the political dimensions of policy research and suggests that those doing such work should be more explicit about the political commitments that inform their work. We explore the intellectual and political roots of research that puts science in the service of policy and assumes that linkage to be unproblematic. In any and all sociolegal work there will be a range of political purposes that can be nourished, yet most policy focused research presents itself as if the empirical product leads naturally, and necessarily, to a consideration of a rather limited set of policy issues.

Engagement with political rather than policy questions, and explicitness about the political commitments of empirical work is, of course, at odds

with the conception of political and social life found in liberal thought and with the conventions of normal science. Both that conception and those conventions are basic to the relationship of sociolegal research and American policy elites.[2] In questioning the former we challenge the latter. Sociolegal scholarship can, and should, be politically engaged without adopting the agenda of those who currently make or administer policy.

The pull of the policy audience has important consequences for the style and substance, as well as the politics, of law and society research. Thus, we direct attention to the ways policy research presents itself and to the conception of science which informs it. Here (section V below) we confront what is, for us, an unnecessarily narrow form of scientific practice.

This paper turns in section VI to explore the ways the pull of the policy audience encourages sociologists of law to focus on state law and, at the same time, to produce a partial version of that law and its operations in society. We recognize that sociolegal scholars have not confined themselves to the exploration of state law, that they have unearthed and explored a plurality of legal forms (see Selznick, 1967: 479). Nevertheless, we will argue that sociologists of law have, in part because of the pull of the policy audience, explored only one aspect of legal pluralism, namely its contribution to social order, while neglecting the ways it provides spaces and opportunities for the development and expression of resistance to state law.[3]

Distancing sociolegal research from the policy audience, and the methods and subjects of research it promotes, will allow exploration of a wider array of political possibilities and alliances as well as facilitate exploration of alternative visions of knowledge and the place of law in society. In trying to promote such distance, and urging a new direction for sociolegal studies, we do not wish to create a new orthodoxy nor do we reject entirely the subjects of existing sociological investigations of law. Because the pull of the policy audience frames and orients that work, we urge exploration of other frames and orientations.

We realize that to try to describe fully the relationships between theories of knowledge and the political focus of sociolegal research, we would have to attend to epistemological debates within sociology, political science and other disciplines from which contributors to the law and society enterprise are drawn. Attention would also have to be given to the preeminence of law professors as leaders in sociolegal work. Thus we are not suggesting that the pull of the policy audience, in and of itself, can explain fully the substitution of policy for politics, the preference for an unnecessarily narrow brand of scientific practice or the vision of state law which we describe below. This paper seeks only to locate a particular policy audience in sociolegal scholarship and to identify its contribution to the development of that work.

II. THE LIBERAL TRADITION IN SOCIOLEGAL RESEARCH

The pull of the policy audience is deeply implicated in the roots of the scholarly tradition of empirical inquiry about law.[4] Two interrelated themes illuminate that tradition: a distinction between policy and politics and a vision of an unproblematic relationship between knowledge, science and power. The distinction between politics and policy is claimed on the ground that policy analysis is value free and apolitical, a technical inquiry concerning the efficiency of the relationship of possible means to predetermined ends. This perspective reflects, while it propagates, a vision of knowledge and science independent of and removed from the sources of social power which it helps generate and support. This allows sociolegal scholarship to disclaim an advocacy role in the collective struggle over community values while it simultaneously rationalizes the outputs of that collective struggle.

By maintaining a distinction between policy and politics sociolegal scholars align themselves with and reproduce the premises of liberal legalism which also rests upon a divorce of Politics, with a big P, from policy, or politics with a small p.[5] Liberal legalism grows out of the 18th century European political struggles we associate with the Enlightenment, and from which emerged a vision of an organic social order composed of an interactive web of contractual relationships in which individuals struggle with one another for survival, and possibly for betterment and enrichment (MacPherson, 1964). In the classic formulations of liberal social theory, the larger questions of Politics, i.e. how we shall live together and what is the good and just society—are resolved in favor of the free play of self interested ambition; the messy, open-ended questions concerning the meaning of justice, the distribution of property and the definition of the public welfare are settled through the adoption of the institutional arrangements of liberalism—i.e. separation of powers, checks and balances, republican forms of government.[6] These institutional arrangements define the tasks of government and of law as limited and instrumental: to monitor, and possibly to mediate, the largely self-regulating processes of competitive private ambition.[7] Governance becomes a more circumscribed, and mechanical[8] problem concerning the useful and effective adjustments within a fundamentally just, if flawed, arrangement. In this system, the tasks of government are not simply narrow but are removed from Politics. In the terms in which the progressive reformers reinterpreted this ethos more than a century later, good government is a matter of technically proficient administration.

Deborah Stone (1988) describes policy issues as having three parts—goals, problems, and solutions—which she illustrates with the following formula: (a) something is good, bad, or part of a necessary trade-off; (b) we do not currently have enough of what is good, have too much of what is bad, or a non-optimum balance in the trade-off; (c) how can the government remedy

this situation. Policy analysis involves elaboration of the elements of this model. Sociolegal scholars can contribute to and participate in public debate about public policy without having to acknowledge their involvement with the larger questions of Politics because policy goals, the first premise of this syllogism, are relatively unexamined and are often formulated in terms few would disagree with. Thus Stone notes that policy goals refer to the "enduring values of community life . . . equity, efficiency, security, and liberty" (1988). She calls these motherhood issues because everyone is, for them in the abstract, but notes that controversy emerges from conflicting but equally plausible interpretations of the same abstract goal.

Nonetheless, what is for some, the genius of American politics (Boorstin, 1953), has been our ability to practice politics without thinking too much about it, without being interested in "the grammar of politics".[9] "We have been more interested in the way it works than in the theory behind it" (Boorstin, 1953: 2), and thus have been able to act as if the controversies arising from conflicting interpretations of political goals were indeed minor technical differences. Similarly Louis Hartz described American liberalism as a form of politics in which "men [sic] who make speeches do not go out of their way to explain how differently they would speak if the enemies they had were larger in size or different in character" (1955: 5). There is "a matter of fact quality," "a vast and almost charming innocence of mind" evident in American politics that denies differences and eschews foundational controversy.[10]

Thus by attending primarily to the technical means of achieving legitimately established goals or policies, sociolegal scholars reproduce the problematic distinction between the ends and means of political life characteristic of liberal social thought. Both political life and mainstream scholarship rely upon a shared vision of an imperfect but just legal order in which approximate solutions to the larger questions of justice, equity, security and liberty are built into the institutional framework and need not be subject to the sort of probing examination which would reduce discourse to unresolvable debate and incommensurate arguments.[11] By thus aligning themselves with the dominant policy audience, sociolegal scholars can do their work and imagine that they are speaking to benign, well-intended, and rational decisionmakers who also share fundamental assumptions about justice and legality, the primacy of rights, the necessity of due process for balancing the interests of individuals and communities, and the conceptions of efficiency and rationality incorporated in the market. By addressing this audience, scholars can do research and believe that they are doing good. But, as Deborah Stone argues (1988), "policy analysis is political argument." The "traditional modes of policy analysis—economic, statistical, ethical, institutional and decision-theoretic—often obscure the political conflicts inherent in policy but do not eliminate them. . . . Political fights are conducted through the substance of policy issues, and policy issues take their shape and definition from the political conflicts that produce them" (Stone, 1988).

By addressing a policy audience, scholars speak directly to power—those who make policy; policy is a world which presumes power and the control and management of political power. The desire to speak to power invites researchers to speak with authority in the political arena while simultaneously denying and devaluing political discourse and public debate about the uses of power. Moreover, the address to power and the claim of authority, joining with the denial of politics, encourages the use of science as a source of legitimation (Morgenthau, 1946; Wrong, 1976, 1979; Lasch, 1977; Chomsky, 1969), and helps silence both political and moral challenges as well as voices which do not share its assumptions or speak its language. The prestige and organization of professional experts carries the risk that "expertise is more and more in danger of being used as a mask for privilege and power rather than, as it claims, as a mode of enhancing the public interest" (Freidson, 1972: 337). The desire to be useful and speak authoritatively on public policies not only limits the kinds of arguments and perspectives that researchers offer, (cf. Janis, 1971; Chomsky, 1969) and the kinds of science or knowledge that are sanctioned, but it also fosters naive and uncritical conceptions of progress and effectiveness (Foucault, 1978). It masks the exercise of authority with a veneer of disinterestedness because deference to researchers' knowledge and advice is seen as serving the subordinate's self-interest rather than the aims of the power holder, or some higher, collective ideal or purpose (Wrong, 1979: 55). Expert knowledge is offered on the basis of utilitarian rather than normative justifications and thus eschews debate about moral or political purposes.

Empirical inquiry about law is, however, not only fueled by the liberal distinction between politics and policy but also by Enlightenment views of the relation of reason and knowledge and the further location of both reason and knowledge in the scientific study of nature. The project of such Enlightenment thinkers as, Locke (1689, 1959 and 1690) and Descartes (1637, 1958) was to expose the fallacious idealism of Aristotelian metaphysics and epistemology, and to substitute a view of knowledge based upon empirical observation and neutral reason. The reasoning person, stripped of sentimentality and prejudice, approached a world accessible to disciplined inquiry. Such inquiry produces valid observations, that is, observations which, when subject to the discipline of method, could be repeated and would produce essentially similar results. Those observations provide the raw material for the mental operations of judgment. Given that such observations and operations could be performed by anyone trained in proper methods of investigation, Enlightenment epistemology promised that men could be freed from the authority of tradition and traditional religion. Thus as Engels (1959: 68) would later write, in the Enlightenment, everything had to "justify its existence before the judgment seat of reason. . . . Reason became the sole measure of everything."

The Enlightenment's equation of knowledge and reason, and the assimilation of both to the methods of science, was, of course, part of, and

associated with, a political revolution.[12] Reason was a political force. As Hobbes put it (1839: Vol. I, 7), "The end of knowledge is power." The emergence of and alliance between liberalism and science was itself a challenge to traditional political elites and modes of knowledge; empirical science provided the means for contesting both aristocratic and ecclesiastical power in the name of democracy and publicly demonstrable truths.

Reason, knowledge and science had to be useful to men in coming to terms with and managing the threats of nature,[13] and in developing a new political order. For Enlightenment thinkers the errors of political life were largely a result of distortions in man's understanding of himself and his world. Reason, knowledge and science applied to the task of producing a realistic picture of the social world would, it was hoped, produce a political life which would be rational and, as a result, more clearly subject to human adjustment and control.

Thus, from the Enlightenment onwards political authority has systematically shifted its claims to legitimacy from tradition, emotion and religion to increasingly rational and professional sources. By chasing away the gods, as Weber (1958) claimed, the Enlightenment equation of reason and science seemed to make calculable and predictable what in earlier ages had seemed governed by chance. Science provided not only calculable processes and consequences but simultaneously nourished an optimistic view of the power of scientific inquiry and education to increase the happiness of mankind and to provide the foundations of a free and harmonious social order. In a rather direct way, contemporary sociolegal scholars who address themselves to policy elites, share the inheritance of the Enlightenment faith in the ability of science to further progress and human perfectibility. Their authority rests upon specialized knowledge and skill which is not depleted or impaired when it is applied in the service of policy goals, but is rather enhanced by the deference reflected when expert advice is followed.

Noting the emergence of scientific authority generally in political life does not mean, however, that the policy audience has been, or is, especially eager for, or attentive to, the results of social scientific studies of law. The policy audience is, in one view, more interested in conclusions than method, and is impatient with the tentative or cautious bottom line of much social science. In this view, policy makers eager for clarity, or at least certainty, about the consequences of particular courses of action care less about science than about the capacity of social scientists to recommend solutions for immediate problems.[14] This understanding has much to commend it, and it certainly helps to explain the dilemma that those who seek legal reform and address a policy audience surely face.

It is, however, narrow in its understanding of the relation of knowledge and politics. While policy makers may articulate their demands and discomforts in utilitarian and instrumental terms, the policy audience seeks to use social science to legitimate, not merely to direct, policy choices. Reason is turned into a justification for, rather than a guide to, action. This

turns the Enlightenment project on its head. The mere association of policy choice and scientific inquiry is politically useful in suggesting that those choices are deliberate, rational and guided by reasonable predictions of consequences as well as concerns for the public interest. Policy makers want to be able to say that they have consulted the experts, those who claim to know or understand the most about some particular subject. While there is always danger that the advice or evaluation will come out wrong, it is a small danger since there are other experts who can be mobilized and there are always problems of scope, method or design which can be used to undercut the credibility of adverse findings. Thus critics should not be taken in by the demand for a clear bottom line, or by apparent impatience with scientific methods, for it is the availability and existence of those methods which has claimed the attention of a policy audience.[15]

III. THE POLICY AUDIENCE AND THE LEGACY OF LEGAL REALISM

The influence of the policy audience in shaping sociolegal research takes place not only against the backdrop of Enlightenment liberalism but within a context of more recent trends in legal thought, in particular the rise of American legal realism. In the history of realism it is possible to read some of the same issues and oppositions challenging contemporary legal scholarship. At the beginning of the 20th century, the modest reform efforts of legal realism advanced an instrumentalist concept of law. In this, legal realism reacted against then prevailing formalist conceptions of law[16] and worked to adapt legal thought to a changing political environment, one in which the state came to assume a much more explicit role in steering society (Ackerman, 1984).

Legal realism was by no means, however, a unified or singular intellectual movement.[17] At one and the same time, the label legal realist has been applied to people like Felix Cohen (1935), who took what Gary Peller (1985: 1222) later categorized as a deconstructive approach, a radical skepticism which challenged the claims of logical coherence and necessity in legal reasoning[18], and to others like Karl Llewellyn (1930) who embraced and believed in science and technique. Moreover, realism embodied three distinct political perspectives. It included a critical oppositional strand which sought to undermine the law's ability to provide legitimacy for political and economic elites by exposing the contradictions of classical legal formalism and the hypocrisy of legal authority. Realism also included a strand of scientific naturalism whose proponents attempted to advance a more enlightened, rational, and efficient social order by using the methods and insights of the empirical sciences to understand a wide range of human, political and social phenomena. Among these scientific realists there were divisions between the pragmatic followers of Dewey and James and those

realists who pursued a more positivistic version of empirical science. Finally, legal realism was a practical political effort which did not merely support or legitimate political elites but some of whose members were themselves the officials designing, making and enforcing reform policies.

All strands of realism emerged as part of the progressive response to the collapse of the nineteenth century laissez-faire political economy. By the beginning of the twentieth century, state involvement in a variety of arenas was substantial, and "wise and far-thinking advocates of the 'status quo'" such as Theodore Roosevelt and Woodrow Wilson urged policies to accommodate the pressures of urbanization, big labor, and concentrated wealth. Careful and caring policies, they believed, would both socialize violent individualism and preserve the main features of the existing social order (Hofstadter, 1955). Some realists picked up these political themes and embodied

> "the conscious espousal of policy-oriented intervention by the state. It was the difficulties encountered in persuading the legal establishment of the necessity of this new conservatism that led to the clash between the judiciary and the state that came to a head in 1936. The espousal by the Realists of a favorable response to socioeconomic legislation, . . . alongside their advocacy of judicial activism, was in essence a plea for a readjustment of the legal order to social developments." (Hunt, 1978: 39)

By attacking the classical conception of law with its assumptions about the independent and objective movement from pre-existing rights to decisions in specific cases (Cohen, 1935; Llewellyn, 1931 and 1960), realists opened the way for a vision of law as policy, a vision in which law could and should be guided by pragmatic and/or utilitarian considerations (Llewellyn, 1940). By exposing the difference between law on the books and law in action realists established the need to approach law making and adjudication strategically with an eye toward difficulties in implementation. By exploring the ways in which law in action, for example the law found in lower criminal courts, was often caught up in politics, realists provided the energy and urgency for reform designed to rescue the legal process and restore its integrity. By thus attacking, exposing, and exploring, realism sought to sweep away the vestiges of an idealist conception of law and open the way for a fundamental reorientiation of legal thought.

Not all stands of realist inquiry were, however, equally confident that law could, or should be rescued, or that its integrity could or should be restored. The deconstructivist strand, which came to be viewed, by mainstream legal scholars, as dangerously relativistic and nihilistic, tried to reorient legal thought by emphasizing its indeterminacy, contingency and contradiction. According to Peller,

> "This deconstructive, debunking strand of realism seemed inconsistent with any liberal notion of a rule of law distinct from politics, or indeed any mode of rational thought distinct from ideology . . . This approach emphasized contingency and open-ended possibilities as it exposed the exercises of social

power behind what appeared to be the neutral work of reason." (Peller, 1985: 1223).

Cohen claimed that in its critical "negative" form, realism represented "an assault upon all dogmas and devices that cannot be translated into terms of actual experience" (1935: 822); it took offense with conceptualism and the attempt by traditional legal scholars to reduce law to a set of rules and principles which they insisted both guided and constrained judges in their decisions. It was the boldness of what appeared to be that blatantly errant assertion which prompted Holmes (1881) to write that tools other than logic were needed to understand the law.[19] Law was a matter of history and culture and could not be treated deductively. To do so, that is, to treat socially and historically developed concepts and ideas as if they were a closed system which existed independently of their creation by lawmakers was to produce palpable fictions, what Cohen referred to as "transcendental nonsense" (1935) and what Holmes had called "the brooding omnipresence in the sky" (1881). While Llewellyn claimed that legal concepts were empty concepts which could be understood only through their application, that is, through the actions of lawyers, judges, and courts,[20] Cohen wrote that,

> Legal concepts (for example, corporations or property rights) are supernatural entities which do not have a verifiable existence except to the eyes of faith. Rules of Law, which refer to these legal concepts, are not descriptions of empirical social facts (such as the customs of men or the customs of judges) nor yet statements of moral ideals, but are rather theorems in an independent system. It follows that a legal argument can never be refuted by moral principle nor by any empirical fact. Jurisprudence, as an autonomous system of legal concepts, rules, and arguments, must be independent both of ethics and of such positive sciences as economics or psychology. In effect, it is a special branch of the science of transcendental nonsense. (1935: 821)

William O. Douglas prophesied Cohen's argument six years earlier when he wrote that "attention is too frequently focused on the [legal] device used rather than the function which the device is intended to perform" (1929: 675). Moreover, for Douglas, the device or legal concept was defined in terms of other concepts which also needed defining. Thus a corporation's liability could not depend upon the status and acts of its subsidiaries as if these 'agents', 'tools', 'alter egos', 'corporate doubles', 'adjuncts' or 'dummies' were determining (Douglas and Shanks, 1929). These concepts were themselves legal creations, consequences rather than sources of legal reasoning and judicial decisions. Realists repeatedly assailed the metaphysics which passed for legal reasoning.[21]

By demonstrating the circularity and groundlessness of legal reasoning, and by arguing strongly for a distinction between words and things, between law and official action, these realists opened the way for a vision of legal reasoning, and judicial decisionmaking as charade and manipulation. The most critical realists suggested that the law was merely rationalization for the interests and desires of judges (Llewellyn, 1931). "Judicial

judgments, like other judgments" Jerome Frank maintained, "doubtless in most cases, are worked out backward from conclusions tentatively formulated" (1930: 109, cf. 114–121). "Of the many things which have been said as to the mystery of the judicial process," Yntema argued, "the most salient is that decision is reached after an emotive experience in which principles and logic play a secondary part" (1928: 480). The biting critique of these realists seemed to some to jeopardize the very foundations and morality of American democracy; it denied any place for concepts of justice and ethical right in legal reasoning. "The ideal of a government of law and not of men," Yntema concluded, "is a dream" (1928: 476).

Nonetheless, no realist believed that legal rules and concepts were entirely irrelevant; they sought, instead, to move the focus from the words and concepts of law to legal action and the consequences of legal behaviors. Legal rules could help predict that behavior but other factors were also important; it was here, in the realm of behavior and action, that the scientific side of realism became prominent.

Realists saw the start of the twentieth century as a period of knowledge explosion and knowledge transformation (Reisman, 1941). Some saw in both the natural and emerging social sciences the triumph of rationality over tradition, inquiry over faith, and the human mind over its environment (McDougal, 1941). They took as one of their many projects the task of opening law to this explosion and transformation. Moreover, some realists argued that the law's rationality and efficacy were ultimately dependent upon an alliance with science (see Schlegel, 1980). By using the questions and methods of science to assess the consequences of legal decisions, realists claimed that an understanding of what law *could* do would help in establishing what law *should* do (Llewellyn, 1931). As Yntema put it,

> Ultimately, the object of the more recent movements in legal science . . . is to direct the constant efforts which are made to reform the legal system by objective analysis of its operation. Whether such analysis be in terms of a calculus of pleasures and pains, of the evaluation of interests, of pragmatic means and ends, of human behavior, is not so significant as that law is regarded in all these and like analyses as an instrumental procedure to achieve purposes beyond itself, defined by the conditions to which it is directed. This is the Copernican discovery of recent legal science. (1934: 209)

Thus realism initiated a dialogue between law and social science by staking a claim for the importance of phenomenon beyond legal categories and by thus attacking the self-centered arrogance of legal decisionmakers (Cardozo, 1921; Pound, 1923; Llewellyn, 1940).

By pointing to the scientific impulse in realism, however, we do not want to suggest that there was only one model of empirical social science available for adoption by those who pursued a more "constructivist" approach.[22] Institutionalists of such varied stripes as Walton Hamilton, William Douglas, Rexford Tugwell, John Commons, and A. A. Berle attacked the metaphysics and psychological abstractions of classical

economics and organization theory, producing detailed descriptive histories and analyses of organizational behavior and legal doctrine (e.g. Hamilton and Wright, 1926; Commons, 1924). Making space for this style of realism, "only a small number of scholars went so far as to embrace a full-fledged operationalism," i.e. defining concepts in terms of a set of physical operations, observable action external to and removed from the human mind,[23] and "probably half of the active social scientists of the period accepted the outlines of [a] broader [less stringent] quantitative behaviorism" (Purcell, 1973: 39). The work of the largest majority of social scientists was even more generally particularist and functional without sharing the tenets of the most extreme objectivism of some. Particularism meant specificity and attention to detail, it eschewed generalization and categorization. If a concept was to be valid and meaningful, it had to refer directly to an individual concrete thing.[24] Functionalism meant that those details, specific facts, cases and things were to be understood in terms of their social and economic consequences; it denied the possibility of a further standard for determining the worth of anything (Purcell, 1973: 42).[25]

Many of the social scientists who shared a generally functionalist approach, and who participated in the spread of scientific naturalism in the twenties and thirties nonetheless criticized what they considered to be its excesses: too extreme a "concern with measurement and an abuse of statistical techniques" (Purcell, 1973: 39; cf. Hamilton, 1931; Ogburn, 1934). There was a strong pragmatic impulse; fact finding was to be related to practical problem solving, according to Merriam and Berle (Karl, 1969). Dewey "argued that the quantitative behaviorists distorted the scientific method in their desire to reduce social science to purely 'factual' data" (Purcell, 1973: 40; cf. Dewey, 1931).

Although the most critical deconstructionist wing of the realists had suggested arguments for the moral and political basis of all knowledge,[26] the institutionalists as well as the more extreme positivists saw in social science methodology the ability to make explicit, and thus perhaps to circumscribe, the place of moral values in science and knowledge. Dewey had rejected the idea of complete objectivity, but he had nonetheless insisted on the need for a scientific study of social problems, and "the supremacy of method" (Dewey, 1960). Others sought truly value neutral inquiry, and they believed that what social science could make available to legal decisionmakers was an accurate, and relatively undistorted portrait of social relations and processes. Social science had, if it was to have a claim at all, "to deal . . . with things, with people, with tangibles, with definite tangibles, and observable relations between definite tangibles and not with words alone . . ." Science would help get at the positive, determinative realities, "the tangibles which can be got at beneath the words" (Llewellyn, 1931: 1223).[27]

Positivism was evident in the realist belief in the primacy and accessibility of social facts, of facts about how people lived and about how they

behaved. More to the point, some realists believed in a realm of facts, of real things, which allegedly existed beyond and independent of all systems of representation (Yntema, 1934). This realm of facts was, according to the realists, accessible to the informed and disciplined observer.[28] For some realists, social facts were not only "observable," but "definite" and "tangible" (Peller, 1985: 1241). According to Cook (1924: 475),

> Lawyers, like the physical scientists, are engaged in the study of objective physical phenomena. . . . As lawyers we are interested in knowing how certain officials of society . . . have behaved in the past in order that we may make a prediction of their probable behavior in the future.

And Llewellyn (1931) wrote that the realists, "want to check ideas, and rules and formulas by facts, to keep them close to facts." For law to work, indeed for law to be justifiable, it had to conform to such definite, tangible and observable facts; to ignore the facts of social life was folly.

Some realists went beyond the assertion of a scientific faith in the observability of fact and the possibility of value neutral inquiry to include an argument about the priority of context or structure in explaining behavior. They tried to look beyond idiosyncracies or individualistic explanation to analyze the social context within which decisions were made and within which receivers of legal decisions acted. In this move, realists inverted the determinism of the classical legal formalism.[29] Instead of arguing for the primacy and independence of free will in the construction of social forms and law, these realists believed that it was possible to identify "significant, predictable, social determinants" of decision and action (Cohen, 1935). Social science could aid decisionmaking by identifying the factors that limited the choices available to officials and, more importantly, by identifying the determinants of responses to those decisions. Aware of those determining conditions the informed decisionmaker could and should adopt decisions to take account of what was or was not possible in a given situation (Lasswell and McDougall, 1943).

In addition to the effort to bring science to the service of policy, realists gave special prominence to the law school.[30] Freed from an almost theological obsession with identifying rights within the common law, the law school could become the focal point for the organization of all social knowledge about law. Law schools, equipped with the tools and knowledge of social sciences, would become the mobilizing stations for national social reform.

> The proper function of our law schools is, in short, to contribute to the training of policymakers for the ever more complete achievement of the democratic values that constitute the professed ends of the American polity. (Lasswell and McDougal, 1943: 206)

Myres McDougal wrote (1941: 839–840; see also Reisman, 1941: 636) that rational and effective public policy was attained,

> not . . . by reconciling Science and God and calling it Law, but by seeking the organization of better law schools: that is, of law schools adequately staffed with the skills of modern social science and with resources ample for the exercise of these skills in both investigation and teaching. In such schools it might eventually come to pass that the principal policy makers and executors of our society and their teachers could be trained as such and not as priests in outworn and meaningless faiths . . .

Thus, the belief that possessed, and was possessed by, some realists associated science with philosophical determinism[31] and attributed to the scientist a key role in educating policy makers in and through the law. In this association, aspects of the realist heritage ground sociolegal research in an argument about public policy among legal elites. By locating scientific knowledge about law in the law schools, realists could attribute to scientists a key political role without challenging the privileged role of the legal academy and profession. They never called into question the legal academy's special associations with public power, nor did they suggest that expertise, or authority to influence policy could lay elsewhere.[32]

Realists operated within a profession the primary focus of which was, and is, the rationalization of the power exercised in and through law. They never disputed the orientation of many American law professors—their wish to speak to political elites, to shape the way power is used and deployed (Schlegel, 1979). Then, and now, many of the animating questions for law professors were questions of legal policy, questions of what the law ought to be, or how legal decisions ought to be made. (Compare Lasswell and McDougal, 1943 with Ackerman, 1984.) More than passively assenting to this role, realists enhanced the policy mission of the law school by asserting the possibility of a new, truly scientific study of law.[33]

By the mid-thirties, legal realism seemed to have provided a successful challenge to orthodox jurisprudence, a range of empirical methods for putting legal decisionmaking on more practical and scientific grounds, and a good part of the leadership for the New Deal. Realism had helped expose the biases and pretensions of judicial power, the inconsistencies between practices and the claims of mechanical jurisprudence.[34] Realists joined philosophers, political scientists, psychologists and other social scientists who participated in a wider intellectual movement which denounced efforts to rationally construct ethical and moral principles (Purcell, 1973).

The intellectual and institutional victory of realism was enormous;[35] nonetheless, the critical or deconstructionist strand of realism was ultimately discredited by charges of nihilism and moral relativism (e.g. Fuller, 1940; Kantororwicz, 1934; Mechem, 1936). Fostered by fears of and reactions to the spread of dictatorship in Europe, suspicion of realism's explicit critique of deductive reasoning as a basis for decisionmaking and its implicit critique of democracy based upon the rule of law intensified, in the face of which the critical wing of realism retreated. After the war, the behavioral and functional orientations that had been urged by the scientific

realists had become conventional in mainstream social science, and found similar acceptance in mainstream legal analyses and teaching. Thus realism's sustaining legacy is an instrumental vision of law coupled with a pragmatic reformist politics.

By virtue of its association with moral relativism, the legacy of realism is itself simultaneously a source of suspicion and fascination. For example, Critical Legal Studies identifies its roots within the critical deconstructionist camp of realism claiming that they are not merely replicating those efforts, but extending further a project which had more to do when it was prematurely stilled (Singer, 1984; Kennedy, 1987). The positivist and reformist aspects of realism fed both law and economics and law and society research, although the politics of each of these perspectives seems to be different. Furthermore, while Critical Legal Studies see the realist project as unfinished, social scientists seem to have adopted the insights of realism as relatively complete.[36]

For social science, the unmasking of legal formalism and the opening of legal institutions to empirical inquiry offered, at one and the same time, fertile ground for research and the opportunity to be part of a fundamental remaking of legal thought. The possibility of influencing legal decisions and policies, may have also suggested grounds for establishing social science's relevance and legitimacy (Cf. W. F. Whyte, 1986). For policy elites, the social scientific study of law was authenticated on the basis of claims concerning facts, values and access to "truths," and it "selectively appropriated" one part of the available traditions of social inquiry (Trubek and Esser, 1987).

In the end, the silencing of the deconstructionist wing of the realist movement and the entrance of other realists directly into the policy sphere meant that the major intellectual legacy of realism was left in the hands of those realists who allied with the progressive temperament of the early twentieth century and who at the same time believed in a privileged place for legal scholarship in public policy making. Rather than challenge basic norms or attempt to revise the legal structure, their brand of realism ultimately worked to increase confidence in the law and to foster the belief that legal thinking informed by social knowledge could be enlisted to aid the pressing project of state intervention. Realism thus invited law and social science inquiry to present itself in a particular way, and to make itself available to, and for, a policy audience, an invitation which many, though by no means all of its practitioners, have taken up.

IV. THE MODERN LAW AND SOCIETY MOVEMENT

If the heritage of all contemporary empirical studies of law were confined to, or by, the realist project, then perhaps we would have moved more fully and clearly away from the audience and agenda provided by the realists.

However, that heritage has not had to stand isolated or alone; it has been reinforced and strengthened in the last two decades by the modern law and society movement. Indeed, the beginnings of the modern period of sociolegal research might be set with the formation of the Law and Society Association in 1965. While there is, and was, more to sociolegal research than can be encapsulated by the formation of that Association, its creation marked an important step forward for empirical studies of law and provided impetus for the kind of self-conscious articulation of the goals of law and society research which make clear the continuing pull of the policy audience (see Schwartz, 1965).

The emergence of the modern law and society movement coincided with one of those recurrent episodes in American legal history in which law is regarded as a beneficial tool for social improvement, in which social problems appear susceptible to legal solutions, and in which there is, or appears to be, a rather unproblematic relationship between legal justice and social justice (Trubek and Galanter, 1974). By the mid nineteen sixties, liberal reformers seemed once again to be winning the battle to rebuild a troubled democracy; the political forces working, albeit modestly, to expand rights and redistribute wealth and power were in ascendancy. The national government was devoting itself to the use of state power and legal reform for the purpose of building a Great Society. The courts, especially the Supreme Court, were out front in expanding the definition and reach of legal rights. Because law was seen as an important vehicle for social change, those legal scholars who were critical of existing social practices, believed they had an ally in the legal order. Pragmatic social change was an explicit agenda of the state and an equally explicit part of the agenda of law and society research. Legality seemed a cure rather than a disease (Scheingold, 1974); the aspirations and purposes of law seemed unquestionably correct.

Thus, the modern law and society movement, like the realist movement before it, grew up in, and allied itself with, a period of optimism about law. The period was one in which, "the welfare regulatory state program of liberal capitalism was once again in the ascendancy" and in which,

> liberal legal scholars and their social science allies could identify with national administrations which seemed to be carrying out progressive welfare-regulatory programs, expanding protection for basic constitutional rights and employing law for a wide range of goals that were widely shared in the liberal community and could even be read as inscribed in the legal tradition itself. (Trubek and Esser, 1987: 23)

This period was, of course, also a period of extraordinary optimism in the social sciences, a period of triumph for the behavioral revolution, a period of growing sophistication in the application of quantitative methods in social inquiry (Cf. Eulau, 1963).

The continuity between modern law and society research and some

elements of realism extends beyond a shared optimism about law and about social science or even a shared set of social goals and political alliances. Although they seemed to challenge the existing distribution of wealth and power, both realist and law and society scholars supported implicitly, if not intentionally, a politics that was simultaneously progressive and conservative, that sought to democratize, and thus buttress, American liberal capitalism. Both sought to work with rather than challenge or criticize the dominant political consensus.

The pull of the policy audience can be seen clearly in the standard form of many law and society presentations which begin with a policy problem, locate it in a general theoretical context, present an empirical study to speak to that problem, and conclude with recommendations, suggestions or cautions.[37] (For a discussion of this approach see Abel, 1973; Nelken, 1981; Sarat, 1985.) It appears with striking clarity in some of the most widely respected, widely cited work in the field. It is our contention that the alliance between sociolegal scholarship and policy elites of the liberal state is sufficiently strong and subtle that research apparently critical of aspects of American legal institutions works, paradoxically, to reinforce fundamental assumptions of liberal legalism.

Take, for example, Abraham Blumberg's "Practice of Law as a Confidence Game" (1967) which described the ways the organization of criminal courts worked to support the interests of court officials and defense attorneys to the detriment of the due process claims and rights of criminal defendants. Defense attorneys, court officers, prosecutors and judges interact repeatedly and regularly so that networks of reciprocal deference and obligation develop which simultaneously bind them together and constitute the practice of criminal prosecution and defense. In the intimate setting of the "court regulars," the defendant is the odd man out. As a transient who passes through the organization rather than a member, the defendant's demands and interests are relatively marginal to activities which sustain the court as a productive and efficient organization.

The importance of Blumberg's work is its insistence upon the reasonableness of the actors, and the absence of malfeasance, malevolence, or incompetence. Read alongside a number of equally detailed studies, for example Skolnick's *Justice Without Trial* (1966), Blumberg's work produced a compelling indictment of structural inequities in the criminal justice system. If Skolnick revealed the contradictions in policework born of the demand for law enforcement and peacekeeping, what he called the law and order dilemma, Blumberg demonstrated the contradictions between social organization and due process rights. The reasonable behavior of well-meaning people earning a living by working in the criminal justice system would nonetheless subvert the best intentions of the law. Moreover, it appeared that the unequal distribution of resources which seemed consistently to threaten liberal ideals was not only a product of class and status distinctions but was created through the ordinary patterns of interaction

which characterized membership and exclusion. Reasonable behavior in organizations seemed antithetical to the goals of law.

Blumberg begins his critique paradoxically by identifying himself with the policy project of progressive legal reform. Early in his article Blumberg (1967: 16) argues that,

> very little sociological effort is expended to ascertain the validity and viability of important court decisions which may rest wholly on erroneous assumptions about the contextual realities of social structure. A particular decision may rest upon a legally impeccable rationale; at the same time it may be rendered nugatory or self defeating by contingencies imposed by aspects of social reality of which lawmakers are themselves unaware.

He takes as his point of departure "important court decisions" whose logic or content he does not wish to question or interrogate. In this way he also both affiliates with and distinguishes himself from traditional doctrinal analysis; his is after all a "sociological" effort. But, note the affinity between that effort and the legal, doctrinal tradition. Not only does Blumberg's work begin with the same legal act that doctrinal scholarship begins with, "important court decisions," but Blumberg is ready to concede the "legally impeccable rationale" for the decisions he is about to analyze.

Despite its similar starting point, however, Blumberg's project is quite different from doctrinal analysis. While he wants to "ascertain the validity and viability" of court decisions, for Blumberg validity is an extension of viability; viability is understood in terms of effectiveness, that is, whether court decisions are consistent with social facts and thus have the capacity for realizing their goals. Blumberg claims that the validity of a decision is what is at stake; this looks like a project of traditional legal scholarship but with a realist twist because viability, not logic, we are told, dictates validity.

From his sociological perspective, Blumberg worries that "important court decisions" may rest on "wholly erroneous assumptions about the contextual realities of the social structure." Sociology provides access to the reality of the determining social conditions which will influence whether "impeccable" legal reasoning is viable and therefore valid. The sociologist may be able to save the lawmaker or judge from error, to help prevent decisions which are "rendered nugatory" or which defeat themselves. Thus the sociological project involves the education of lawmakers, "lawmakers" whose good works fail because of the contingencies imposed by "aspects of social reality" of which they are "themselves unaware." They are unaware; we, the sociologists of law, however, are equipped to provide the awareness they do not possess. Blumberg writes to save his audience from the innocent errors imposed by its own sociological naivete. Sociology can provide a handle on "reality" which will be both true, and useful by helping to make decisions that are viable and valid.

While Blumberg's methods, participant-observation, may seem to lack the ambition, the rigor and the detachment most commonly associated with positivist and scientific approaches, it would be wrong to conclude that he

did not buy into the assumptions that had also animated some realists' embrace of social science. He embraces those assumptions in his attitude toward, or beliefs about, his data. For Blumberg the results of his inquiry involve neither an interpretation nor a social construction of reality. They are presented as if his observations provide immediate, unmediated access to the actual operations of the criminal court. His is not a version, or a production, to be read with and against other versions or productions. It is instead, in his view, *the* version, *the* true and accurate version. Here we see how soft methods may be compatible with a scientistic attitude.

Blumberg's legally impeccable decisions turn out to be *GIDEON v. WAINWRIGHT, ESCOBEDO v. ILLINOIS* and *MIRANDA v. ARIZONA*. He reads those cases to identify the Court's mandates for the behavior of criminal defense lawyers. He claims (1967: 18), however, that reading the cases is not enough because, as he puts it, "the fundamental question remains to be answered." No doubt is reflected in Blumberg's prose. There is a fundamental question and merely reading the cases cannot answer it; the implicit promise is that it must, and can, be answered. The fundamental question for Blumberg (1967: 18) is whether ". . . the Supreme Court's conception of the role of counsel in a criminal case squares with social reality." Blumberg himself does not argue for the proposition that this is A, let alone THE, fundamental question raised by these cases, he simply asserts it; moreover, he does not suggest for whom such a question might be fundamental. His earlier argument suggests, however, that this question is fundamental because if the court's conception of the role of counsel in a criminal case, a perception which lay at the root of the court's reasoning in all three cases, "does not square with social reality," the decisions in *GIDEON, ESCOBEDO* and *MIRANDA*, will be neither viable nor valid. Moreover, because the viability of the cases is a function of empirical impact, the answer is fundamental for those seeking to rely upon those decisions and alter the role of counsel in criminal cases.

Blumberg, having made his claims about the importance of his work, identifies those social realities shaping defense practices which are largely invisible to those outside lower criminal courts (lawmakers and appellate court judges). Blumberg's article (1967: 31) relies heavily upon metaphors of concealment or invisibility. (e.g. "the lack of visible end product"; "the lawyer-client confidence game . . . seems to conceal this fact.") These metaphors portray his research as a project of revelation, of bringing the unseen to the light; while others are deceived by, or are unaware of, the true nature of the process, the sociologist can get at that which is concealed or that which is not readily visible. Here again, we see one of the legacies of legal realism's effort to unmask the hidden structures of law.

"The Practice of Law as a Confidence Game" concludes with the suggestion that the Supreme Court decisions which it takes as its subject will be made "nugatory" because they "fail to take into account . . . crucial aspects of social structure" (1967: 38), aspects which Blumberg's article

seeks to make visible. Blumberg reminds civil libertarian liberals, whose goals he shares, that the ideals of the Court, and the rights it created, could and would be defeated. His work encourages, for those who support these goals, a radicalizing attention to court organization and court management. He worries that unless those things are taken into account, presumably by those who are responsible for making decisions, that "recent Supreme Court decisions may have a long range effect which is radically different from that intended or anticipated" (1967: 39).

Blumberg is confident, however, that the Court's intention is to provide defendants with resources to resist pressure put upon them by court organization. Here one encounters the limits of his critique and the way it legitimates policy elites even as it tries to educate them. Legal decision makers are thus portrayed as benign in their intentions but naive in their anticipations. He writes as if the revelation of the possible unanticipated outcomes of the Court's decisions will, in itself, move judges to amend or alter those decisions to avoid what he observes correctly to be "the rather ironic end of augmenting the existing organizational arrangements" (1967: 39).

The address to the policy audience and its impact on the self-consciousness and self-presentation of sociolegal studies is by no means limited to studies of the administration of criminal justice. It is found in research on the impact of legislation, the practices of lawyers in civil matters and the operations of the administrative process. Thus, for example, the pull of the policy audience is manifest in Stewart Macaulay's "Lawyers and Consumer Protection Laws" (1979) which, like Blumberg's work, reminded liberals that the goals of law reform could and would be defeated by insufficient attention to the distribution of legal resources and incentives underlying routine behavior in legal settings.

Macaulay noticed less the institutional issues which animated Blumberg, and focused instead on the circumstances and incentives underlying the ordinary practice of law. Lawyers were more likely to cool out their clients, to discourage or possibly mediate consumer complaints, than to aggressively pursue remedies for clients who claimed to suffer losses from misrepresentative trade practices or faulty products. Yet lawyers vindicated rights consciousness even as they refused to vindicate rights. By not turning clients away, they coopted clients, and transformed their dissatisfaction with the market into a subtle legitimation of the possibilities, if not the probabilities, of remedies through law. Although the Magnuson Moss Warranty Act had shifted the burden of proof and had hoped thereby to shift some of the balance of power between consumers and business, the lawyers, on whose energy and skill the effectiveness of law depended, were painfully ignorant of the law and the changes that it had hoped to create. Macaulay's work revealed, in stark relief, the incompleteness of the legal system, the operation of competing professional and legal norms, and the existence of legal pluralism within the American legal system.

Moreover, Macaulay's critique eschewed reductionism and simplistic analyses of cause and effect. He described a movement of social action, of meaningful behavior between lawyers and clients, in terms of overlapping and potentially conflicting beliefs and structural constraints. Neither the lawyers nor the clients were reduced to either objects of institutional forces or naive examples of universal cultural ideals. For Macaulay, the relationships between action and belief, between legal doctrine and social behavior, could not be assumed *a priori* but must be carefully and painstakingly constructed from detailed descriptions of empirically observable social interactions. Macaulay's work made available a telling critique of the contradictions of liberal reform. It illustrated the ways in which the practice of law could promote and reinforce the ideals of liberal legalism by maintaining the facade of responsiveness despite the systematic denial of remedy, or reform; thus, the research might have disturbed liberal confidence that legislatively created rights could adjust positions in the market.

In the description of his research Macaulay (1979: 118) accounts for the origins of his study in the following way:

> The research on which this article is based began as a study of the impact of the Magnuson Moss Warranty Act . . . in Wisconsin. This statute . . . was heralded as an important victory for the consumer protection movement, and was given national news coverage . . . and prompted an outpouring of law review articles . . .

But, Macaulay tells us, he was forced to broaden his story because, he says (1979: 118) "As our research developed, it quickly became apparent that the focus of the study was too narrow." The broadening of focus resulted not from abandonment of the policy audience, a willed alteration or change, but because Macaulay "found that most lawyers in Wisconsin knew next to nothing about the Magnuson Moss Warranty Act—many had never heard of it" (1979: 118). The statute seemed to have so little impact on the practices of lawyers representing consumers that Macaulay had no choice but to leave the statute behind and produce a thick description of lawyers' "techniques" for dealing with consumers' complaints, now grounded in a broader concern for inaccuracies in popular and scholarly portraits of legal work.

What looks initially like an anomalous case in an argument about the power and seductiveness of the policy maker as audience has some, to say the least, ironic twists. The stated focus of the article is no longer an account of the efficacy of a particular public policy; it is, instead, the consequences, costs and benefits of conventional models of lawyering (1979: 117).

> The legal profession may find the classical model valuable in justifying its activities and status. . . . The public may benefit too insofar as this conventional view of practice is a normative indicator of what a lawyer ought

> to do and what influences behavior. Nonetheless, the classical model has costs: it may serve to mislead clients about what lawyers can, should, or will do. It may obstruct serious thought about the techniques and ethics of counseling, mediation and negotiation. And it may undermine effective efforts at reforms through law. Over the past twenty years when reformers have won victories in such areas as civil rights, sex and racial discrimination, and consumer protection, their successes have come in the form of cases, statutes, and regulations which, along with other things, have granted rights to individuals or groups. . . . But the actual nature of law practice may leave these rights as little more than symbolic words on paper with only marginal life as resources in the process of negotiation.

"Social reality" referring in Macaulay's work to law practice rather than court organization, can render "nugatory," not only the decisions of the high court but, twenty years of social reform so that, according to Macaulay, it is "little more than symbolic words." Macaulay suggests that the focus on legal practice will enlighten his audience about the possible efficacy, read "viability," of law reform and legally created rights.

Thus, not two pages after the explanation of the broadened focus, Macaulay subtitles a section of the article, "The Impact of Consumer Protection Statutes on the Practice of Law" (1979: 120). The pluralized "statutes" alerts the reader that Macaulay, perhaps disappointed by the failure of Magnuson Moss to dent the consciousness of lawyers (1979: 120), is undaunted in his desire to explain why legal practice does not incorporate law or respond to legal reform. He warns his readers of "unintended consequences" and of the inadequacy of statutory reforms in coming to terms with particular social realities.

> The example suggests that consumer protection law may most benefit an unintended population—the wealthy who can afford to pursue individual rights. . . . All of these approaches [statutes] have had some effect, but neither singly nor all together do they offer an adequate solution to the problems of cost and difficulty in consumer litigation. (1979: 132)

Policy makers have "aimed an inadequate weapon at the wrong target" (1979: 132) because they have not taken into account the realities of professional practice. Public policy does not achieve its intended or anticipated goals because decision makers do not take full account of economic, as well as political and cultural realities.

Note the similarity to Blumberg's notions of the sociologist revealing the unintended consequences and the need to "adequately" address social forces. Macaulay, now taken up with the familiar sociological task of unmasking those forces, spends several pages exploring various approaches to the provision of legal services which "have not gone completely unnoticed by those who draft consumer protection statutes" (1979: 132). Macaulay is empowered to do the work of providing a complete account of what has been noticed, although incompletely, by those who will write future consumer protection statutes.[38]

As Macaulay moves to his conclusion the policy audience, until then incompletely acknowledged, is brought more clearly into view. Macaulay worries (1979: 160) that public officials "concerned about the failure of the Magnuson Moss Warranty Act" might condemn Wisconsin lawyers. This, he suggests, would be unfair (1979: 160) and perhaps unwise. Instead he warns,

> If awareness of a more empirically accurate view of legal practices is not developed, reformers are likely to go on creating individual rights which have little chance of being vindicated, and, as a result, they may fail to achieve their ends repeatedly (1979: 161).

Awareness, or lack of awareness, not the fundamental contradiction and coopting power of liberal legalism, becomes the problem for Macaulay. The potential for an important and deeply political critique of the legal order disappears. Awareness plays the same role for Macaulay as it did for Blumberg. The problem of failed law reform is interpreted as a problem of perception not intention. The job of the sociologist of law is to provide such insight, to provide an empirically accurate view of legal practices so that lawmakers can create rights which have some chance of being vindicated. As Macaulay summarizes his work, "lawyers . . . seem to be responding predictably to the social and economic structures in which the practice of law is embedded" (1979: 161). Sociology of law, by providing an accurate picture of those structures and the predictable response to them, can help lawmakers design laws and policies which do not "fail to achieve their ends repeatedly." Here the incompleteness of the critique is evident. Consumer protection is no longer seen as a rationalization of fundamentally inequitable market relations or as cooptation; the problem is not the ends but the means chosen to achieve consumer protection.

This desire to help benign lawmakers achieve their ends also plays an important part in Lenore Weitzman's book, *The Divorce Revolution* (1985). Like both Blumberg and Macaulay, Weitzman's work can be interpreted as having a critical edge. She argues that no fault divorce has done great damage to women and children and has contributed in a significant way to gender inequality and the feminization of poverty. In so doing, she creates an opening for challenging prevailing elites by energizing feminist revisionism. Her work provides evidence that might be used to call into question the capacity of legal elites to accommodate the interests of women. Yet, without explanation, Weitzman frames her inquiry not as a challenge to elite capacity or willingness to respond to women; instead, she labels the California no-fault divorce law, which is the object of her critique, as a piece of "enlightened and historic legislation" (1985: 20).

Weitzman, it turns out, is much less ambivalent, or reluctant, in her address to the policy audience than is Macaulay. Yet she shares with Macaulay the assumption that sociologists of law can and should use their work to help well motivated and well meaning public officials do their jobs

better. And in words strikingly similar to those of Blumberg and Macaulay, Weitzman argues (1985: 51) that the bad effects of that legislation were both "unanticipated" and "unintended." They were unanticipated, in part, because they were unintended but also because the reformers were too narrow and focused in their concerns. "The reformers," Weitzman suggests (1985: 19), "were so preoccupied with the question of fault . . . that few of them thought sufficiently about the consequences of the new system to foresee how its fault neutral standards might come to disadvantage the economically weaker party."

This is, of course, both a forgiving and a helpful argument. It attributes the problems Weitzman documents to the exclusive preoccupation of legislators with the problem of fault while suggesting that if they had given more thought to the economic consequences of such gender neutral standards they would have foreseen those consequences.[39] What isn't stated is Weitzman's implication that had thought produced foresight the legislative result would have been different. This assumption is basic to Weitzman's work since she sees herself as providing the thought necessary to enlighten her policy audience, and to move it to alter the law in order to alleviate the problems she describes. Thus, she states (1985: xix), "these results are not inevitable" and she elaborates, for that audience, an audience assumed to be receptive, reforms in no-fault legislation, "reforms based on fairness, equity and equality of results . . ."

Weitzman indicates, throughout this book, her identification with, and desire to help, the policy audience. Early on (1985: xi) she admits that she, like the sponsors of the no-fault legislation, was naive and unguarded in her expectations, "When I initiated this research I assumed, in the optimistic spirit of the reformers, that the 'California experiment' with no-fault divorce could only have positive results." One might ask how such a sophisticated student of the sociology of law could have such expectations, but by owning up to them Weitzman expresses sympathy and identification with the policy audience. Sociologists have no greater foresight than law makers. What they do have, or are able to get, is data. Getting such data is, in Weitzman's book, eye opening. She too relies, repeatedly, on the language of revelation. Many sentences begin "the data reveal. . . ." Like some of the legal realists Weitzman promises and provides access to truths about the law's effects, truths which exist beyond the realm of imagination and which must be carefully gathered to inform both the sociologist and the law maker.

Weitzman's identification with the policy audience (1985: 40) goes beyond a shared surprise. She sees herself as involved in a "continuous process of correction and refinement," as playing an active role in helping policy makers achieve their allegedly benign and admirable objectives. "The lesson of this experience is not that the goals of the divorce law reformers were unworthy, but rather that the means used to achieve them were not in all ways appropriate. . . . We should not lose sight of the fact that it is the

means that need correcting—not the ends" (1985: 401). For Weitzman and for many other sociologists of law the role of sociology is to provide awareness of the consequences of legal reform so that a policy audience, again allegedly both benign in its motives and limited in its understandings, can make necessary corrections in the strategy and tactics of legal control and legal change.[40] This is, indeed, a quite clear statement of what we have come to recognize as the technocratic mentality, a seemingly complete merger of scholarship with the perspective and interests of the subject of study, here lawmakers. The policy maker's problem—that is the creative or experimental manipulation of means to achieve unproblematic goals—becomes the scholar's problem.

The desire for a policy audience is not only embedded in many, important empirical studies. It is clearly present in commentaries on the tradition and direction of sociological research. Thus one doesn't have to read very closely, or very far, to find exhortive statements urging sociologists of law to pay heed to the policy audience. Victor Rosenblum, in his president's message to the Law and Society Association delivered in August 1970, quotes approvingly the words of one of his students. (1970: 3–4)

> In today's world the relationship between law and social change seems to me to be the overriding problem facing any person or group concerned with the relationship between law and society. . . . The social-scientific investigation of the variables which produce (varying degrees of legal effectiveness) carried on with the aim of formulating a general theory of the limits of effective legal action seems to be essential to the understanding of the relationship between law and social change. Such a theory should be useful to lawmakers as a guide in using law as an instrument of social policy. Another service the social scientist can and should provide the lawmaker is the pragmatic evaluation of the social consequences of specific rules of law to determine how well they achieve their ends and how they might be modified to better achieve those ends.

What was, for some, a hope in 1970, a hope of influencing legal decision makers, has in the view of two recent past presidents of the Law & Society Association, become a reality. Thus Herb Jacob (1983: 420) praises the contribution of law and society scholarship to the study of trial courts and argues, "we can begin to inform policy makers about some of the probable non-anticipated consequences of their actions even if we cannot state with certainty the outcome of reforms." Marc Galanter is even more confident in his assertion that law and society scholarship can and should speak to a policy audience. Galanter (1985: 541) argues that the policy debate about the litigation explosion has "both utilized and promoted law and social science research." Concerning proposed reforms designed to alleviate the alleged litigation crisis Galanter suggests that, ". . . it is the work of the law and society community that supplies much of the conceptual basis, methodology and data for public debate on these proposals." Galanter believes that we should take pride in such an accomplishment and that the policy audience can be addressed, in large part, because it takes sociolegal studies seriously.

But, Galanter believes more is at stake. Addressing the policy audience through social science research transforms and elevates the way policy makers think and speak about legal problems. (1985: 541)

> Debate about legal policy remains a game of persuasion in which the canons of evidence are breathtakingly permissive, reflecting the tendency of mainstream legal learning to rely on causal surmise about patterns of practice and systematic effects. The presence of law and society scholarship, with its accumulation of empirical data and critical apparatus, exerts pressure towards institutionalizing norms of intellectual accountability in the discourse.

This description of the elevating effects of law and society scholarship, while much less direct than Rosenblum's suggested role for sociolegal research in the policy process, is, nevertheless, an indication that the pull of the policy audience did not die with the last gasp of Great Society liberalism, with a resulting change in the political direction of policy elites, with the accumulation of repeated evidence of policy failure, or with the coming to age of a new generation of more skeptical law and society scholars.[41] Thus, the pull of the policy audience continues to be seen with striking regularity in the pages of the major scholarly journals of the field.[42]

Like some of the realists, important strands in the modern law and society movement have expressed and continue to express in works which are both critical and supportive, an optimism about law, and a desire to speak to a policy audience. This has, we believe, two unfortunate effects in sociolegal research, effects which occupy the last two sections of the paper. The first is that it reinforces or contributes to, although it doesn't fully explain, a tendency to embrace a narrow version of science as the most appropriate guide for research; and, the second is that it emphasizes the centrality of the state in law and thus diminishes the critical potential of sociolegal scholarship, turning some parts of the sociology of law into apologetics (Hunt, 1978).

V. THE POLICY AUDIENCE AND THE PULL OF NORMAL SCIENCE

To the extent some sociologists of law continue to take policy elites as their audience, they are likely to be led, like the realists, to try to establish credibility with that audience by claiming that they offer a posture of "deliberate detachment" (Friedman, 1986: 780). This is not to say that speaking to the powerful is the only force encouraging sociologists of law to adhere to, or to adopt, the posture and canons of normal science; there are certainly others. Nonetheless, it is worthwhile noting the powerful effect of a policy audience that invites sociologists of law to characterize their empirical work in the language of science (see Dror, 1975). That audience encourages sociologists of law to operate as if social behavior could be understood in terms of a tangible and determinate world of facts (see White

and Rem, 1977; see also Rich, 1977), to treat data as if it were an undistorted window on the social world, to treat the ambiguity of what we observe in an unambiguous way. Sociologists of law are invited to act as if there is a clear congruence between our representations of things and things themselves, and to accept the model of value free, detached, objective inquiry in which empirical research seeks generally valid propositional knowledge about "reality". This is one of the prices of attempting to speak convincingly to the powerful. (See Trubek, 1984; cf. Black, 1976.)

There are, we think, at least two related ways in which the policy audience encourages or supports those attitudes and tendencies. First, the policy audience seeks and/or demands authoritativeness in the inquiries it commissions, supports or attends to (Lindblom and Cohen, 1979). As the reach of the regulatory state expands, and more public regulation is made at farther remove from democratic processes, policy makers seek and require new forms of authority and legitimation. Neither electoral mandates, nor public stature is sufficient to underwrite the expanding universe of contemporary public policy. The claim of scientific expertise seems, however, to offer a particularly useful form of legitimacy for the modern state. (See Chomsky, 1969; Lasch, 1977; cf. Wrong, 1979.)

It is rarely satisfactory for the purposes of the policy audience, however, to be told that research is partial, expresses the values of the researchers or that it is itself a relatively self contained representational system. If sociolegal research is to be influential it must claim to have something that policy makers do not themselves have, that is, it must claim to have something which is different, and presumably better, than the ordinary understandings that policy makers themselves routinely acquire (Lindblom and Cohen, 1979: 22). Opinions are ubiquitous but knowledge is rare; policy elites want knowledge, that is, advice that has a greater probability of predicting accurately the outcomes of alternative courses of action.[43]

Thus, some of the realists understood that to reach a policy audience, social science would have to be able to provide its own kind of internal quality control, its own set of assurances about the truth value of the research product. Science then and now provides an explicable set of conventions for such an internal quality control effort. It purports to be able to guarantee the reliability and validity of research results, to assure that research results could be replicated, and are therefore not the idiosyncratic product of a particular investigation (Kaplan, 1964). It provides both an assurance of quality and a hope that an objective realm of knowable conditions can be managed, or coped with, if not altered and changed. Thus, for the policy audience, science is often good politics.

Because political legitimacy in state managed capitalism depends so heavily upon the efficacy of political action, voices that speak with relative certainty about the latter, are empowered and privileged. Thus, research which offers conventional, commonsensical or experiential accounts is unlikely to supply the kind of authoritative support that has a chance of

being taken seriously by policy makers. Moreover, for sociolegal work to enter into, or direct itself toward, the policy arena, it must prepare to withstand the attack of those on one or another side of public controversies eager to challenge its validity or its conclusions. The claims of science provide a powerful, if not always decisive, defense (Ross, 1984: 100). Apparently freed from subjectivity and therefore political bias, sociologists of law can speak without interest and therefore with authority. They can participate in the political process without being explicit about their politics.

Second, the policy elite requires not only legitimation but also demands what Herbert Gans described as "programmatic rationality." Policy makers attempt "to achieve substantive goals through instrumental action . . . that can be proven, logically or empirically, to achieve those goals" (1975: 4; cf. Bok, 1983). The policy audience looks to social research, not simply to supply justification through better or more reliable information but in particular, to supply technical advice in the form of precise, conditional propositions about the relationships between identified social and legal variables, about the relationships between available means and desired ends. Only when scholars produce seemingly reliable estimates of the probable relations between means to ends—the elements of technical rationality—can scientific authority satisfy the demand for an allegedly apolitical justification for political choice.

While there is much sociolegal work that works hard to distance itself from the assumptions of normal science either in the choice of so called soft methods or in its focus on particular cases (see, for example, Engel, 1980 and Yngvesson, 1985), the influence of science is not simply a choice of hard over soft or extensiveness over intensiveness. It is seen as much in attitudes toward data as it is in the choice of data itself. It is seen as much in the removal of the observer and the process of observation from the analysis of the things observed as in the choice of quantitative over qualitative methods, as much in a refusal to be as explicit about political commitments as in the choice of research methods.

Consider, for example, Malcolm Feeley's important study of the New Haven lower court, *The Process is the Punishment* (1979). In that study Feeley challenged conventional and mechanistic assumptions about criminal courts. Standard descriptions and analyses had chastised courts for providing rote processing of large numbers of cases, thereby denying to defendants both procedural due process and substantive justice. Feeley provided a powerful refutation of this 'case load hypothesis' by illustrating, in rich detail, the ways in which the members of the court, and the institution generally, responded to the particulars of individual cases and the surrounding political and social culture. He described both the process and outcomes in the misdemeanor court, highlighting the rates of non-appearance and defaults as well as the range of penalties imposed. He concluded, to the dismay of many who wished to locate the source of inadequacies of the criminal process in the organization and personnel of

the courts, that punishment for defendants lay in the process itself—rather than any particular outcome. The costs of participation in the criminal process, costs born by the innocent and guilty alike, outweighed the possible and regular punishments imposed upon the guilty as a result of the adjudication of his/her case.

By looking closely at the criminal courts, without the blinders of formulaic models or legalistic presumptions, Feeley exposed the limits of the criminal sanction and due process ideals. His research suggested that it is possible to be responsive to the concerns of substantive justice even when due process rules worked to increase costs upon guilty and innocent alike. Moreover, it is possible to use his argument to rebut elitist and legalistic criticisms of the criminal courts that focus on the quality of the personnel, the caseload capacity of the courts, and the remove of the institutions from their cultural setting. His argument suggests a powerful critique by demonstrating that the limits of the criminal sanction lay elsewhere, perhaps in a more fundamental paradox in which the extensiveness of legal regulation frustrates the achievement of process ideals.

Despite the insight of Feeley's analysis and what it makes available, that analysis is framed in ways which show striking resemblances to an earlier generation of criminal court studies, from which he tries to distance himself. Like Blumberg, Macaulay, and Weitzman, Feeley also relies on metaphors of revelation, on images of awareness and of a policy audience benign in its intentions, though limited in its vision. He worries that policy elites have taken an abstract, formalistic and oversimplified view of the nature of criminal courts, and, as a result, have failed to intervene effectively to reform those courts. Thus he argues that,

> The lower court is a complex, flexible institution that is able to absorb efforts to change it and adapt to new circumstances without abandoning old ways. . . . (Thus) reformers should reflect carefully on their concrete objectives as they contemplate change and replace the abstraction of theory with real situations. (1979: 292–294)

Getting access to and describing those real situations is, of course, the service that social scientists perform. Feeley (1979: 294) warns his readers that "courts are not often what they appear to be. . . ." He warns them not to be deceived by appearances and offers them help. This help is necessary because the effort of policy makers to address the problems of criminal courts has been and will be, in the absence of a clearer perception of the "reality" of courts, "frustrated" (Feeley, 1979: 280). But more is at stake than simply frustration. Like Blumberg, Feeley warns of unanticipated and undesirable consequences from policy efforts unguided by social science expertise. ". . . (S)uch efforts," Feeley suggests, (1979: 280) "are not likely to achieve their desired results and many of them may in fact be counter-productive." Such efforts may, among other things, ". . . make the process more costly, a punishment which would be meted out to the innocent as well as the guilty" (1979: 34).

Conceiving of the policy audience disabled from achieving its goals by its own confusion and lack of clarity requires or invites Feeley to offer social science for the clarity and certainty which it can provide. His book is offered as "a complete account of what shapes the decision process in the lower criminal courts" (1979: 11-12) and as "a full explanation of what goes on in the criminal courts. . . ." (1979: 25). The book regularly draws contrasts between appearance and reality (e.g. "what appear to be rapid and routine decisions are really the expression of a complex process . . ." (1979: 21) and makes claims to certain understanding (e.g. "The *single most important factor* in determining how much care will go into reviewing a case to determine its 'worth' is the official description of the changes" (1979: 160).

Nowhere is Feeley's attitude toward his project and his data stated as succinctly as it is early in the book when Feeley (1979: 25) juxtaposes the "casual observer" and those "familiar with the court." The former, he argues, is left dizzy by "rationales for decisions" that "appear arbitrary and chaotic." The latter, and Feeley seems to want to include himself in this group, are able to see "a logic—even if it is unwritten and unarticulated—to the process." Note the singularity and confidence of this assertion. While the criminal courts may be deceptive in their appearance, they are structured and singular in their underlying logic. The job of the social scientist is to avoid the dizzying appearances and to reveal the singular logic. Multiple readings, conflicting logics and/or contradictions within a single logic are to be avoided or ignored or reinterpreted lest the social scientist contribute to the very confusion which he claims to clarify.

Like Blumberg, Feeley seems to believe that he has gotten at and revealed the deep logic of the courts. This claim is especially odd in *The Process Is The Punishment* because that book is justifiably well known for its insistence on the ambiguity and pliability of facts in the criminal process. The facts of a criminal case do not exist in some simple external fashion; they are created, mobilized, manufactured by the participants in the court process. Thus Feeley states unequivocally (1979: 197) "Facts are malleable.[44] They must be mobilized and often are manufactured." Yet Feeley seems resistant to including his own work within the analysis he provides. He describes the malleability of fact as if his description of that fact were not itself malleable. While there are moments of tentativeness where Feeley seems ready to acknowledge the subjectivity of his analysis, and the importance of his own beliefs (1979: 232) (e.g. "My observation of the court led me to believe that non-appearance is more likely to be accounted for in terms of how well defendants understood the operations of the courts"), the predominant attitude is quite different. For Feeley, the problem of malleability and interpretation is local not epistemological; it applies to prosecutors and public defenders but not social scientists.[45]

A similar tendency to remove the observer and the process of observation from the analysis of the things observed is present in other important works

on the criminal process, most notably in Ken Mann's, *Defending White Collar-Crime* (1985). Mann's book provides a thick description of a rarely seen elite sector of the bar. While he shows the importance of professional training and experience in white-collar criminal defense practice, he questions the purposes to which the training of these lawyers, high in the stratification of the profession, is put. Moreover, he suggests that the ambiguity of statutory definitions of white collar crimes provides room for able defense lawyers to maneuver, to defend and often to exonerate factually guilty clients. Mann's work shows how the very ambiguity which enables white collar defenses also raises critical problems for a legal order premised upon notions of fair notice and correct procedure. This critique is further buttressed and enhanced by attention to the importance of money and resources in constructing white collar defenses. By pointing out the role of unequal resources, Mann's work illustrates the imperfections of the commitment to equal protection, and to some extent, the defeat of the normative aspirations of liberal legalism.

Like Feeley, Mann invites his readers to contemplate the way facts are presented, manufactured, interpreted or hidden in the adjudication of cases of white collar crime. Mann suggests that defense lawyers in white collar cases, spend much of their time and effort in the mobilization and manipulation of facts. This activity has two sides to it. First, defense lawyers deal with clients who resist giving their attorneys all the information that might be relevant in their case. They are resistant out of a desire to save face, or to protect particular interests or because they have their own conceptions of what kinds and uses of information will achieve their desired goals (Mann, 1985: 40–51). Thus, Mann tells us, defense lawyers are always suspicious of their clients, always dubious about whether their clients are giving them all the information they need to know (Mann, 1985: 35). They develop a variety of techniques to elicit information from clients and, at the same time, to discourage clients from telling them things that might pose or present ethical dilemmas, for instance, whether the client's criminal activities are still going on. This delicate process of eliciting facts is in Mann's mind, "creative" (1985: 58). Mann acknowledges that gathering facts and creating facts may be essentially indistinguishable or blurred at best. Yet, this powerful insight is one which Mann ignores in presenting his own fact gathering process.

The second part of the process of manufacturing and managing facts occurs in dealings with the government and the prosecution. Here, Mann suggests (1985: 19) "defense attorneys have access to information . . . that is not available to any other observer or inquirer" except, Mann would have his readers believe, to Mann himself. Defense attorneys work hard to control and limit the information about their client, his alleged crime and their defense strategies which becomes known outside the lawyers office. As Mann puts it, "information control lies at the very heart of the defense function" (1985: 7 and 241). Mann provides an interesting account of the

skill of white collar defense lawyers in controlling what others know and find out as well as of the techniques they use to achieve such control.

While Mann writes about the creation of facts and the social process through which actors in the legal process seek to construct reality for others, he nowhere worries that he is one of these others whose impressions have been skillfully managed. Moreover he does not seem to see any similarity in the position of the defense lawyer vis a vis the prosecution and the position of the social science investigator. He writes about a social process as if he is not implicated in that process; he writes as if social science can describe the social world without being influenced by the social world which is described. These are non-issues for Mann and yet perhaps they should not have been given his own closeness to those issues in the lives and work of the persons he studied.

There is, in fact, some evidence that Mann was aware of such issues or at least concerned about the limits of his own understandings. This concern, however, is cordoned off and discussed as a problem of particular methods rather than as a central epistemological issue. Thus Mann explains why he moved from an almost exclusive reliance on interviews to a participant-observation strategy. Interviews, he suggests (1985: 33–34), were

> ineffective for obtaining essential detail about what attorneys actually do in meetings with their clients and in meetings with investigators and other attorneys. I received a picture of defense work that was often blurred or truncated. When the attorney felt obliged not to violate his client's confidentiality privilege and, so it seemed, when he was reluctant to disclose the true nature of strategies . . . an occasional telephone communication between attorney and a client or an investigator, overheard by me during an interview, made it obvious that the attorneys' own description of what they do was not capturing all that occurs during a criminal investigation.

The quest for "essential detail," a picture of defense work which was neither blurred nor truncated, a revelation of the "true nature" and "all" that occurs, these are Mann's self stated aspirations.

After reviewing the impediments to those aspirations posed by the interview method, Mann (1985: 34) informs us that "the problem was largely overcome" when he began his participant observation work. Such a method, he tells us (1985: 5), again relying on a metaphor of revelation, "brings to light in a new way fundamental qualities of the defense function." Lest the reader remain in doubt, Mann assures us, at the end of the book (1985: 231), that his combination of interviews and observations suggests that the defense strategies of white-collar crime lawyers, strategies which he describes in his book, "are empirically valid phenomena." Thus Mann joins with important legal realists and sociolegal scholars in believing that he can provide, and has provided, an account of legal phenomena which is not a product of his own creation or version of "facts," which is grounded outside his observations, and which is the result of his own successful efforts not to be deceived or manipulated by those who, as he argues, make a profession of deception and manipulation.

While Mann's book appears to be addressed to many audiences, he like Feeley, believes that his findings provide a reliable basis for policy decisions, in particular for decisions about reforms in legal ethics and in criminal procedure. Because he believes in the reliability of his data Mann uses the language of compulsion to describe the relation between the facts he has uncovered and the decisions which policy makers, especially those concerned with and responsible for legal ethics, can and should make. Thus he argues (1985: 248) that while ethical rules must be made more specific

> we are *forced to accept* (emphasis added) that although we may be able to draft a disciplinary rule and its effect may be significant in certain sectors of the bar, it is likely not to change the ingrained behavior of another large sector of the bar.

In addition to the language of compulsion, Mann's choice of pronouns suggests a rather complete identification between those who gather facts and those who write ethical codes for lawyers. In the end one might ask about Mann's choice of prescriptions and implications. Nowhere does he justify the choice which allows him to relate his work to legal ethics as opposed to the equally compelling issues of fair notice and equal justice. Here the politics of, or justifications for, his policy work remain unstated. Here science, even as it gives way to prescription, masks the fact that this choice of policy object is a political choice.

The normal science strategy of exempting the observer from the process of observation, writing as if the social scientist was exempt from, or outside, the social processes he describes and denying the politics of academic activity is challenged by recent work in philosophy, epistemology and social theory which offers alternative accounts of what constitutes knowledge of the social world and its relationship to social power (Foucault, 1972; Unger, 1975; Derrida, 1978; Rorty, 1979; see Rajchman and West, 1985). This work challenges the premises of the Enlightenment, and the liberal alliance between scholarship and political power which appropriates and uses science in the name of an unquestioned pursuit of progress (Spragens, 1981). It builds upon traditions of philosophical skepticism in denying that any known mental activity is able to have unmediated access to a world of facts. What we call fact, it is argued, does not exist outside of, or prior to, the categories of thought we construct to guide and make possible our inquiries. This argument puts the observer, and the process of observation, directly within the thing observed and collapses the distinction between subject and object. Thus contemporary skepticism celebrates the failure of analytical philosophy to adequately address the Humean problematic of causation, of dividing the world into its "furniture" and our "projections," and of determining what "really" exists. It suggests that analytic philosophers demonstrated, despite their best efforts, the insolubility of this problem of determining how "words 'hook onto' the world" (Putnam, 1985: 20).[46]

Thus, much contemporary philosophy has abandoned the traditional quest for congruence between appearance and reality. Instead some philosophers are now concerned with "the quotidian, with the Lebenswelt," what Husserl called the life-world, or lived world, and with a "philosophy free of the search for a 'true world'" (Putnam, 1985: 29).[47] Because as Rorty writes, "the notion of 'logical analysis' turned upon itself and committed slow suicide" (1982: 227), contemporary philosophy is characteristically pluralistic, conventionalist, and historicist, as well as anti-reductionist. According to West, this

> leaves no room for a correspondence theory of truth (of any importance) in that it undermines the very distinctions upon which such a theory rests: the distinctions between ideas and objects, words and things, language and the world, propositions and states of affairs, theories and facts. The result is not a form of idealism because the claim is not that ideas create objects, words create things, language creates the world, and so forth. Nor is the result a form of Kantianism because the claim is not that ideas constitute objects, words constitute things, language constitutes the world, and so on. Rather the result is a form of pragmatism because the claim is that evolving descriptions and ever-changing versions of objects, things, and the world issue forth from various communities as responses to certain problematics, as attempts to overcome specific situations and as means to satisfy particular needs and interests. To put it crudely, ideas, words, and language are not mirrors which copy the 'real' or 'objective' world but rather tools with which we cope with 'our' world. (West, 1985: 263)

While there are differences of view within the philosophical community about how far to depart from the search for a "sub-basement of conceptualization, or language" (Quine, 1960: 3), nonetheless, there seems to be a general consensus that in rebuilding philosophy, and in doing science, we rework it piece by piece rather than from the ground up. Neurath (1959) describes this scientific project as a boat we are forced to reconstruct, plank by plank, while remaining afloat in it. Neither we in our attempts to describe history or science, nor science in its attempts to describe the physical and social world, begin with a tabula rosa. Neurath writes,

> We are sailors who must rebuild their ship on the open sea, never able to dismantle it in dry-dock and to reconstruct it there out of the best materials. Only the metaphysical elements can be allowed to vanish without trace. Vague simplistic conglomerations always remain in one way or another as components of the ship. If vagueness is diminished at one point, it may well be increased at another. (1959: 201)

These readings of contemporary philosophy remind us of Emerson's rejection of philosophical authority; "we are left with no philosophically authoritative traditions with which to recreate and redescribe ourselves and the world" (West, 1985: 266). Nonetheless, the deconstruction of traditional philosophical authority, of traditional ideas of objectivity and distance between subject and object, is empowering rather than disabling,

offering more discursive space by encouraging greater openness and tolerance in judgments about what counts as knowledge. By challenging the notion of knowledge as accurate representation of externally existing reality, and by asserting that knowledge is itself "a social phenomenon rather than a transaction between 'the knowing subject' and 'reality'" (Rorty, 1979: 9), we are liberated to see/create our subject anew, perhaps with fewer illusions and greater self consciousness.

These arguments challenge the paradigm of normal science and the claims of positivism[48] in sociolegal studies to be able to identify, through rigorous scientific methods, determinate responses to legal interventions. Moreover, this challenge suggests that the search for the kind of objectivity and clarity demanded by the policy audience may be ultimately self-deceptive. This challenge requires, or invites, sociologists of law to implicate themselves in their analyses and their scholarship. It requires, or invites, an effort to overcome the subject/object distinction and to consider the way sociolegal research constitutes its subject of study. Paying attention to these challenges threatens the alliance between the sociology of law and policy elites in the liberal state. It means returning to, and exploring the implications for empirical practices of, those deconstructivist strands in legal realism which have, to this point, played a small role in sociolegal studies (see Silbey and Sarat, 1987; Trubek, 1984; Kennedy, 1986).

The usual response to such musings about the problems of science is a warning about nihilism and a philosophical reminder that the world isn't invented through our descriptions of it. The fear is that the rejection of scientism is a rejection of empiricism and a return to idealism and solipsistic subjectivity. But, here we think that the response misreads the challenge. While that challenge emphasizes the observation that social relations are socially constructed, it does not deny that those social relations are, in and of themselves, consequential. (See, for example, Berger and Luckman, 1966; Mannheim, 1936; Gouldner, 1979; Gusfield, 1981.) Social relations bound or limit the connotations which, at any point in time, will appear as plausible. While the challenge to positivism suggests the inherent limits on the human capacity to know a world beyond consciousness and language, it need not, and does not, argue that there is no world separate from consciousness.[49] The impact of contemporary challenges to positivism is not that there is no there out there; it is found rather in its insistence that the ability to know what is there is limited (Macaulay, 1984). If there are, indeed, no determinate ways to know the world separate from our socially created representational systems, then what matters most is what counts as knowledge, what styles of work are welcomed and imagined to be legitimate.

Research which addresses the policy elite of the liberal state speaks with a particular voice, one that is instrumental, rational, and programmatic; attempting to speak with certainty, its presentation is limited, if not singular. In particular, the pull of the policy audience leads sociologists of law to ignore perspectives inconsistent with its epistemology, or purposes.

Those who address this audience, write as if they were describing an objective, manipulable world of social relations; indeed, it would be difficult to advise policy makers without the assumption of the externality of the social world. In this, the policy interest is not radically different from the normal working attitude of competent members of society.[50] The task and interest of scholarship should, however, be different. If the policy maker is like the member of society who acts in the world as if it were predictable and thus somewhat manageable, must the scholar give in to this assumption? The goal of social research is not to take the perspective of the actor as the standard of research, but to make that perspective and epistemology the subject of inquiry. This distinction emphasizes the difference between technocratic and critical social research (cf. Silbey, 1985: 21).

VI. THE POLICY AUDIENCE AND THE FOCUS ON STATE LEGALITY

More is lost in speaking to policy elites than just the opportunity to explore alternative, non-positivistic, epistemologies; more is lost than the narrowing of what counts as knowledge. In our view the very subject of study is artificially limited and distorted. In policy studies the subject of sociolegal research becomes state legality. Such studies limit themselves to those areas of law in which policy elites are most interested, in which state law appears as a means used to achieve allegedly unproblematic, uncontroversial social goals. Because policy elites are most interested in areas of state law where implementation and impact are most problematic, studies addressed to policy elites (see Feeley, 1983; Robertson and Teitelbaum, 1973; Loftin *et al.*, 1983; Lefstein *et al.*, 1969; Casper and Brereton, 1984; Ross, 1973; Skolnick, 1966; Zeisel, 1982), focus on areas of the law, on decisions or situations, where law is least likely to be effective. They produce pictures of a legal system struggling to retain what seems like a tenuous grasp on the social order (Abel, 1980; Sarat, 1985), and portray legal officials as vainly struggling against great odds to do law's bidding.

There are, we think, two important intellectual and political problems in this portrait of law. First, such a portrait neglects the hegemonic and constitutive functions of law (Gramsci, 1971; see also Brigham, 1985, 1987). By looking at the hard cases, the exceptional example in which policy implementation is problematic and policy goals are frustrated (see Wildavsky, 1979: 26), policy researchers are drawn away from the unproblematic norm, from the everyday reality of law's effectiveness. The result is to efface the overwhelming reality of law's constitutive power, of its contribution to the reproduction and maintenance of existing social relations and practices (Gabel, 1980; Klare, 1981; Freeman, 1978). Because of their allegiance to the policy audience, too few sociolegal studies have focused on this more normal pattern of legal life. Sociolegal research has done little to investigate or demonstrate how law works when it works and

has done little to problematize the consequences of effective legal regulation (cf. Silbey and Bittner, 1982; Silbey, 1984).

The second problem with the portrait of law produced by policy studies is that it ignores, or misstates, the role, and importance, of legal pluralism.[51] Where gaps are identified between the substance of state law and the governing pattern of social behavior, they are, in one view, assumed to be normatively empty, indicative of nothing but technical problems in the clarity or communication of legal rules (see Wasby, 1970; Casper and Brereton, 1984; Pressman and Wildavsky, 1973; Heumann and Loftin, 1979).[52] Another view recognizes that such gaps are often indicative of the existence of norms at variance with state legality. Some seek to legitimate such normative life (see Macaulay, 1963 and Moore, 1973), while others associate themselves more fully with the normative agenda of the state and lend sociological expertise to the task of overcoming that resistance (Blumberg, 1967; Wald, 1967; Muir, 1973; Dolbeare and Hammond, 1970).

Nevertheless, there is an important way in which all research which addresses policy elites presumes, or must presume, the existence of a vibrant legal pluralism. Built into the fabric of liberal legal thought there are two tenets that require such a vibrant pluralism. First is the view that society itself is composed of a range of shifting interests, none of which achieves, or can be allowed to achieve, dominance. In this sense pluralism means that the state, and state law, balances, and regulates, even as it responds to, the plurality of interests which flourish in liberal society. Second, is the view that the state is limited in its regulatory role, that society is essentially self regulating. Liberalism denies that the state does, or can, occupy all of society's normative space. The legal pluralism which is presumed by policy studies suggests that the various normative orders contained within society are, at once, not fundamentally hostile to the normative agenda of the state, an agenda they are presumed to play a role in shaping, and that the role of those normative orders is to provide the first-line, primary mechanism for social control and social order (Ehrlich, 1936; Bohannan, 1967; Galanter, 1981; Pospisil, 1971).

Sociologists of law, when they recognize legal pluralism, have, for the most part, failed to see it, at least in an American context, as a potential source of political resistance to the hegemonic project of state legality, as something other than a source of idiosyncratic evasion. As Peter Fitzpatrick (1984: 2) states

> Legal pluralism, in sustaining the idea of a persistent plurality of legal orders has proved an enduring . . . affront to unitary state-centered theories of law. Yet its own relation to the state, and to state law, has been distinctively ambivalent. Some of its adherents attribute no special pre-eminence to the state or even see it as subordinate to other forms. . . . Other adherents permaturely reduce or subodinate plurality to some putative totality, usually the state or state law. I want to argue that both these stands are 'right' . . . state law does take identity in deriving support from other social forms . . . but in the constitution and maintenance of its identity, state law stands in

> opposition to and in asserted domination over social forms that support it. What is involved overall is a contradictory process of mutual support and opposition.

The hegemonic reach of state legality, while it frames all social relations, does not constitute their totality. The paradox of liberalism is that its ideology limits its own hegemonic project and thus gives some deference to those places and spaces in the vast interstices of social and legal life where competing normative orders may generate or encourage resistance to state legality (Fitzpatrick, 1984, 1986). The pull of the policy audience is thus associated with a misapprehension of the possibilities and power of legal pluralism even as it is also associated with an underestimation of the hegemonic character of state legality.

In the realm of state law sociolegal research is often based on the premise that law could and should be made more effective. (Refer to our earlier discussion of Blumberg, 1967 and Weitzman, 1985). Like some legal realists, sociologists of law who embrace the policy agenda often become advocates for legal intervention and promoters of effective legal regulation (Galanter and Trubek, 1974). What starts out looking like critique almost inevitably ends up in apology. The law itself is seldom questioned. Those who do policy research become technicians for the existing social order as they ally themselves with those whose work requires the identification of problem areas, or instances of ineffectiveness. Sociolegal scholars help rationalize the policy project in precisely the ways Gans (1975) described when they suggest the need for more careful planning in and of the law.

Sociologists of law, perceiving themselves as marginal or ineffective in the world of legal policy (cf. Friedman, 1986), nonetheless become important participants in maintaining the existing legal order. They replicate liberalism's distinction between policy and politics by failing to interrogate or question the basis or adequacy of existing legal institutions and arrangements. Too often sociolegal scholars act as if the solution for legal problems is to be found within law itself, eagerly participating in what Weitzman (1985: 401) called a "continuous process of correction and refinement." Sometimes this leads to calls for more law (see Nader, 1980), sometimes to calls for less law. Yet, it almost always is based on the assumption that sociology of law is socially useful when it helps to produce more informed, sophisticated and realistic legal decisions (Ross, 1984). By showing where law fails, and acting as if that failure can be overcome by the infusion of greater rationality into the policy process those who seek to speak to power play a technical assistance role, supportive of the legal status quo (Sarat, 1985).

For example, in *Court Reform on Trial* (1983), Feeley characterizes most recent efforts to reform courts as "bold but often empty solutions that are guaranteed to bring about disillusionment and disappointment. . . ." (1983: xiii). He indicts reform efforts on many counts:

> Some fail because we try to impose bureaucratic structures on a protean if imperfect adversary process. Some fail because we mistake discretion for arbitrariness. Some are misdirected because we focus on isolated horror stories. Others respond to the symbols of legal formalism and ignore actual practices. Some strive to extend the courts beyond their capacities. (1983: xii)

He moves from this indictment to a detailed critique of four court reform efforts. In each, however, problems turn out to involve neither politics nor intention but rather alleged misunderstandings of the judicial process. In the end, having supposedly corrected those misunderstandings, Feeley advances what he calls a "strategy of rights" (1983: 211), a coordinated effort of judicial intervention, research and development and a "modest" national effort to support experimental efforts in a few jurisdictions. Legal reform ends up being the answer to the problems caused by legal reform.

Others suggest that we need to lower our expectations about law and about what law can do. For them the problems of law are problems of excess and unrealistic demands, demands generated in and through the political process, demands which need to be resisted and rolled back if the effectiveness of state legality is to be maintained or recovered. (See Huntington, 1975.) One important analysis is provided in Bardach and Kagan's (1982), *Going By the Book*. What makes Bardach and Kagan's argument particularly interesting is that they ally themselves with those, in the policy audience, who advocate deregulation. Their book tries to demonstrate how we have gone too far, how we have pushed law beyond its limits and how going too far produces unanticipated and dangerous consequences, what they call "regulatory unreasonableness" (1982: 59).

They seek both to educate policy makers about the complex and subtle adjustments necessary to maintain an equilibrium and to preserve the basic structure of legal regulation. That structure incorporates, in their view, the necessary and benign response of a "humane and democratic society. . . ." (1982: xii). Here at least, Bardach and Kagan are explicit about their political commitments. For them, the basic social structure is sound, and worthy of respect. Thus, they worry that the deregulation movement will "go too far, hack away too much. . . . Reasonable controls and intelligently managed inspectorates may become casualties in the retreat from excessively costly air and water quality standards that have rightly given 'environmentalism' a bad name in some quarters." Bardach and Kagan present themselves as allies and advisers to, as well as participants in, "the Republican regulatory counterrevolution" (1982: xii), allies and advisers who will help to save necessary regulation by resisting the temptation to go too far in rescuing law from its excesses.

Bardach and Kagan portray the 1960s and 70s as a period of political activity in which much attention was given to using regulation to correct and respond to all manner of human and social problems. In addition to the resulting rapid expansion of the regulatory apparatus, efforts were made to overcome the problems of capture and colonization which had come to

plague the then existing regulatory apparatus. The expansion of regulation and the growth of regulatory stringency were, according to Bardach and Kagan, caused by a complex of intellectual, technological and political forces. The intellectual and technological impetus could not and would not have succeeded, however, without the "reform activism of the civil rights and anti-Vietnam war movements" (1982: 13). What these political forces wanted was both more law and more stringent enforcement of the law. What they got was both "unintended and incidental to the accomplishment of a larger purpose . . ." (1982: 6), very harmful to those subject to the new style regulation and damaging to the law itself.

Bardach and Kagan argue that regulatory unreasonableness, strict adherence to the letter of legal rules and uniform treatment, produce massive inefficiency, resentment and efforts to evade the law. Regulatory unreasonableness is, in their view, neither necessary nor inevitable. It is a species of what they call "legalism," what others might call bureaucratic pathology. For them the rule of law requires a balance of rules and discretion, a balance difficult to maintain in a political environment impatient with legal niceties and fine line distinctions. Bardach and Kagan seek to save the rule of law from legalism, from simple solutions to complex problems. They think that this should be done because the rule of law reflects important moral and political values. They think it can be done if policy makers follow a strategy of deregulation which relies on rules and standards, encourages flexible enforcement and provides incentives for effective private regulation.

Bardach and Kagan do not respond to the problems they identify by interrogating or questioning the values or assumptions of state legality. The problems are not symptomatic of anything deeper or more troubling. Like Feeley they see complexity as the key to adjustment; like Feeley their critique serves to strengthen existing legal arrangements, even as they appear to ask for less law. They see themselves as helping their policy audience to select "the appropriate regulatory implements more wisely and of developing the competence to regulate more reasonably and responsibly" (1982: 301).

By accepting the values and assumptions of state legality, Bardach and Kagan slight the role of law in the organization of social power and, as a result, do not investigate the law as a field for the play of social power (Wrong, 1979). By attending narrowly to the effectiveness or ineffectiveness of regulation, they disregard the ways regulation, which may not achieve its stated purpose to make the workplace safer, may nonetheless influence relations between workers and managers, consumers and businessmen by providing resources, strategies and arenas for contest among social groups or interests (Silbey and Bittner, 1982). Indeed, the focus upon effectiveness masks, as it neglects, the contribution of particular laws to the network or repertoire of symbols, stories, meanings, and rituals that provide the "toolkit" of skills and tactics from which people construct strategies of action as well as belief (Swidler, 1986: 273).

Not all policy studies, however, apparently detail the ineffectiveness of law. For example, Ross's *Deterring the Drinking Driver* (1984) describes the ways in which attempts to deter drinking and driving have been successful. Following the Scandinavian model of control, using very specific and technically defined criteria of impairment (.05 to .10 percent blood level alcohol), Ross argues that contemporary regulations closely approximate the conditions for effective legal deterrence. Deterrence theory "proposes that the efficacy of a legal threat is a function of the perceived certainty, severity, and swiftness or celerity of punishment in the event of a violation of the law" (Ross, 1984: 89). By specifically defining the criteria of offense, by providing technical means to ascertain whether a suspect is under the influence by determining blood level alcohol, and by increasing the surveillance of drivers, law enforcement agencies attempt to increase the certainty of apprehension, to increase the deterrent effect and thereby reduce the amount of driving while drinking. Ross admits that he is actually unable to determine the effect of the law, because "there is . . . very seldom direct evidence of changes in drinking and driving, as would be provided by competent roadside-sample surveys using screening breath tests" (1984: 104). Thus he marshalls indirect evidence from crashes and casualties in a wide range of national and international jurisdictions to argue that policy purposes can be achieved through law.

What reads like a study of effectiveness, however, very quickly turns out to be a more cautious message about the prospects for long term success through law. First, Ross explains how the short term deterrent seems to depend more upon publicity accompanying the introduction of new laws and enforcement strategies than upon the actual probability of apprehension. With time, drivers seem to experience not the perceived threat created by the publicity campaign, but the real, very modest threat that current drinking and driving laws are able to produce (Ross, 1984: 105). The effects of the law, Ross claims, are closely associated with the publicity and are therefore evanescent; changes in behavior resulting from changes in the law are therefore uncertain.

Second, by conceiving of law in narrowly instrumental terms, Ross is forced to construct a mystifying paradox—to regard drinking and driving, a pervasive social activity, as socially unsituated. Ross argues (1984: 10) that because drinking and driving involves offenses "less anchored in morality and other nonlegal systems of rules" than more traditional crimes, legal regulation can be studied in relative isolation. His reading of the research demonstrates, however, that the law is only marginally effective and that most drinking-driving behavior is untouched by law; on the other hand, he suggests that this behavior is relatively unconnected to non-legal rules. Ross has left us with a widespread social activity that he implies is, nonetheless, without normative ordering, or cultural signification.

Attention to the popular representations of drinking in the media, in socialization practices, and in rites of passage, for example, would

immediately suggest possible locations for assessing the normative status of drinking behavior, and the way it is both constituted by and exists outside the formal law. Moreover, it is difficult to create a plausible depiction of the law's ability to affect drinking and driving behavior without reference to the myriad forms of legal regulation, including the history of licensing, revenue and public order statutes, which have contributed to the construction of the social meaning of that behavior (Gusfield, 1981). Although Ross suggests, at the end, a move beyond legal deterrence to social ordering through law, the focus upon simple deterrence and immediate impact leads him to underestimate law's more pervasive effectiveness and its hegemonic character (see Cain, 1983).

Addressing work to the concerns of policy elites distracts sociologists of law from tracing the way legal power and legal forms exist in social relations, for example, in the relations of lawyers and clients, doctors and patients, employees and employers (cf. Sarat and Felstiner, 1986). By focusing upon the law where it attempts to change social behavior, they divert attention from the ways in which law helps to constitute social practices (Brigham, 1983); they direct attention away from the ways state law works to stifle resistance before it is voiced (to state actors) so that acquiescence becomes the norm (cf. Nader, 1980). By concentrating on violations of law, or instances of the failure of law to control behavior, sociologists of law have overlooked the pervasive experience of legality. Rarely do they look to where law is unproblematic, to instances of law abidingness; sociolegal research seems for the most part (cf. Engel, 1980) to take for granted the fundamental values and rules which order daily life and which, despite cries of failure, are, at least partially, constituted through state legality.

The hegemonic character of state law can't be seen in those instances in which law actively intervenes in people's lives to change behavior; it works, instead, quietly, unobtrusively, to channel and shape both attitudes and behavior. Here the law may be least visible, hardest to sec, and more importantly, hardest to differentiate from the social norms by which people go about their daily lives. But there is a difference; that difference suggests some distinction between social norms and legal hegemony. Norms are spontaneously enforced and lack authorized agencies of control; in contrast, violations of law carry the possibility of the imposition of state legitimated and administered force.[53] Although legal activity rarely involves the use of force, the elaborate system of rules, decisions, interpretations, and activities associated with producing them nonetheless "takes place in a field of pain and death" (Cover, 1986: 1601).[54]

By helping to form, constitute, and structure the way people behave routinely, law is associated with particular visions of order, justice, goodness, property, family, health, education etc.[55] And because people generally go along with legal prescriptions, because the law's vision becomes ordinary practice, the law works against alternative perspectives

and sources of authority while it establishes its moral, political and cultural values as conventional norms of practical behavior.[56] Thus hegemony implies more than normal behavior, or normative behavior; it emphasizes the notion of imposition and legitimation of particular norms, that is, of political rule. Hegemonic law is not synonymous with normative social behavior but implies routine acquiescence with norms and rules in which the threat of organized force remains in the background.[57]

What this means is that, as a rule, "one pays one's debts and renders to one's employer the performance that is due" (Vago, 1981: 40); one pays the shopkeeper for a packet of toothpaste, and the title is thereby transferred. It is neither the threat of adjudication nor compulsion by the state that routinely induces a person to perform these duties, although that is certainly a part of the situation. More is at stake than the performance of legal obligations. Because legal forms are constitutive of the very forms which social relations and practices take, law is embedded in those relations and practices so much so that it is virtually invisible to those involved. It is this invisibility, this taken-for-grantedness that makes legality and legal forms so powerful.

This perspective, all too often forgotten in contemporary sociology of law, and in the past sometimes used to suppress differences rather than celebrate them, reminds us that the policy maker's vision of law as an instrument of state power is insufficient. In it, the idea of law is impoverished; the conventional practices and the social institution of law are disregarded (Silbey, 1985). The hegemonic capacity of law is ignored.

A renewed attention to the pervasiveness of legality, to its normalcy, ought not, however, lead us to overstate the uniformity of the lived law and to overestimate the penetration of the state. It is as dangerous to overestimate that penetration, to equate hegemony with a stultifying, homogenizing uniformity,[58] as it is to underestimate its effectiveness. While the former serves to preserve the status quo of liberal legalism by strengthening the liberal state, the latter, perhaps against its own politics, diminishes opposition by suggesting its futility. The latter danger means that sociologists of law may be insensitive to the voices of protest and strategies of resistance that challenge, in some fundamental way, the premises of liberal legalism. By either allying themselves with policy elites or providing an overdetermining account of law's hegemonic character sociologists of law have, for the most part, not found the intellectual strategy for organizing and/or legitimating those voices and strategies (for important exceptions see Fitzpatrick, 1983b; Santos, 1977, 1980).

While both law and norms work to produce order, to relegate relations and practices to the realm of the taken-for-granted, neither is, or can be (Foucault, 1980) completely successful. Indeed the way dominant power and policy elites work in a liberal state, through the legitimating forms of law, provides points of resistance and opposition (Thompson, 1975; Hay, 1975). Moreover, even in conceptions of power which seek to trace its operations beyond the boundaries of the state resistance is arguably always

present (Foucault, 1978). As Foucault (1978: 95) puts it, "(W)here there is power there is resistance . . . power relationships . . . depend on a multiplicity of points of resistance. These play the role of adversary, target, support or handle. . . ." Although contained within power, resistances are "inscribed . . . as an irreducible opposite" (Foucault, 1978: 96). The 'tool kit' of habits, skills, cultures and roles from which people construct patterns of action provides room for challenge and opposition even as it imposes constraints (Swidler, 1986; Fitzpatrick, 1986; Minow, 1985).

Recent work by Kristin Bumiller (1987) exemplifies the way sociologists of law, freed from the pull of the policy audience, can overcome the twin dangers of underestimating the hegemonic character of state law and of equating hegemony with uniformity. In so doing she is able to give voice and credibility to those who question, in a fundamental way, state legality, existing practices and institutions. Those who use those deficiencies and problems to go deeper in inquiring about the nature of legality are able to do so, in part, because they imagine a different audience. Kristin Bumiller (1987) provides an example of how it is possible to talk about state legality without adopting the perspective of the policy audience. Bumiller studied persons who reported that they had suffered some form of insidious discrimination based on age, sex, or race. She reports that they refuse to turn to law in order to avoid the tendency of legal processes to individualize grievances and to require them to speak through a professional, a lawyer. She argues that these tendencies and requisites rob victims of a sense of being in control of their own lives and isolate them from their communities and cultures at a time when they are most in need of support. Her respondents resist a double victimization; first in becoming "an object" of discrimination and, second, in becoming "a case" in law.

Bumiller argues that the source of this double victimization is deeply embedded in the values and assumptions of liberal legalism. She seeks to call into question the idea of legal intervention itself rather than to recommend one or another particular instance of such intervention. She calls upon her readers to identify with the victims rather than the powerful and to imagine new ways of organizing social life to avoid discrimination and new responses to it. But, most of all, she makes sense of the refusal of victims to give in and to take what the law makes available. She finds in their narratives a powerful, alternative vision of persons and society. In so doing, she questions the capacity of liberal legalism to do much more than inflict further damage upon persons already victimized.

VII. CONCLUSION

This paper sets forth the attraction of speaking to the powerful in the tradition of sociolegal studies, describes the ways in which that attraction is displayed in some of the best work in the sociology of law, and argues that it

has disadvantaged and limited the range of vision of law and society research. Turning away from the policy domain rather than devoting ourselves to the task of figuring out how better to enter it will, we believe, both liberate and improve sociology of law. It should help loosen the grasp of scientism and enable us to provide a richer more complete picture of law in society.

But, some might ask, what would empirical scholarship on law look like if it resisted the scientific attitudes and choices encouraged by the policy audience? As we seek to move from an expression of dissatisfaction with and concern about the policy audience and its influence, what are we looking toward? We have noted, first and foremost, that we think that sociolegal research would be enriched by more critical attitudes toward one's own data and greater consciousness about the process of constructing accounts of the narratives which constitute and comprise our experience of social relations. This is an argument for greater "self-consciousness about values and contested social visions" (Trubek, 1986: 33). This means being willing to articulate and examine one's own values as part of one's research activities. Perhaps more importantly it means social research which seeks not only to identify and examine rival hypotheses and multiple narratives, but also attempts to keep multiplicity alive, rather than to test and reject, to silence, all but one interpretation and then to present it as *the* interpretation (see, for example, Sarat and Felstiner, 1986: 125–132).

Scientism invites arrogance in interpretation (if not in policy recommendations) in which the observer allegedly stands outside the systems of meanings presented. We seek to implicate the observer. This means an even more complicated, subtle investigation of the malleability of fact and control of information in which observers are engaged in, or victimized by, the processes they observe. It means that one displaces the aspiration for truth and for an epistemological conquest of the social world with an aspiration for participation, albeit participation at a distance, in the construction of narratives about social life. Finally, it means that the distinction between policy and politics is fundamentally untenable; it is no longer possible to speak to policy elites by claiming the authority of a disinterested science; one cannot speak apolitically about politics.

The break from scientism will enable and legitimate research which is intensive and self-conscious, which sees things in their singularity rather than assimilating them to general categories. This turn to the particular will celebrate the varying forms of law instead of regarding variety as itself antithetical to the commitments of the rule of law. The abandonment of the policy audience and the accompanying interest in the intense investigation of particulars may further stimulate the ethnography of law. (See Greenhouse, 1982; Engel, 1983; Merry, 1979.) We will indeed learn new and exciting things about our law as we leave the state behind and go to the periphery, to small towns, to rural places, to working class neighborhoods and look at the way people in those places come to terms with official legal

norms, and the way they construct their own local universe of legal values and behaviors.[59]

Finally, breaking away from the policy audience, may encourage research which begins, not with an already defined legal policy, but with the social processes in which legality is embedded and in which legality operates. If we take as our subject the constitutive effect of law and the oppositions nurtured by legal pluralism, we cannot be content with literary theory applied to legal doctrine. We must instead study families, schools, workplaces and social movements to present a broad picture in which law may seem at first glance virtually invisible. We will find in these efforts both instances which confirm and contradict the dominant political and legal discourse; we will also find instances which will require us to reimagine that discourse in a different way. We would then understand law not as something removed from social life, occasionally operating upon social forms, struggling to regulate and shape them, but as inseparable, fused with all social relations and social practices.

To avoid overestimating tne effectiveness and stability of legal forms, as we have heretofore overstated the ineffectiveness of law, it is necessary to look neither solely at the efforts at legal instrumentality and change, nor solely at the hegemonic realm of conformity, but at the ways in which issues, people, and problems move from one domain to the other. With renewed attention to the role of intellectual resources, the stock of established expertise and symbols (Block and Burns, 1986; Swidler, 1986) available not only to agents of the state but to citizens as well, we can observe the struggles to break from the hegemonic realm and to precipitate fundamental legal change. Our caution in this paper, is to note the role that the social sciences have played, and might play, in this movement, in the social construction of law and legality.

What moves us here is thus not just an interest in the scholarly or intellectual effects of the policy audience but rather in the political dimensions of policy oriented work in the sociology of law. We want to nurture the critical potential of that work even as we worry that the potential is not often fully realized. We want to encourage movement from policy to political thinking, from the realm of technique to the realm of values. But even this language is, we realize, somewhat deceptive. The realm of values and politics is, as we have argued above, inescapable. Policy oriented work which intends to be silent about its politics speaks nonetheless. We want to engage with that speaking to suggest the importance of making political argument explicit so that it will be possible to bring the sociology of law to the process of questioning the premises of America's version of liberal legalism.

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NOTES

1. Because it appears to be easier to criticize than to escape the pull of the policy audience, this paper can and should be read not only as a proposal to encourage more open dialogue and exchange with our colleagues but as self comment as well, as an effort to talk to ourselves about our work. The ambivalence we perceive in many sociolegal studies with regard to the attraction and appropriate voice with which to speak to a policy audience is also apparent in our own writing; thus, the struggle we advocate is one in which we are certainly implicated.

For example, *The Policy Dilemma* (Feeley and Sarat, 1980) not only describes the implementation of the Safe Streets Act of 1968 but concludes with advice for "federal authorities seeking to make a contribution to the management of crime" on restructuring LEAA. (1980: 145) Although the authors focus upon the complexity and apparent intractability of most social problems, as well as the inadequacies of policy responses, they claim that these problems should not be seen as insoluble. The policy dilemma derives from simultaneously increasing demands for government intervention and growing recognition of the inefficiency and ineffectiveness of government action; in response, government is "too ambitious in its goals and too careless in its designs." Nonetheless, despite its pervasiveness and roots in the foundations of American political philosophy, the policy dilemma is amenable to adjustment and correction with proper attention to the complex "reality" the authors explore and describe.

Although Feeley and Sarat begin with skepticism about the prospects of resolving the policy dilemma, about their "ability to provide more than suggestive answers" (1980: 5), and skepticism about "the possibility of making meaningful and valid statements about policy impact" (1980: 33), they conclude with confidence that they have located the obstacles to a successful crime policy. Those obstacles constitute the reality of the policy dilemma—a failure of practice which becomes a failure of conception—which prevents any hope that policymakers will develop more reasonable expectations for public policies and thereby eliminate one of the horns of the dilemma. Despite their original skepticism and a developing appreciation of the inability to correct problems incrementally, Feeley and Sarat urge Congress to do just that. They suggest "changes drawing on the lessons of the Safe Streets experience, changes which recognize the complexities of federalism and the reality of the crime problem

(1980: 148); in particular, Feeley and Sarat urge Congress to support research and experimentation with new technologies for dealing with social problems.

The desire to speak to power is not always so explicitly juxtaposed with acknowledgements of the limitations of the author's vision. Often, the policy audience is invoked post hoc as a justification or instruction on how, or why, to read an author's work. In this case, the legitimation process is reversed, policy legitimates research rather than the other way round. In "Case Processing: Consumer Protection in An Attorney General's Office," Silbey (1981) describes how, in the implementation and routinization of a new statute, considerations external to the law or the individual case arise, transform, and begin to characterize law enforcement. In particular, she describes the endlessness of case processing and the limitlessness of the task which the consumer protection staff attempts to confine and manage. The management of the process eventually becomes both the form and substance of consumer protection, providing bias and legitimation. Although the considerations which seem important in structuring consumer protection—practical concerns associated with getting things done—are described as general concerns characteristic of work in many settings, the observations are offered because of their relevance for conceptions of law in a society which "increasingly relies upon legal remedies for social problems." (1981: 881)

2. By American or liberal policy elite, we mean to suggest that policymakers—those who make or administer rules, regulations, laws—of the moderate left, center or right operate within a dominant liberal consensus whose contours and place in American society has been described by de Tocqueville, 1946; Hartz, 1955 and Boorstin, 1953. The term liberal thus refers to classical enlightenment liberalism and not to welfare state liberalism of the modern political left. The references to a dominating consensus do not, however, deny the grounds for a critique of that perspective. See for example, Wolf, 1968, 1965; Marcuse, 1965; Moore, 1965; Kariel, 1977 and section I below.
3. To speak of the state and of an audience of the politically dominant may seem alien in the American context. Here, substantial intellectual efforts have been made to deny the importance of class differences and to promote the language of pluralism and consensus as a way of denying problems of hierarchy and domination associated with analysis of the state. Moreover, it may seem equally foreign in a fragmented and federal political organization which has traditionally made it difficult to imagine consistent, let alone unitary, state interests. Thus, as we question the address to the policy elite, as we question some of the central assumptions of mainstream analysis of the Americal legal tradition, we draw upon ideas of legal pluralism which have often animated sociolegal work in non-American contexts (Fitzpatrick, 1980; 1983a; 1984; Snyder, 1981), and seek to encourage the alliance of intellectuals and opposition groups which has been an important part of the politics on the European continent and in other cultures.
4. The influence of the policy audience in shaping sociolegal work takes many forms. While the most visible source of influence is tangible and financial, another source of influence may be found in the very subject of study. Some seek to speak to policy makers because they see law as policy and their research as part of the policy process; for others the attraction of the policy audience reflects a desire to use research to teach problem solving skills and ways of thinking about social problems.
5. The distinction between politics and policy is but one of a series of dichotomous differentiations which are presumed within and regarded as existing prior and external to the tenets of liberal social theory. For one of the earliest discussions of such distinctions, see K. Marx, "On The Jewish Question" (1964)

(public/private distinction); For a discussion of the distinction between reason and will, see T. Adorno and M. Horkheimer (1972); H. Marcuse (1954); R. Unger (1975). For a discussion of the role of binary oppositions in the cognitive structure of American legal thought, see Gary Peller (1985) and Boyle (1985).

6. The substitution of procedural solutions for substantive questions is yet another distinctive characteristic of western liberalism. In twentieth century American jurisprudence, the "legal process materials" of Henry Hart and Albert Sacks (1958) exemplify the penchant for institutionalizing procedural solutions as a means of mediating substantive debate. Hart and Sacks argue that the best way to understand law is to separate the substantive content of social arrangements from the procedures for settling disputes about those arrangements. They contend that the processes for resolving disputes are separate from and "more fundamental" than disagreement about the content of social arrangements "since they are at once the source of the substantive arrangements and the indispensible means for making them work effectively" (1958: 5). The emphasis upon process and dispute settlement as the foundation of liberal institutions encourages a relatively benign view of the status quo because it is clearly preferable to the theorized alternative: the violence and insecurity of "the state of nature".
7. Enlightenment confidence that justice would materialize from the free exercise of private ambition rested upon three commanding assumptions. First, man [sic] was fundamentally rational, behaved reasonably, and was morally governed by right reason. Second, the human world was circumscribed by a potent and often hostile nature which limited individual capacity for good or evil. Third, if the consequences of individual ambitions were restrained by God-given conscience or nature, a well-designed constitutional order would similarly confine the collective public consequences. Thus a fortuitous blend of natural phenomenon and careful constitutional drafting would both enable and secure ultimate justice: the free play of individual will. In this conception, individual free will is both the goal and the means of political life, simultaneously substance and process.
8. The mechanical metaphor has played a prominent role in liberal social, political, and legal theory. References to mechanical jurisprudence provide a taking off point for much contemporary work on judging. More classic and encompassing use of mechanical metaphors are found in Durkheim (1964) and Rush (1947).
9. While the avoidance of the larger, ultimate questions of politics is for some, like Boorstin (1953), the genius of the American political system, it is for others a source of profound discomfort and criticism. See, Wolff, 1965, 1968; Moore, 1965; Marcuse, 1965; Connolly, 1967; Beard, 1925; Parenti, 1978; Mills, 1959; Domhoff, 1967.
10. In the context of our argument, Hartz offers a telling and useful illustration by observing that "the extraordinary power of judicial review would be inconceivable without the national acceptance of the Lockean creed, ultimately enshrined in the Constitution, since the removal of high policy to the realm of adjudication implies a prior recognition of the principles to be legally interpreted" (1955: 9). Similarly we argue, by addressing the agenda concerns of policy elites, sociolegal scholars ally themselves with the goals and assumptions of liberal legalism, in particular with liberalism's remove from active challenge and criticism of the substantive goals of public policies.
11. A critical feature of liberal discourse is the characterization of moral and political arguments as resting upon incommensurate principles, and thus unresolvable differences. From this perspective, political discourse is about values which are emotional and non-verifiable. The substitution of procedural, algorythmic formulations for substantive moral and political differences (See fn

6 above) is seen as a way of preventing the degeneration of political discourse into nihilism or solipsistic relativism. See for example, MacIntyre, 1981.

12. As Kant (1949: 132) put it, "Enlightenment is man's exodus from his self-incurred tutelage. Tutelage is the inability to use one's understanding without the guidance of another person. This tutelage is self-incurred if its cause lies not in any weakness of understanding, but in indecision and lack of courage to use the mind without the guidance of another. Dare to know."
13. Descartes (1958: 130–131), often thought to be an exponent of abstract, pure reason, saw the Enlightenment as making possible "A practical philosophy, by means of which, knowing the force and the actions of fire, water, of the stars, of the heavens . . . we may . . . employ them in all the uses for which they are suited, thus rendering ourselves the masters and possessors of nature."
14. This argument was pointed out to us by Craig McEwen.
15. In suggesting that the silence about, and denial of, politics characteristic of policy research draws upon the intellectual resources of Enlightenment liberalism, its effort to separate politics and policy and its faith in reason and science, we need, at the same time, to recognize repeated challenges from socio-legal scholars to this intellectual hegemony. Within the empirical tradition generally, and legal studies specifically, there have been competing epistemologies and alternative political strategies. Some have continually opposed state power (e.g. Cain, 1974, 1980; Hunt, 1980, 1985; Beirne, 1975; Beirne and Quinnely, 1982; Abel, 1982; Harrington, 1985); others, though seemingly less oppositional, have despaired of the rationalizing project of modernity to which science has been lent (Trubek, 1985 and 1986; Weber, 1949, 1958; G. Marx and Reichman, 1984). Some pursue historical research on subjects and in places often overlooked in mainstream work, providing data and interpretations which challenge conventional legal thinking (Munger, 1981). And still others have sought to maintain their opposition to hierarchy and oppression but have done so by distancing themselves from the empirical strand of sociolegal studies (Kelman, 1984; but see Munger and Serron, 1984). We need constantly to remind ourselves of the viability of these competing perspectives even as we recognize that the success of political liberalism has been its ability to welcome its adversaries, and in the process weaken them by this tolerance (cf. Wolff, Moore and Marcuse, 1965).
16. One of the clearest statements of the formalist position in legal thought is found in Zane (1918). Zane (1918: 338) argues that "Every judicial act resulting in a judgment consists of a pure deduction."
17. It is important to stress that realism was an historical phenomenon more than an analytical legal theory or organized political movement. Grant Gilmore (1961) characterized its historical significance as the "academic formulation of a crisis through which our legal system passed during the first half of this century". Twining (1973: 78) writes that Llewellyn was "emphatic that there was no school or group of realists, sharing a single credo or pursuing a single programme. Rather there was an amorphous movement." (See Llewellyn, 1962: 53, 74; 1960, appendix B). In "Some Realism About Realism", for example, Llewellyn (1931) tried to explore whether it was at all possible to generalize about realism. Hunt (1978) suggests that some of the variety within realism was due to the fact that its proponents were eagerly and actively incorporating the methods and perspectives from a variety of fields and disciplines. Sometimes described as a way station between sociological jurisprudence and contemporary sociology of law, legal realism was, according to Hunt, distinctly modern in the degree to which it "took cognizance of contemporary developments in other fields of human learning. These influences were by no means uniform some exponents being more influenced than others and some being influenced by different

aspects of contemporary scholarship. The differences that existed among the Realists themselves can largely be accounted for in terms of the differential impact of other stands of inquiry." (Hunt, 1978: 43). Laura Kalman (1986) emphasizes, however, that the realists' embrace of social science was not only uneven but highly eclectic.

For the most part, the twenty to thirty men who were, at various times, labelled realists (see Twining, 1973; Purcell, 1973) didn't see themselves as a group until they differed over the construction of a new curriculum and appointment of a Dean at Columbia Law School, (see Twining, 1973), and were attacked two years later by Pound in the Harvard Law Review (1931). Thus our description of realism as consisting of intellectual wings and political positions is not meant to suggest any such self-identification by realists, or the possibility of putting individuals into separate camps, but rather to suggest the range of positions and insights which the movement made available.

18. William Cain, Professor of English at Wellesley College, describes deconstruction as "a form of literary/philosophical critique that emerged in the mid-1960s and 1970s. Its leading proponent in France was, and remains, Jacques Derrida; important advocates in America include J. Hillis Miller and the late Paul de Man. Deconstruction is a literary and philosophical position that highlights the radical instability of language; we can never know, finally, what a text 'means' because the language of that text will never stabilize itself, that is, it will never 'sit still long enough' for us as interpreters to gain control over it and master its multiple, and contradictory, meanings. To be sure, readers could, and usually do, 'say' what a text means, but deconstruction can always demonstrate that what the reader has said is partial, incomplete, inadequate; it is unfaithful to the endlessly subversive power of language. A text will always mean more than we say it means. This vision of the 'indeterminacy' of language suggests that interpretation can never come to an end."

Deconstruction, like the tradition of philosophical skepticism which it recalls, questions all that we take for granted about language, experience and 'natural' systems of human communication. It is a process, or discourse, in which all claims, philosophic, literary, or scientific, are "open to rhetorical questioning, or deconstruction." (Norris, 1982: 21) By demonstrating the incoherence of ideas and concepts, deconstruction attacks efforts to systematize, differentiate, and structure ideas, writing, communication. For deconstruction, all privilege is challenged, all priorities reordered, or more accurately disordered, through creative relationships between reader and text. Thus, deconstruction not only redistributes traditional distinctions in the relationships between philosophy and literature (suggesting that literature turns out to be the kind of truth to which philosophy aspires), it subverts claims of authority in the relationship between author and text.

Close connections are evident between deconstruction and contemporary philosophical and sociological theory which argues that all language, all thought, all categorization ends up "in a hermeneutic circle," (C. Taylor, 1985) in an infinite sequence of signifiers, each set within a socially created context and grammar. For social science, both the objects of investigation—the web of language, symbol, and institutions that constitute culture—and the tools by which investigation is carried out share inextricably the same pervasive context that is the human social world. The investigator is both the subject and object of investigation, at once producing and investigating her production. We cannot get outside our own creations, echoing Derrida's much quoted phrase, 'Il n'y a pas de hors-texte' ('There is nothing outside the text").

Finally, deconstruction is a story about the rhetorical construction of social worlds, institutionalized through privileged texts and categories of writing:

philosophy, literature, science, etc. Deconstruction exposes the faulty edifice which cloaks scientific and literary attempts to grasp hold of a foundation external to this process of writing or textuality. Derrida challenges "the 'nature' which Rousseau identified with pure unmediated speech, and Levi-Strauss with the dawn of tribal awareness," claiming that it "betrays a nostalgic mystique of presence which ignores the self-alienating character of all social existence" (Norris, 1982: 40; see also, Culler, 1982; Felperin, 1985).

Peller argues that one strand of legal realism reflected an epistemology consistent with contemporary deconstruction. "It is this strand of realism that . . . was dismissed in mainstream legal discourse as nihilistic, morally relativistic, and nominalist. It is this same strand which supports the claim of critical legal studies practitioners that they are heirs of realism. This critical realism focused upon indeterminacy, contingency, and contradiction to debunk" (Peller, 1985: 1222) both the claims of liberty of contract discourse and the notion of a private sphere constructed independently of a public sphere of action and knowledge. Here, realism focused upon the circularity—incoherence—of legal reasoning.

19. Morton White writes in *Social Thought in America: The Revolt Against Formalism* (1947, 1957 ed: 16) that what Holmes was rejecting was simple, traditional syllogistic logic. He was unfamiliar with either the idealistic logics or mathematical corrections on syllogistic logic that were appearing in the latter nineteenth century. "No enrichment of syllogistic logic in the modern manner would have changed the situation for Holmes' purposes. It was simply his conviction that deductive logic did not suffice, no matter how enriched. Holmes was not about to give a list of legal axioms in the manner of Euclid and promptly deduce theorems with the help of logic. If this had been his sole purpose, logic would have been the sole tool necessary in addition to the legal principles expressed in his axioms."
20. Llewellyn wrote in a book review in the Harvard Law Review (1926: 145) "Mortgage is a legal concept; that concept, in all its phases, is important. Mortgage is also a security device. That fact, in all its phases, is even more important. The legal concept is empty, without its application." In "On What is Wrong with So-Called Legal Education," (1935: 669), he wrote "Legal rules mean, of themselves, next to nothing. They are verbal formulae, partly conveying a wished-for direction and ideal. But they are, to law students, empty."
21. For example, Wesley Sturges wrote that the "attempt to report synoptically on the total nature of 'the mortgage', to set forth a conceptual entirety of 'the mortgage,' is the technique of the metaphysicians" (Sturges and Clark, 1928: 701). Edwin Patterson claimed that what united the realists was a common "distrust of the 'king parameter,' the grand unifying principle whose cavernous words only echo the voice crying for guidance" (1933: 425).
22. For extended discussion of the varieties of intellectual vision and legal realism, see Hunt, 1978; and Purcell, 1973. Indeed, the vision of society adopted by some of the most vocal realists—a society populated by utilitarian, economic man operating in a world of scarcity—was being supplanted in most of the social sciences of the day. Llewellyn claimed that, "Law operates under the principle of scarcity. The energy available for social regulation at any time and place is limited. . . . Because of this fact, control by law takes on the aspect of engineering. We require . . . to invent such machinery as, with least waste, least cost, and least unwanted by-products, will give most nearly the desired result." (1925: 666) Llewellyn, one form of whose fundamental social vision is expressed in the quote above, and Frank, are reported to have been greatly influenced by William Graham Sumner, the social Darwinist. Hunt writes, however, that

(1978: 47) "It is significant that in the other social sciences the social Darwinist legacy was already being discarded whilst among lawyers turning towards the social sciences this should still have a substantial influence." The predominance in realism of a utilitarian and functionalist conception of man competing in a world of scarcity may account for the fact that contemporary law and economics also traces its roots to legal realism. The argument and examples in the next two paragraphs are drawn primarily from Purcell, 1973.

23. In *The Logic of Modern Physics* (1927: 5) Percy W. Bridgman defined a concept as "nothing more than a set of operations". If a "concept is synonymous with the corresponding set of operations", then the concept of length is defined in terms of an activity performed with a yardstick.
24. In legal matters, the concrete thing was the case, and the actual behavior of legal actors. Thus Llewellyn wrote that a realistic study of the law demanded attention to the degrees to which legal rules actually controlled or influenced the disposition of cases, and "you cannot generalize about this, without investigation." If men were ever to understand the legal system, they would have to study individual cases empirically because "the significance of a particular rule will appear only after the investigation of the vital, focal phenomenon: the behavior" (1930: 444).
25. W. W. Cook wrote, "Underlying any scientific study of the law, it is submitted, will lie one fundamental postulate, viz., that human laws are devices, tools which society uses as one of its methods to regulate human conduct and to promote those types of it which are regarded as desirable. If so, it follows that the worth or value of a given rule of law can be determined only by finding out how it works, that is, by ascertaining so far as that can be done, whether it promotes or retards the attainment of desired ends. If this is to be done, quite clearly we must know what at any given period these ends are and also whether the means selected, the given rules of law, are indeed adapted to securing them." (1927: 232)
26. Some realists, for example Cook, Moore and Nelles explicitly rejected the possibility of moral absolutes. Cook (1927: 305) maintained that human knowledge had "reached the era of relativity". Moore (1923: 612) had written that "Ultimates are phantoms drifting upon the stream of day dreams"; and Walter Nelles declared (1933: 767) "I deny ethic, right and ought without qualification".
27. Pound characterized the belief in value neutral research, in one of the most celebrated criticisms of realism, as an effort to express "fidelity to nature [and to provide] accurate recordings of things as they are as contrasted with things as they are imagined to be" (Pound, 1931: 697).
28. To a great degree, the energy of the realist movement, so bent upon immediate social reform, was absorbed by their preoccupation with facts and data collection. For the empiricist wing of the realists, factual data seemed a sufficient condition, rather than merely a necessary condition for the development of a social science. (cf Hunt, 1978: 55)
29. Peller (1985: 1225) suggests that the constructivist wing of the realists did not emphasize the deconstruction and debunking of the classical legal discourse; they "simply . . . reversed the temporal metaphor"; the dichotomy between public private was maintained but now gave priority to the public over the private. "Accordingly, each of the . . . metaphors" characterizing classical legal doctrine, "was reordered to reflect this flip in the determinate ground for legal discourse from subjective intent to objective context".
30. Purcell suggests that the rise of sociological jurisprudence and legal realism is partially accounted for by the development of the professional law school. "The very idea of a professional teacher of law suggested the role of a specialized

expert capable of objectively evaluating the social consequences of legal institutions. The general problem of professional identity, acute for lawyers newly separated from practice, made self-definition in terms of the scientific method an obvious resource." (Purcell, 1973: 78; cf. Auerbach, 1976). Twining (1973) also describes the realist movement as a response to the internal development and divisions within three law schools in particular, Harvard, Yale and Columbia. He emphasizes the reaction against the idealism of Langdell and Beale and the efforts to develop a practical curriculum at Columbia as breeding grounds for the realists' self-identification and attack on formalism. And Laura Kalman (1986: 46) writes that unlike sociological jurisprudence which dreamed of changing legal thought, the realists tried to change legal education.

31. "The proposition that every event has a cause is sometimes referred to as the principle of determinism. And this principle of determinism may, perhaps, be re-expressed . . . by saying that every event e of a kind E is a case of an event of some other kind, every instance of which is a case of an instance of E. In this formula, the expression 'is a case of' is intended to imply no more than that if an event of the one kind occurs an event of the other kind occurs also." (Ayer, 1958: 179–180) For a discussion of determinism in sociolegal studies see (Trubek and Esser 1987; Trubek, 1984).

32. It is worth noting that fascination with the law school as a strategic location for organizing sociolegal scholarship did not end with the realists. Both the attraction of the law school and the sense of loss or exclusion which many law and society scholars feel when they survey the current status of sociolegal research within the legal academy are most evident in Friedman's (1986) recent essay. After praising the accomplishments of the law and society movement, Friedman turns to what he calls "a less sanguine side of the story" (1986: 773). He suggests that sociolegal scholarship "has been trying to shoehorn its way into law schools for more than 60 years" (1986: 773) but that it remains "something of a stepchild in the law school world" (1986: 773). Not only is law and society a "stepchild," "neglected" and unwelcome in the law school, but despite its "solid accomplishments" and "strong work" (1986: 773), it is a something of a failure, unable to "capture" (1986: 774) the law schools.

As Friedman explores the relation between law and society research and legal education, the problem becomes one of explaining "neglect in the law schools" which is a source, for him, of lost hopes and disappointed expectations (1986: 774). Why, Friedman asks, are they neglecting us? He suggests good reasons for the law school's rejection of law and society research; empirical work is hard, tedious, lacks the prestige of "exalted 'theory'," and is generally "uncomfortable," "threatening" and fearsome (1986: 774). Moreover, the emphasis on political and economic behavior implies less "reverence for the causal force of purely intellectual forces—the role of legal thinkers, formal doctrine, philosophy and theory of law . . ." (1986: 775). Sociolegal research simply does not sufficiently privilege legal academicians and thus is rejected by them, according to Friedman. However, hopes and expectations of influence in the law schools die hard; the problem is still one of not being welcomed or allowed in. Friedman and many in the law and society community (see for example Monahan and Walker, 1985) still imagine themselves "outside the law schools, pressing his nose against the glass . . . most definitely a wallflower at the ball" (1986: 778).

What makes Friedman's lost hopes and disappointed expectations more painful, and these explanations somewhat less plausible and compelling, is that law schools, while neglecting sociolegal research, have eagerly embraced law and economics. Are we to assume that economics is less taxing, less threatening, less fearsome and more comfortable than sociology or psychology? Surely

economics does not revere the "causal force of purely intellectual forces" any more than its sister social sciences. No, the reason why law and society work is neglected and law and economics embraced is far simpler and more direct; economics is perceived to be useful.

Because "lawyers are inveterate problem-solvers," (Friedman, 1986: 775) they find "the better or more elaborate problem-solving methods" (1986: 776) of economics more attractive than law and society research. Economics provides guides for action, decision rules and policy advice, and is able to "produce answers, right or wrong" (1986: 775), that judges and lawmakers require to settle issues and cases. Although Friedman argues that "the law and society movement has abandoned *most* of its problemsolving emphasis," he insists that its "relevant insights" have "practical" value. (1986: 776) "It simply has to be true that policymaking is better off when it is based on a sophisticated understanding of the way the legal system actually works and *why* it works that way—better, more just, and, yes, more efficient than policy-making based on neo-Langellian logic or on some purely abstract 'theory' or 'model' hatched in a booklined office and full of simplifying assumptions."

Thus, Friedman claims that the "marginality" (1986: 777) of the social sciences within the law schools, comes at a price. Sociolegal scholars are excluded from the law schools where practical legal problems are most intensely addressed even though, in Friedman's eyes, we deserve to be included. But when admitted, the social sciences are either "elegant frills" (1986: 777) or used for expert social information in support of litigation. "All this, however, is peripheral to the law and society movement, just as forensic medicine is peripheral to the sociology of medicine" (1986: 777), because law and society offers a sociology of law, not social science for or in law.

Others outside the sociolegal tradition continue to hold out the hope of creating a more welcoming law school environment, that is, continuing and renewing the realist project of reforming the law school. Derek Bok's (1983) now rather well known critique of legal education is perhaps the most prominent example of such a contemporary vision of legal education informed by social science of law (cf. Goldstein, 1967). Bok, in words strikingly reminiscent of Lasswell and McDougal, encourages the view that social science should address itself to the problem of informing policy makers and warns (1983: 45) that, in the absence of social science knowledge, law schools will not be able to generate sensible, sound policy advice. "Our limited knowledge," Bok argues, "seriously inhibits efforts to increase efficiency and access in the legal system. It is useless to create arbitration panels and mediation services if no one troubles to test their performances against predetermined criteria. It is reckless to offer proposals to ease congestion in the courts if even the proponents cannot tell whether such measures will achieve their goal or simply evoke more litigation. Worst of all, it will be impossible even to develop more sensible theories of the appropriate role of law if we do not make greater efforts to examine the effects of laws we already have." Bok goes on to argue that, "law schools have done surprisingly little to seek the knowledge that the legal system requires," and to warn that "we ignore the social sciences at our peril. . . ." (1983: 45)

While Bok and others continue the realist quest for a broadened vision of legal education and a strategic position for law schools, some within the law and society community have begun to worry, not that the quest has been unsuccessful but, that it has been damaging to the sociolegal enterprise. As David Trubek (1985: 484–485) has recently argued, "If we look at the history of the legal studies movement, the law schools have been the problem, not the solution. There have been tension and conflicts between law schools which are primarily institutions for education in the practice of a profession—and the

dream of a legal studies enterprise that can provide to the entire community information about the history, meaning and impact of law. The point is that until we think about this activity as going beyond the mission of legal education, we will not realize the full potential of the legal studies movement."

Despite such pleas we are a long way from freeing ourselves from the pull of the law school and from overcoming the sense of neglect or rejection which many feel when they confront the legal academy.

33. This view is rejected by critical legal scholars who seek to use law schools for other purposes.
34. Their effort to rebuild the law schools was less obviously successful. The re-examination of the Columbia Law School curriculum, undertaken in 1926 by the entire faculty but largely shaped by Oliphant, is often regarded as "the most comprehensive and searching investigation of law school objectives and methods" (Currie, 1951: 333; Twining, 1973; Goebel, 1955). The result was a new curriculum designed along functional rather than conceptual lines, and a plan for the creation of a research school alongside or within the law school. Although these schemes were ultimately not instituted, the designs reflected not only compromise between competing visions of the law school, as a center for professional training versus a center for research about law but a more general agreement and "sympathy with the approach to law that had been made popular at a general level by Holmes and Pound" and a "serious effort to work out rigorously and in detail the implications of a sociological jurisprudence for law school activities" (Twining, 1973: 30). The plans for the new curriculum and research institute at Columbia floundered when President Butler appointed Young B. Smith, instead of Herman Oliphant, to be Dean of Columbia Law School. Although Young and Oliphant had been able to find grounds of agreement and compromise in the curriculum project, Young was a strong proponent of the professional training obligations of the law school, while Oliphant was one of the most emphatic, and positivistic, of the realists who sought in the law school a place for fundamental research on law as an aspect of social organization. As a result of the split on the faculty between supporters of Young and Oliphant, several faculty members resigned. Oliphant, Yntema, and the economist Marshall joined Cook at Johns Hopkins; William Douglas went to Yale and was soon joined by Underhill Moore. Thus the fall out from the Columbia split moved the realist project further into other institutions.
35. It is common practice in law schools today to announce that 'we are all realists after all'.
36. As Peller (1985: 1226) argues,

> This . . . strand [of legal realism] was less threatening to the legal world because its implication of a determinate, objective discourse for the representation of social life was amenable to the notion of a neutral and determinate rule of law. Under this conception, determinacy existed in consequences rather than antecedents. Objective consequentialist analysis it was imagined, could ground law as an instrumentalist discourse which could carry out purposes and policies provided by elective bodies or made apparent by the social field itself. Law was 'political' . . . but 'politics' itself was retranslated from the notion of wide open, subjective ideology to closed, determinate issues of technique. Stability could be found in the science of consequences.

37. There seems to be a consistent logical-cognitive (syllogistic) structure in a wide range of legal and political analyses that includes a major and a minor premise and a conclusion. The major premise (e.g. the ultimate questions of justice and politics, the goal to be achieved in some policy analysis, the specification of a policy problem to which research is addressed, or the general principle of law which is to govern a particular case) is rarely questioned, while the minor premise becomes the subject of inquiry and the basis from applying the general

premise to a conclusion. This persistent dominance of the syllogistic model is notable in light of the development of non-euclidean logics and the concomitant challenge to deductive and absolutist philosophies in both the physical and social sciences in the early twentieth century (see Purcell, 1973). In legal scholarship, it seems to suggest an enduring attraction of the logic of formalism despite the successive claims of its demise (See White, 1947, 1957 ed.). Legal formalism rested upon the model of the judge reasoning syllogistically from rules and precedents through the particular facts of a case to a clear, unambiguous, authoritative decision. "The function of the judge was to discover analytically the proper rules and precedents involved and to apply them to the case as first premises. Once he had done that, the judge could decide the case with certainty and uniformity" (Purcell, 1973: 75). The model of policy analysis described above repeats the same logical structure. One can also perceive the same logical model at work in some contemporary sociolegal research described as 'gap' studies (Feeley, 1976; Abel, 1980; Nelken, 1981; Sarat, 1985). Here, research assumes without serious challenge the first premise (the law or policy whose effect is to be studied) and then proceeds to empirically examine the second premise (behavior engendered by that legal rule). The conclusion of the research documents or challenges the existence of a 'gap' between law on the books and the law in action.

38. Indeed, in the Commonwealth of Massachusetts, consumer protection legislation was repeatedly amended in response to evidence of enforcement difficulties. Although Chapter 93A was first enacted in 1967, it was amended in 1969, 1972, and again in 1979. Several causes of action and expanded categories of plaintiffs were added.
39. This also suggests that the relationship between so-called neutral standards and social inequality, substantiated in many studies in the law and society tradition including ones by Macaulay, Blumberg and others discussed in this paper, had not been understood or recognized before this legislation was designed and promoted.
40. For another effort to assess the consequences of divorce reform see Jacob (1986). Jacob's work employs a nation wide data base. His conclusions are much more cautious and qualified than are Weitzman's.
41. Yet, not anyone who does sociolegal research seeks as an audience those who make or administer the law; there are several prominent examples and arguments to the contrary. (See Black, 1976; Friedman, 1986) Indeed Lawrence Friedman has recently argued (1986: 776) that "the law and society movement has abandoned MOST of its problem-solving emphasis. What it has is, first of all, a hunger to describe and explain, more or less divorced from problemsolving in its crudest sense". There is, of course, considerable plasticity in Friedman's use of the word "most." Indeed Friedman himself reveals some ambivalence toward abandoning a policy focus when he refers (1986: 777) to the "happy position of economics" in the study of law. And why is economics in such a happy position? Because, Friedman tells us, "judges and administrators [may come to] actually USE economics to solve legal problems" (1986: 777). This reading of Friedman suggests that law and society would be in a position as advantaged and happy as economics if judges and administrators sought answers for their problems in our research. It seems that for Friedman too, despite what he sees as a shift in the orientation of the field, policy-makers offer an attractive audience. Thus we share with William Simon, whose views are quoted in a long footnote in the Friedman article (1986: 778), the view that "the aspiration to produce policy-relevant studies concerning the efficacy of the various activities of the regulatory welfare state" is still an important part of the law and society enterprise. Indeed the very focus of this symposium suggests that

we have not given up on our concern for practical policy and our devoted, albeit perhaps modest, address to the policy audience.

42. We gave into the temptations of normal science and conducted a content analysis of volumes 17/1 (1983) through 20/3 (1986) of *Law and Society Review*. We read and coded all published articles (excluding research notes) to determine whether the author(s) addressed a policy audience. Insofar as the authors(s) suggested practical uses of the research or included recommendations, suggestions or cautions as to its applicability in a public arena, we coded it as addressing a policy audience. Further, if the research began or ended with a claim of relevance for public policy—irrespective of its remoteness, if it examined the effectiveness or viability of a public policy, or the impact of a policy, we included it as an example. Finally, language which referred to problems of administration and management, or the ability of legal actors to achieve stated goals suggested an address to a policy audience. Out of the sixty nine articles coded, thirty addressed themselves to that audience.
43. This conception of the role of science in providing knowledge that is useful in making choices between alternative courses of action is one which some who are critical of positivism also adopt. See, for example, Whitford (1986: 773). Whitford argues that ". . . empirical work is worth doing if it helps me to be a little more comfortable in my guesses about what strategies will be most effective in achieving desired ends, or what ends will seem satisfactory once achieved. And it has been my experience that empirical observation has helped in that respect."
44. This way of reading Feeley, this suggestion that authors of sociolegal scholarship implicate themselves and their own position by reference to the theories or descriptions they provide, may seem somewhat at odds with conventions of reading in social science. Our readings in this paper have been very much influenced, and tutored, by deconstruction and deconstructive readings of texts in literature and in the social sciences. (For a particularly interesting illustration of deconstruction applied in the social sciences see Ryan, 1983.) Our argument here is that the properties of malleability which Feeley attributes to the outside world of fact gathering and presentation inevitably rebound upon any effort to systematically address the nature of those properties. Deconstruction suggests that no "scientific" theory can fully secure a boundary between its own discourse and its alleged object. Feeley's theory is at once an explanation for, and site of, the very malleability which it describes. This same kind of argument has been used to explore the writings of Marx (see Parker, 1987), writings in which conflict plays a central role. For someone tutored by deconstruction the question which must be addressed to Marx is whether his theory can escape the very conflict it attempts to describe. "Can Marx, in other words, succeed in describing conflict without performing it inadvertently, or do his texts ultimately instantiate the very properties they would analyze? Does a place exist from which Marx can describe the dynamics of class struggle without, in the process, involving his own writings in a struggle of classification?" (Parker, 1987: 15–16) The answer that deconstruction would suggest is that Marx can't establish such a place; texts perform that which they seek to narrate.
45. Feeley does not use his insight to reflect back on his own work because it seems possible to exempt social science from his analysis of the malleability of facts; social science, unlike the adversary process, does not involve advocacy. It is our claim, and the argument of this paper, that there is more in common between social science and advocacy than has heretofore been acknowleged. Moreover, because the 'facts' describing courts, and legal practice, and the behavior of judges and enforcement agents, are malleable, the claim to difference is both a

self-fulfilling prophecy and a pretense which our aspirations to critical and empirical science impel us to unravel and deconstruct.

46. For two thousand years, western philosophy has been driven by the distinction between knowledge and opinion, appearance and reality, and consequently has been searching for ahistorical, universal Truth. Western philosophical discourse has sought to overcome opinion and appearance through objectivity. At its foundation, Rorty claims, "the desire for objectivity" is an attempt to connect with the nonhuman, to achieve a "God's eye view of things" (Rorty, 1982: 7), "to escape from history and put . . . closure upon human practices" (West, 1985: 264). Modern intellectuals and scholars, indeed all "modern" people—in the sense we often use the word modern to denote rational, empirical, and non-idealist persons (Berger, Berger and Kellner, 1973)—are heirs of this objectivist tradition. It "centers round the assumption that we must step outside our community long enough to examine it in the light of something which transcends it, namely that which it has in common with every other actual and possible human community." (Rorty, 1985: 4)

We recognize easily the elements of this tradition, and its twentieth century positivist representations. Here the tradition includes at least three critical elements: one, a categorization of statements as either empirical (factual), logical (mathematical necessity), or evaluative; two, an understanding that statements about physical objects refer to actual or possible sensations of things; and three, belief that "observational evidence is the criterion for cognitively meaningful sentences and hence the final court of appeal in determining valid theories about the world" (West, 1985: 260; cf. Hempel, 1965: 101–122; 173–226).

By the late nineteen fifties, this basic paradigm was under attack by efforts to refine and extend it. Taken together, the work of Quine (1960), Goodman (1951; 1972; 1978), and Sellars (1956) unsettled the foundations of analytical philosophy, opening the door for the re-discovery of and elaboration of American pragmatism. On the basis of what is regarded as exemplary philosophical inquiry, Quine replaced sentences or statements as the fundamental units of empirical significance; with systems of sentences or theories, arguing for a kind of epistemological holism. Goodman substituted "acceptable" verbal description for "accurate" pictorial depiction as the end and aim of philosophical constructions. He highlighted the theory-laden character of observation and relegated truth to the notion of fitness; in this, Goodman replaced the notion of a fixed world and unique truth with the notion of diverse, sometimes conflicting, truths about the world. Sellars challenged efforts to invoke self-justifying, theory-neutral, or noninferential elements of experience as foundations for knowledge claims and argued that knowledge begins, not with elementary particles of experience, but with the ability to justify or the capacity to use words. Since language is public and intersubjective, he claimed, any foundational elements of experience, any possible givens which purportedly ground knowledge, are actually matters of social practice.

In addition, the history of science as described by Kuhn, Quine, and Putnam, also conveys a message about competing conceptual schemes, shifting paradigms, and plural models of procedure and verification. It is not science, but "scientism," according to these writers, that claims unity, consistency of method, or objectivity; we should not assume that science and rationality are unified, nor should we assume that there is a single nature for all sciences to be about. In rejecting the notion that science can abstract a pure stream of sense experience, whose regularities are systematically described in terms of physical or scientific doctrine, these philosophers point out that the immediate,

unmediated experience of physical things does not, "of itself, cohere as an autonomous domain. References to physical things are largely what hold it together" (Quine, 1960: 2).

47. Putnam calls the heroic efforts of analytic philosophers such as Frege, Russell, Carnap, and the early Wittgenstein, to solve the problems of metaphysics "the most ingenious, profound, and technically brilliant constructions of metaphysical systems ever achieved." (1985: 29) Even as failures, "negative accomplishments," they set the stage for the developments of much contemporary philosophy.
48. The challenge to normal science is clear. There is a basic mistrust of the positivistic, "scientistic" notion that rationality inheres in the application of criteria, criteria derived from correspondence to fundamental, elementary particles of sensation or experience. After Kant made this correspondence theory of truth seem untenable, and Peirce seemed to turn correspondence into consensus within a hypothetical enduring community of inquirers, philosophers turned to the history of science and the organization of scientific communities for a surrogate model of rationality. For a contemporary version of this approach, see Fish (1980).
49. There is a similarity between the arguments we have been describing and the development of quatum mechanics in physical science. Quantum physics asserts that particles, or electrons, are describable only in terms of the experimental processes devised to observe those particles. Divergent experimental procedures may produce different "readings" or descriptions of the subject phenomenon, particle, or electron. Nevertheless, once observed, through any one of a number of experimental procedures, the observations are predictive. That is, different experiments will produce different readings; each of those readings turns out to be predictive. Note however that all the predictions are probabilities.

    David Easton offers a similar assessment of the utility of alternative approaches or theories of political analysis: ". . . each type of theoretical orientation brings to the surface a different set of problems, provides unique insights and emphases, and thereby makes it possible for alternative and even competing theories to be equally and simultaneously useful, although often for quite different purposes." (1965: 23)
50. Molotch and Boden, (1985) summarize sociologists' construction of the epistemology of normally competent members of society. People commonly assume the existence of an intersubjectively known, yet external and accessible, world in their "natural attitude" as competent members of society. (Schutz, 1970) The notion of "one single world," knowable by any competent person, is the "incorrigible assumption" of social life. (Pollner, 1975) Yet this assumption of objectivity and externality is inevitably belied by the practices which make interaction possible. The methods people actually use to make meanings and provide accounts are not products of objective or foundational elements, but "interpretive processes" (Cicourel, 1970: 139–40), which are themselves resources required by all people to participate in the processes of reality-making that sustains this presumption of objectivity. Thus, while people ordinarily behave and speak as if a world of facts was objectively "out there" and external to themselves, close analysis of the way individuals apprehend that world reveals their own collaborative social construction of those facts. (See, also, Gurwitsch, 1962: 50–72; Berger and Luckmann, 1966: 19–30; Garfinkel, 1967; Schutz, 1970: 72–76) Moreover, people solve this paradox by keeping tacit the actual procedures of discourse, leaving them "seen but unnoticed." (Garfinkel, 1967: 57). In this way, policy makers and citizens share a set of "practical ethics" by which we conspire not to hold one another accountable for impossible tests of objectivity in our conversation and accounts (Garfinkel, 1967: 74), and indeed

exercise power when we demand objectivity and deny social conventions and context necessary for making meanings.

51. John Griffiths (1986: 70) defines legal pluralism as, ". . . the theory of normative heterogeneity generally entailed by the fact that social space is normatively full rather than empty and of the complexity of the workings of norms entailed by such heterogenity."
52. For an interesting but somewhat different argument about the ways in which taking the policymaker's perspective misdirects social research, see Kolb and VanMaanen, 1985. They suggest that too much of the emphasis in policy studies is on the misuses of public policy without giving due regard to the perspective of the malfeasants, or to the fact that what is misuse to some is quite proper for others. While much social research talks about the perspective of the actor, and Kolb and VanMaanen indicate the errors of ignoring the actor's perspective, e.g. of ignoring situationally specific uses of public policies, the subject of social inquiry, they claim, is ofttimes confused, especially so in policy studies.
53. Law, at least in part, consists of historically and culturally developed activities regulating and legitimating the use of force in social groups. The notion of law as regulation, however, should not be overstated so as to ignore resistance to law and its inability to regulate. Llewellyn and Hoebel's succinct description of law in *The Cheyenne Way* (1941), begs that we recognize that "law exists also for the event of breach of law and has a major portion of its essence in the doing of something about such breach" (Chapter Two). For discussions of the relationship between law and force, see Max Weber (1954); Oliver Wendell Holmes, American Banana v. United Fruit Co. 213 U.S. 347, 356 (1908). There is a rich literature distinguishing law as a body of rules guaranteed by force and law as a body of rules about force. See Olivecrona, (1959: 134); Kelsen (1949: 25, 29); Ross (1958: 134). See also H. L. A. Hart (1961), for the view considering force or coercion to be a means for the realization of law rather than an essential feature of the concept of law itself. If, however, law is recognized not as a body of rules guaranteed by force, but as a body of rules about force or which regulate coercion, as has been argued by Kelsen, Olivecrona and Ross, a simplicity and elegance of formulation is achieved which seems to avoid recurrent problems of legal theory, and raises the notion of law as the regulation of force to exalted status. A most concise and persuasive argument for law as a system of rules about force is found in Noberto Bobbio (1965).
54. Robert Cover (1986: 1601) described the relationship between legal practices and violence in an article published in 1986, just after his death: "A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence."
55. Exploration of the visions of social life encoded in legal forms and legal practices provided much of the early energy in critical legal studies (Freeman, 1978; Klare, 1978; Gabel, 1982). Recently sociologists of law have begun to undertake similar investigations (Macaulay, 1987; Sarat and Felstiner, 1987).
56. This is the essential idea embodied in Gramsci's (1971) notion of hegemony.
57. Despite the difference between hegemonic law and normative social behavior there is much to be learned from studies of customary law or the order of associations, from research which ignores the connection between the normative and the legal or which assigns a privileged place to the former (for recent interesting examples see Engel, 1984 and Greenhouse, 1986). Ehrlich (1936), for example, pointed to the domain that lies below a threshold of active state

interest, and outside the professional's grasp, what he called the living law, the untroubled transactions in our daily relationships. He identified as the central core of legal life, the behaviors which lay behind the screen of legislation and decision but actually govern society although only periodically become enacted in formal rules. These norms define the taken-for-granted world of legal practices and legitimacy. Ehrlich pointed out what is commonly understood today, that a court trial is an exceptional occurrence in comparison to the innumerable contracts and transactions which are consummated in the daily life of the community. Because only small morsels of life come before officials charged with the adjudication of disputes, he argued that we must go beyond the "norms of organization" which originate in society and determine how actual behavior of the averge person is enmeshed in innumerable legal relations.

58. For examples of this tendency see Fineman, 1987; Balbus, 1973; Quinney, 1977; Abel, 1982.
59. It should be made clear, however, that although students of law and society, and policymakers, have taken an active interest in legal issues involving direct state intervention, long term interests of the state in legitimacy and reproduction have periodically generated interest in the diffuse spread of legal values and culture. See Sarat, 1977 and Kammen, 1986.

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