Learning and Values

There is a fundamental paradox for research that is traditionally described as "empirical". The ostensible purpose of this research is to learn something by observation. Yet, as both the American and the German authors emphasize, observation cannot be objective, or value free. There are two related problems that render all observation inherently value laden.

Description of the social world requires that we group discrete phenomena into categories that we believe, or are trained to believe, describe significant social happenings. In our language we describe these categories with a single word, and come to think of them as a single phenomenon, rather than the grouping of a discrete phenomena that could have been grouped in some other way. Thus, we talk of disputes, and we are trained to think of a marital spat and resistance by an enterprise of an environmental protection agency's order as related social phenomena. But we do not think of the question whether Ivan Lendl, Mats Wilander or Boris Becker is the world's best tennis player as related, because we are not trained to describe this as a "dispute". Consistently, the process by which the latter question gets resolved we call a "game" rather than "disputes processing". The categories we use today were created by our forbears, and they commonly reflect preferences about how society should be organized that were widely shared in the culture in which they were created. In Trubek and Esser's terminology, the categories of social behavior in use today in empirical research are at least partly a product of ideologies that have been dominant in relevant population subgroups.

A related problem has come to be called the problem of agency, which is much emphasized in the Trubek & Esser paper, where it becomes the basis of their principal criticism of the work of the Amherst group. Even though our thought is to a significant extent imprisoned by the set of social categories we have inherited, we retain the capacity to imagine new group-
ings of social phenomena. Hence, we retain the capacity to reject traditional understandings about who benefits from our existing social order and about the potentialities and means of changing that order. But these new understandings, acquired through imagination and through perception, are in part a function of the values and desires of the person imagining and/or perceiving (i.e., the agent). Existing social practices reflect an acceptance of the idea that individual values and desires can partly determine the understandings that person acquires through imagination and perception. Thus, in sporting events, as in legal trials, we seek officials who do not identify emotionally with either contestant, in part because we fear consciously biased judgment, but also because we understand that perception is affected by emotional attachment.

In sum, all observation is value laden for two very different reasons. One reason concerns the value laden character of the concepts, and ultimately all language, that we use to describe the social order, and is much emphasized by the structuralist philosophical tradition. The other reason stresses the impossibility of fully separating description from evaluation, and ultimately comes from our understanding of the self. Together these sources of non-objectivity are enough to invalidate what Trubek & Esser call "uniform scientism" - the idea so prevalent in recent western culture that through use of the "scientific method" we can learn truths about the nature of human society. Winter & Gessner seem to make the same point when they begin their paper with the statement that empirical research had long ago "lost the possibility of a naïve claim to objectivity".

Interestingly, neither paper takes what might seem to many readers to be the next logical step: advocating abandonment of observation as a research strategy in the face of its inherently value laden character. What reason do we have to believe that through observation we can learn anything that can not be learned from analysis of the values contained in the language and concepts we have inherited and our own personal goals and desires? It seems clear that the authors of both papers believe that, in spite of

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1 We can use this capacity to reject both capitalism and marxism, and this is what much of the literature in the "critical tradition" seeks to do.

2 A graphic, and tragic, recent example of this common understanding is the official explanation given for the shooting down of an Iranian passenger airliner by an American warship in the Persian Gulf. That explanation attributed the tragedy to a misunderstanding of images on a radar screen by American servicemen in battle for the first time and biased by the emotions of that circumstance to interpret the images as suggesting an attack on their ship that was in fact not occurring.

3 Though never with quite the specificity stated in the text, there are critiques of legal sociology by American critical legal scholars that come close to questioning the ability of empirical research to teach anything not learnable in other ways. See Kelman, Trashing, 36 Stan. L. Rev. 293 (1984); White, From Realism to Critical Studies: A Truncated Intellectual History, 40 Sw. L.J. 819 (1986).

4 Trubek and Esser, at note 31, very specifically deny any rejection of what they call "investigatory practices", which I presume includes observation. Their definition of "empiricism", text at note 33, seems to contemplate that what they call empirical research need not include observation, however.

I use the term, when it leads to understandings about the nature of the world that could not be deduced solely from preexisting understandings.

My case for observation rests on its ability to aid and abet transformative learning. There is no doubt that imagination and speculative thought are important and perhaps indispensable tools in acquiring transformative learning. Archimedes discovered his famous principle while contemplating. Observation alone would not have sufficed. But observation did precede the contemplation, and lent confidence to the product of the contemplation. Similarly, basketball and football coaches observe the play of their own and of other teams in learning what offenses will work best against different defenses. Another example, drawn from social research on law that will be familiar to most American legal scholars, is Stewart Macaulay's famous research on the contractual behavior of businessmen. Macaulay's direct observation of contractual behavior, as well as his interviews with businessmen engaged in contractual transactions, led him, and later the rest of us, to new understandings about the relationship between contract law and contractual relations. Winter & Gessner discuss a number of different empirical studies in Germany where I believe that observation allowed the authors to predict the future with greater confidence (e.g., with respect to the future effectiveness of environmental laws).

The case I have made for observation rests on acknowledgement of mental experiences that I have had, and believe others have had, that I believe have been useful in enabling me to predict the future more accurately. There is no way I can prove, according to the standards of validity normally professed by positivist social sciences, that observation has this utility. The value laden character of observation, as described earlier, would prevent any proof of my case, just as it prevents proof, in that positivistic sense, of any other proposition about the social order. But in asking for acknowledgement of the experience of learning through observation, I believe I am not asking for a leap of faith that is different in kind from what is required to accept the propositions with which this comment began concerning the value laden character of observation. How do we know that the goals and

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6 Sometimes learning is said to be transformative only if the learning results in discarding whole world views, or ideologies, in favor of others. But I have in mind as "transformative" even little insights as long as they are not logically compelled from pre-existing knowledge. The second part of this comment discusses whether little insights can qualify as "critical empiricism".

7 Archimedes' principle is that an object submerged in water displaces its volume regardless of the object's weight. I was told in my high school physics class that Archimedes arrived at the insight while in the bathtub, whereupon he jumped out, unclothed, and ran into the street shouting "Eureka, I have it!"


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Critical Empiricism: A Comment on Trubek & Esser, Winter & Gessner

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It is not my intention to take a position on a purely definitional issue, but I do want to disassociate myself from any implication that research not
defined as "critical" by these authors is less valid. All research, even non-empirical research, is value laden for the reasons discussed above. The "turn to interpretation" is not an escape from the values imbedded in the categories for describing behavior that we have inherited. The attempt to give voice to excluded interests, according to Winter & Gessner an activity advocated by some German legal sociologists, is just a form of interpretation. Absent the transformative experience, these received categories limit our ability to understand the goals and objectives desired and sought by some social group. And it should be self-evident that interpretive work does not avoid the problem of agency either. Thus, it is no more possible to state objectively the "true" viewpoint of some excluded group than it is to state objectively the "true" cause of some accident or environmental degradation.

The argument against policy-specific research, if one is to be made, must be based on an assessment of political tactics. Winter & Gessner offer several reasons why policy-specific research is more likely to advance the interests of the powerful than the powerless. By this view researchers have limited ability to shape the questions asked. If the researchers want their work to be used by policy-makers, they must address questions the policy-makers want answered. Nor can researchers control the interpretation of their results. To avoid cooptation by the powerful, according to this view, the only sound political strategy is to avoid research pointing towards specific policy goals, reserving one's energies for projects that can help mobilize demands for political change. Frequently such research will focus on delegitimizing the legal order as it presently functions, for example - to use the principal example suggested by Winter and Gessner - by demonstrating the law is often ineffective.

There is much sage advice to those on the political left in these warnings about the uses made of much policy-specific research. But it would be a mistake to understand such advice to represent universal political truth. In what we call western democracies, I believe it makes sense to use such terms as ruling classes and disadvantaged groups, but I also think that authority in these societies is not so hegemonic as to make impossible reform benefiting the constituencies that the left desires to serve. The welfare state reforms of the Twentieth Century, though far from perfect, are preferable to what preceded them. And because desirable reform is possible in these societies, policy-specific research can play a politically acceptable role in structuring such reform to be modestly more effective. It is possible for the researcher to be the coopter rather than the coopted. Not all circumstances will be amenable to progressive change, of course. For the critical researcher, there is no substitute for close attention to the political possibilities of the moment.

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12 This point is discussed extensively in Trubek & Esser, and is the basis on which they direct their strongest criticism at the work of the Amherst group. On the subjectivity of causation, see Kelman, The Necessary Myth of Objective Causation Judgments in Liberal Political Theory, 63 Chi.-Kent L. Rev. 579 (1987).
13 I reject the view, associated with some strains of the Marxist left, that by legitimating the existing order, the welfare state reforms have delayed the revolution that represents the only true hope for progressive change. I agree that the welfare state reforms have tended to legitimate the existing order, but I am not so confident that revolution, rather than a successful repression and further subordination of disadvantaged groups, would have been the consequence of a failure to adopt them. Nor is revolution always a more desirable alternative than incremental reform. Witness (insert whatever revolutionary society particularly appalls you - e.g., Iran).
14 Joel Handler's research on the American welfare system and Herman Goldstein's work on the American police seem to me examples of politically correct implementation research. Both scholars are intensely empirical, engaging in extensive observation. They have concentrated on studying and promoting successful reform experiments, and I suspect their work has helped these experiments to survive and perhaps even to expand. E.g., J. Handler, The Discretionary Decision (1980); H. Goldstein, Rehashing The Police Function: The Problem-Oriented Approach (forthcoming, 1989).