Realism and Its Consequences

John Brigham, University of Massachusetts - Amherst
Christine B. Harrington

Available at: https://works.bepress.com/john_brigham/5/
Realism and Its Consequences: An Inquiry into Contemporary Sociological Research

JOHN BRIGHAM
Department of Political Science, University of Massachusetts-Amherst, U.S.A.

CHRISTINE B. HARRINGTON
Department of Politics, New York University, NY, U.S.A.

Introduction

Socio-legal scholars, particularly in the United States, have understood law through a version of realism for some time. Realism in law has some of the same qualities as realism in philosophy. Both discount ideas in favor of action and see truth linked to the senses rather than reason (Putnam, 1987). At least since the 1930s, the view that judges and legal scholars are naive and trapped in a formal orientation to rules has grown progressively more influential until it may now be described as the framework of the legal establishment (Kalman, 1986). With its widespread acceptance for nearly 30 years, there has been remarkably little change in legal thinking beyond the initial insights of legal realism. In fact, one interesting paradox about legal realism today is that, although it is treated as a given by legal academics and social scientists, it is also continually advanced as a vanguard project (Peller, 1985). Another paradox about contemporary legal realism is apparent in the process by which it is reinvented. Realism manifests an essentially anti-law rhetoric while serving as the rationale for law-reform movements and as the basis of a modern legal orthodoxy. The process of reinvention and the role of realism in social research on law are what we wish to investigate.

In this article we examine socio-legal scholarship with an eye to the absence in the realist perspective of an account of the social and institutional sources of legal power. We suggest that this absence is because the institutional power of a legal community is, in part, linked to the continual assertion of “realism”. For instance, in the United States, evaluation of judicial appointments is circumscribed because it is dominated by consideration of professional qualification and authority on professional qualifications is conceded to the bar. An
of law students who want more practical teaching, enhanced protection of the legal monopoly (Provine, 1986: 30–34). These changes also led inevitably to the realist foundation for law.

Realism emerged out of this academic culture and became grounded in particular social scientific concerns such as the behavioural movement that dominated discussion of public institutions in the American academy after the Second World War (Stevens, 1983). The backdrop created by realists is not the Langdellian avant-garde, but an older formalism, a version of which derived from a romantic if not altogether accurate picture of English legal education (Stevens, 1983: 131). But, it is clear that this movement also stemmed from fascination with the social sciences on the part of Dean Roscoe Pound of the Harvard Law School and Karl Llewellyn of Columbia Law School (Stevens, 1983: 136; see also Kalman, 1986).

A propensity to place the informed present against the darkest past is a characteristic realist proposition [5]. American law professors who built the early foundations of legal realism in law schools, such as Jerome Frank, reflect this tendency. Frank’s *Law and the Modern Mind* (1930) elaborates the realist projects in terms of a distinction between law in the books and law in action (Llewellyn, 1931, 1951; Twining, 1973). Realism was an aspect of the social-scientific advance in the academy. It is the reflection in one community of the much larger characteristic of the western and, particularly, American experience of a world that must be known through science if it is to be “really” known. Although we will say little about the historic particulars articulated by Frank and the other American legal realists, we do want to note that the realism of these early figures was more tentative in that it left much of law’s symbolism intact, and hence it was more sophisticated than the realism we see in law schools today. In the end it seems plain, as some are beginning to note (Cooper, 1987), that legal realism is lawyer’s law and has become the self-conception of legal professionals [6].

The claim that American legal realism “simply ran itself into the sand” comes from the writings of law school professors (Schlegel, 1990). They maintain that proof of its demise is found in the tenure struggles at Ivy League and other elite law schools which pit the contemporary left against some tenured faculty. The realists always claimed to be outsiders. These struggles are the heart of Unger’s realism which builds on the loss of faith and seen in the established faculties a naive attachment to law. Yet, a characteristic of realism is its internal jurisprudential critique in American universities. Although they turn from the allure of the law, modern realists have stayed behind the professional pulpit.

A third aspect of realism as a system of authority is the indeterminacy critique characteristic of modern legal scholarship (Stanford Law Review, 1984; Carter, 1986). The critique says that law does not determine outcomes in court but interests and behaviour do. This indeterminacy has its philosophical bases in the relativism and pragmatism associated with some versions of contemporar y interpretive theory and these connections give realism more than just a contemporary ring, they make possible the continuing assertion that the realist project is new. Modern legal realism which seeks a more open legal landscape and freedom from the chains of “state law” in legal pluralism and the critique of privileged voices, reconstitutes political pluralism and a politics of interests in a realist jurisprudence.

For some time the limits of positivism, on which indeterminacy and realism rests, have been evident in social science (Winch, 1958; Bachrach & Baratz, 1962; Taylor, 1971) as they have in the natural sciences (Kuhn, 1962). One particularly important product of this critique is the non-positivist theory of relational power. Bachrach & Baratz, among others, responded to the positivist theories of human action, such as behavioralism which is based on the premise that interests and attitudes determined outcomes in politics. In the United States, awareness of this response to behavioralism makes it harder for some social scientists to accept the new indeterminacy and the bold assertion that realism is new stuff. While only recently has this perspective reached the law schools (Peller, 1983), in social research the tradition of responding to past scholarship has meant attention to the presumed primacy of politics in law for some time.

A division of labor thus leaves legal authority in the law schools and politics to other parts of the academy. The behavioral movement in social-scientific departments is an example. Social scientists have been less attentive to institutions because of their focus on behavior. The picture of institutions in socio-legal research is often the one provided by participants, lawyers and judges. Thus, Murphy & Pritchett (1986: 6) describe the legal realists as dissidents who “broke from the sociological school and mounted a fresh assault on the still highly orthodox declaratory theory”. One element of this description is the presence of formalism as the backdrop for realism. Another element is the explicit claim about the ability to predict the decisions judges are likely to make. Since prediction is based on behavior, the implication again is that law is indeterminate, a marginal social force.

One of the most striking characteristics of realism in law is the link between institutional and epistemological considerations. For example, “Holmes’s dictum” that the law is what the judge says it is, is institutional. He calls attention to the judge and the exhortation to take him as the source of law has become the convention. The realism associated with Frank, especially in *Courts on Trial* (1971), approaches law from the perspective of what “really” occurs. It is in this notion of the “reality” apart from formal law that the distinction between the law on the books and the law in action is embedded in a realist jurisprudence. Frank makes an epistemological claim, a claim about what determines the outcomes in cases before the bench. These poles are blended together in the jurisprudential practice of the law schools so that these institutions are supported by the realism of social scientific cynicism [7].

Socio-legal research has also developed a criticism of the positivist frame
and the distinction between law and reality. This distinction produces gap studies that are preoccupied with the difference between law in the books and law in action (Feeley, 1976; Harrington, 1982; Sarat, 1983). Recognition by socio-legal scholars that the gap perspective is a problem has straightened us out. Yet, the implications of the critique have not been fully established and thus social research on law has not gone far beyond the initial insights of realism. We will take up these issues for scholarship on high courts and ADR. Our purpose is to explore two arenas of social research that construct a realist view of law for understanding key institutional structures.

The Upper Courts: Scholarship and Authority

Realism, as the contemporary American paradigm that places the judge at the center of the law, has given the appellate courts in the United States immense power. The judge as authority, rather than law, is now something we take for granted. Constitutional doctrines announced by these courts, particularly the federal Courts of Appeal and the Supreme Court, have all but supplanted legal texts as sources of law (Brigham, 1987a). The realist phenomenon of the judges as the definitive source of the fundamental law in America is now as much a part of American life as commercial breaks on television. The result, for discourse on the Constitution in America, is that the courts and those with special access to the courts, the law faculties, have marginalised other authorities.

While the tradition of judicial centralism goes back at least to the early part of this century and is evident in the work of Corwin (1928), the source for modern, politically sophisticated attention to the Supreme Court is the work of Pritchett (1948). This work led to the legal manifestation of the "behavioral" revolution with its attention to the attitudes of judges set against the background of legal form. In behavioral research, scholars analysed judicial attitudes by organizing voting coalitions (Grossman & Tanehaus, 1969). The insight into political orientations of the judges has become commonplace in journalism as well as political science and it has reinforced a picture of legal text as naive formalism.

In addition to judicial behavioralism, realism in upper-court studies manifested itself in "impact" studies and the inquiry into backgrounds. In both cases, the realist perspective set the terms and the limits of the inquiry. In the first sense, impact treated the consequences of law in society as "real," the failure of doctrine to govern behaviors in the community. This construction of law was a story about the failure of law to change social attitudes about segregation, school prayer, and the treatment of criminal defendants. It was a tradition of distinguishing between the law in the books and the law in action. In the case of backgrounds, numerous scholars saw the prospects for realism in the relevance of characteristics like age, sex, and political orientation to the decisions of judges (Grossman & Tanehaus, 1969). Like the conception of behaviorism in general, the framework for background studies was never very complex and seldom accounted for professional training so that the prospects for demonstrating the significance of background was never fulfilled.

The tradition of realism in upper-court scholarship is synthesised in a recent book on the Supreme Court by O'Brien, the name of which, Storm Center (1986), reveals its perspective. Like Lewis' book Gideon's Trumpet (1964), which placed politics and the Court at the center of the legal process for the last generation, O'Brien describes the Supreme Court as the eye of the political storm in America. Like other recent commentaries which build on Lewis, O'Brien enlivens the internal dynamics of the institution with stories of the political influence wielded by Justices Black and Fortas over Presidents Roosevelt and Johnson. O'Brien extends the analysis of the political beyond the internal dynamics of judges in court to establish the Court even more firmly as the real center of legal politics in America.

Two recent books challenge this perspective and indirectly they support new inquiries into our legal policy process. Both Jacobsohn's The Supreme Court and the Decline of Constitutional Aspiration (1986) and Wolfe's The Rise of Modern Judicial Review (1986) see realism as the most recent manifestation of constitutional authority. They ask us to reflect on lost practices and, by implication, they suggest new forms of social research. For one thing, the books reflect a growing interest in institutional relations and interpretation as part of a constitutional structure (Murphy et al., 1986).

The thesis advanced by Wolfe is that the nature of judicial review has changed from the initial constitutional understanding of a limited role for judges to a more expansive power. Wolfe (1986: 3-4) describes the "rise" of modern judicial review in comparison with a traditional practice that characterized the period from the ratification of the Constitution until just after the Civil War. Wolfe describes the early practice as typified by "a distinctively judicial power, essentially different from legislative power", in which the modern notion of judicial supremacy was "unthinkable" (see also Agresto, 1984). This calls attention to a lost tradition of interpretation that predates the modern period.

Jacobsohn's (1986: 145) position is that the judiciary has lost its commitment "to what is permanent in our fundamental law" and with it, what he calls, our constitutional aspiration. And, of course, the larger consequence is that politics has lost this commitment as well, because political actors so often turn to the judiciary. Jacobsohn examines the past more self consciously than was characteristic of the behavioral tradition and the result is compelling, but this form of research falls somewhere between social science and political philosophy. There is poetic license and a utopian tone in his work. Roscoe Pound is compared to the Founding Fathers to distinguish between what Jacobsohn calls "community aspiration", a mood grounded in politics and characteristic of the realist perspective, and "constitutional aspiration", which is embodied in the language of the Constitution and said to be found in the
Founding generation as well as in the speeches of Martin Luther King. In this formulation, community is associated with sociological jurisprudence and constitutional is linked to limited government.

These scholars illuminate issues in American politics that social scientists immersed in a realist perspective have taken for granted. One issue is the locus of authority in constitutional interpretation. Jacobsohn, in devoting a chapter to "the dilemma of judicial finality" discusses the Human Life Bill by drawing on legislative discourse to show the authority of the Supreme Court in Congress. This work is a model for non-realist, maybe even un-realist, social research on how legal institutions structure social life and political discourse [8].

Realism, by undercutting the authority of the text, has made us cynical about the capacity of meanings to guide and constrain. A challenge to this perspective, now 30 years old, is behind the scholarship of Wolfe and Jacobsohn [9]. Wolfe's historical approach shows a change in practices and conceptions over time although he seems to be hoping that the 18th century can be recreated. For Jacobsohn, the portrayal of constitutional authority also has a historical dimension and his point is that something has been lost in the way the Constitution is treated. Yet the author gives the distinct impression that what we lost may be reclaimed by "aspiration", not a particularly scientific attitude. For social research, a new form of inquiry must be established.

There are also other examples of ideologies of authority in research on appellate courts that give them institutional power (Twiss, 1942; Jacobs, 1954; Brigham, 1987a). Back in 1912, Felix Frankfurter said "...there can be no denial that the technique of the brief in the Muller case has established itself through a series of decisions within the last few years which have caused not only change in decisions, but the much more vital change of method of approach to constitutional questions" (1912: 353). Yet, understanding the realist foundations for modern judicial authority in the United States has been put on hold for a time during the American bicentennial celebration.

During the bicentennial celebration for the Constitution in 1987, Americans were faced not only with ceremony and ritual but some dramatic constitutional events which seemed to the media of greater moment: the nomination of Robert Bork to the Supreme Court. President Reagan had the opportunity to appoint another justice to the Supreme Court, and we were told that the appointment "could tip the ideological balance on the Court and thereby shape the law for decades to come". We were also told, by those who report on our government, that this conservative legal scholar could, if he sat on the Supreme Court, hand down rulings which would read his own conservative judicial philosophy into the text of the Constitution. In effect, popular sovereignty under the Constitution has been supplanted with the sovereignty of a profession attentive to the Supreme Court. Most social scientists, like the journalists who work for the national papers, would rather see the lawyers on the Senate Judiciary Committee talk with a distinguished member of their profession about the Constitution than picnic with the people in Philadelphia or sit on the banks of the Delaware river and watch the fireworks with them, or listen to what they say the Constitution means.

But the power of the Supreme Court is much less stable, much more recent, and much more troubling than the realist perspective allows us to see. To the scholar Corwin, the stature of the Supreme Court came from the "higher law backgrounds of our Constitution" (1928). This was of course a new development because the Constitution had been written just a century before and for much of the 19th century those we have come to call "the Founders" were active political figures with reputations a bit short of their present status. However, by the early 20th century the aura of a priesthood was taking on such proportions that it became desirable to erect a Temple to house the Supreme Court. Once the grand edifice behind the Capitol had been constructed, the authority of the Constitution shifted from the document to the institution and the judges. Slowly and imperceptibly the protective robes emblematic of judicial power were replaced with the granite and marble structure symbolising the pinnacle of legal authority in the United States. Now conflicts at law are seen as moving toward the highest court in the oft quoted phrase that one is "going all the way to the Supreme Court".

Justice Robert Jackson said in Brown v. Allen (1953) of the Supreme Court on which he was serving at the time, that "we are not final because we are infallible, but we are infallible because we are final". The authority of the appellate courts is based on an idea of judicial distinctiveness and far more on the complex system of professional authority and hierarchy resting, for America, on a half century of realist jurisprudence. This system of authority is like the hierarchy of the Catholic church where priests, bishops, cardinals and the Pope are the authorities on doctrine. This differs markedly from a fundamental Protestant view like the one offered by former Attorney General Meese and the erstwhile nominee, Judge Robert Bork (Levinson, 1986).

In this sense, then, the struggle over Robert Bork was not only about another conservative on the Supreme Court, opposed by the American left, it also involved a struggle between two views of the Constitution. One view that sees the Constitution as a popular document open to widespread interpretation, and another view that sees it as a legal document open to only professional interpretation. Paradoxically, the left supported realism, and realism is aligned with the second interpretation. The victory over Bork was as much a victory for the realist view as it was for the left and realism as it is practiced in the United States is not very democratic at all.

Three consequences of legal realism from high-court studies may be suggested here and very similar consequences will subsequently be discussed in terms of alternative dispute resolution studies. The first is the overriding concern with policy making and, in particular, policy outcomes rather than the formation of political institutions. There was seldom an inquiry into the nature of state powers and only recently discussion of the relation of a behavioral
Examples of such work on lower courts abound and a few classics have served as models. Skolnick's book, *Justice Without Trial* (1966), characterizes plea bargaining as not only the norm in criminal courts but at odds with fundamental values of due process. Blumberg's (1967) essay on the practice of criminal law echoes this theme, characterizing the organizational pressures that lead to plea bargaining as a betrayal of constitutional due process. Packer's (1968) due process versus crime control models of criminal courts describe not just two different orientations in criminal law, but assert that due process rules are in opposition to the exercise of prosecutorial discretion. In all three studies, the underlying, if not expressed, point of view supports the normative values of legalism and calls for a closer alignment between police, defense counsel, and prosecutor behavior and constitutional rules. These conclusions result from a behavioral perspective on law that has directed numerous lower court studies.

The behavioral orientation is premised on the view that we can know law through the examination of the behavioral effects of law. If these effects differ from formal rules either the rules are not shaping behavior, as impact studies concluded, or the "reality" of law is different from the written word of the law. The perceived disjunction between rules and behavior has now become the commonsense view of lower courts rather than a shocking denial of justice. Tracing the sociology of knowledge about lower courts is not, however, our purpose. Rather, our point here is that as legal realism has become the institutional wisdom of social science, lower-court studies paid less attention to the commonsense understanding of law, that is the discrepancy between rules and behavior, and instead have turned towards descriptions and analyses of the rules of behavior. Much of the debate among sociologists of law has been confined to empirical descriptions of the "reality" of law and to whether or not rules of behavior exist in the experience of law. The behavior of bargaining in legal settings is now a major research enterprise, whereas previously, in the 1970s, lower-court studies described bargaining as "bureaucratic justice" and criticized it for not matching up to the promise of legal rules. Einstein & Jacob (1977) and Feeley (1979) analyze the structural and organizational factors that influence the behavior of bargaining in criminal courts. More recently, studies of civil litigation point to the pervasiveness of settlement, variation in settlement techniques, and the role of judges and lawyers in shaping settlement (Kritzer, 1982; Resnick, 1982; Brazil, 1984; Provine, 1987).

In the world of socio-legal research, plea bargaining and civil settlement are presented as "what goes on in courts", not just "what the courts do". Yet unlike the earlier studies, these works are less alarmed by the finding that informal bargaining is pervasive. One might conclude that informal bargaining is treated as the "reality" of law, if not a natural and inevitable phenomenon [10]. The shift from a description of law as "what courts do" to "what goes on in courts" also expands the scope of law as well as the subjects to be described.

Informalism and Alternative Dispute Resolution

Alternative dispute resolution has emerged from as well as helped construct a contemporary legal ideology called informalism (Abel, 1981; Harrington, 1985; Harrington & Merry, 1989). This ideology is not random or indeterminate. Rather it is socially constructed by a contemporary realist conception of legality. Contrasting "the law in the books" with "the law in action" is a well-known stamp of legal realism discussed above in terms of judicial behavior and impact studies. By juxtaposing formal definitions of law, such as constitutional due process protections for persons accused of crime, with the everyday operations of legal institutions, such as lower criminal courts, social scientists in the mid-1960s again revived the legal realists' proposition that there is a gap between rules and behavior, and that the "reality" of law is best revealed in "action" not in books.
in behavioral studies of law. What was formerly extra-legal, such as bargaining and negotiations between lawyers, or was considered a non-legal setting, such as mediation tribunals, are aspects of dispute processing and contexts where law is documented through its effects on disputants' behavior.

Studies of dispute resolutions are part of this expanded behavioral view of law. These studies apply a behavioral orientation to examining alternative dispute resolution, such as arbitration, mediation, and negotiation. Three types of studies characterize behavioral work in this area. One focuses on the behavior of disputants in different dispute-resolution processes. Another type of research is concerned with identifying the rules of behavior in dispute processing so as to match disputes with appropriate dispute handling mechanisms. A third type of alternative dispute-resolution work emphasizes the uncertainty in predicting what goes on in conflict resolution, but strongly advocates alternatives as flexible methods for producing "quality justice".

The majority of social science research and evaluation studies on alternative dispute resolution fall within the first type of research. This work describes and evaluates the effects of different dispute processes on similarly situated disputants. The central research question is how disputants behave in different dispute processes? The most common measures of disputants' behavior are their attitudes towards the process and whether they comply with the agreement. Those studies that focus on disputants' attitudes seek to determine how well-satisfied disputants are with the process and the outcomes. The issue of disputants' satisfaction, or "client satisfaction" (Harrington, 1984), has been explored mainly in government-sponsored studies (LEAA, Department of Justice, and the Federal Judicial Center) and evaluation studies done by private non-profit research institutes (Vera Institute for Justice, Rand Corporation's Institute for Civil Justice Institute, and the National Institute for Dispute Resolution). In the Vera Institute study, Davis et al. (1980: 56) found that 94% of the complaints (usually known as victims) in first-offense felony cases that went to mediation felt they had an opportunity to tell their story, whereas 56% of the complainants in a randomly selected control group that went to court said they had an opportunity to tell their story. Whether alternative dispute resolution programs handling criminal or civil cases, state or federal disputes, those who participate in mediation or arbitration report that they are more "satisfied" with the process than are disputants in control or matched samples who go to court.

Studies that compare adjudication and mediation of claims in terms of compliance rates are more mixed in their findings. For example, it appears that at least in terms of criminal cases, existing studies have found no difference in compliance between mediated and adjudicated cases (Davis et al., 1980: 73) or that the court process may be more effective than mediation is in preventing future conflicts—the measure of compliance (see Felstiner & Williams, 1980: 44).

McEwen & Maiman's (1984: 19) comparative study of small claims hand-

ling in Maine concluded that there is a higher rate of compliance with mediated as opposed to adjudicated outcomes. They measured compliance in terms of whether the plaintiffs said the defendant had paid some or all of the judgement or settlement. They argue, despite the possible influence of self-selection in voluntary mediation programs, that mediation of small claims produces higher rates of compliance. Further, they speculate that consent "enlists a sense of personal obligation and honor in support of compliance, and consensual processes are more open than command to the establishment of reciprocal obligations and of detailed plans for carrying out the terms of an agreement" (McEwen & Maiman, 1984: 47).

Applying essentially the same behavioral approach, but utilizing different measures of outcomes, Vidmar (1984) challenges McEwen and Maiman's findings. He argues that "the mode of processing [small claims cases through mediation or adjudication] is both a function of admitted liability [on the part of the parties] and, to the extent it affects outcomes, does so in large measure not independently but in interaction with the degree of admitted liability" (Vidmar, 1984: 548). Vidmar encourages us to consider the interaction between the way disputants behave in different processes and the kinds of claims they assert in each setting.

While the findings in McEwen and Maiman's and Vidmar's studies differ, both share a perspective that law can be known though its effects on disputants' behavior. One set of measures (McEwen and Maiman, 1984: 47) leads to an endorsement of mediation and a claim that "[c]ourt-sponsored mediation or negotiation can be viewed as a mechanism for reestablishing control by the disputants over both the conflict and its resolution in the context of a new bargaining relationship defined by the potential for an adjudicated outcome". The other set of measures, offered by Vidmar, provides a more sophisticated behavioral method for comparing the effect of dispute settlement processes on outcomes.

The second type of ADR studies attempts to identify rules of dispute resolution behavior that might enable policy-makers and individuals to decide what forum is the most effective for resolving particular kinds of disputes. This work assumes that there are different goals for different dispute forums and seeks to incorporate these differences into what Bush (1984) calls "jurisdictional principles" and others have labelled "dispute resolution typologies" (Goldberg et al., 1985). Bush (1984: 904) claims that "jurisdictional principles" will help policy-makers and disputants make "process choices" that are not "bias[ed] in favor of using adjudication processes and to disfavor the use of mediation and related processes". As a result of this approach, one which integrates law and economics, law and society and the goals of reformers, Bush believes that in the end whether disputants "do or do not enter the courts or other legal institutions of the state, will often be a function of individual choice or of time and money barriers, rather than of any fundamental functional division between judicial and extrajudicial, legal and extralegal, institutions" (Bush, 1984: 911).
906). Thus Bush, like other lawyers who have worked on establishing the idea that dispute resolution forums have unique jurisdictions, does not want to lock disputants into particular forums, but prefers to provide disputants with "jurisdictional principles" that will help them "choose" the appropriate process.

Social scientists and evaluation researchers tend to rely on empirical measures of the behavior of law (i.e., disputant satisfaction and compliance with outcome), the lawyers tend to establish "jurisdictional principles" from the behavior of law. However, both types of dispute resolution studies are in the legal realist tradition of Llewellyn [11]. Each attempts to identify predictive factors of dispute behavior (satisfaction, compliance, choice) in order to describe the "reality" of law in action.

The third type of alternative dispute resolution work is more similar to Frank's brand of legal realism (see Hunt, 1978), in that it emphasizes the uncertainty of "what goes on in courts" and it is skeptical about efforts to establish rules of dispute behavior. Menkel-Meadow's (1984, 1985) writings on negotiation and settlement are an example of this view. She asserts that conciliation and mediation are "warmer" and more "caring" forms of dispute resolution than adjudication [12]. She also asserts that the results are not "binary, win-lose" and thus outcomes are both flexible and tailored to the parties "polycentric needs" (Menkel-Meadow, 1985: 490, 487). She believes that settlement conferences are not only "here to stay"—the "reality" of law—but that the "quality of dispute resolution is improved when models other than the formal adjudication model are used" (Menkel-Meadow, 1985: 487). In her view, courts have a "limited remedial imagination" and "the settlement conferences provide an opportunity to temper the rigidity of win/lose trials with flexible solutions" (Menkel-Meadow, 1985: 514). In the end she says "on balance I support the movements toward mandatory settlement conferences as long as they are "properly" conducted by settlement officers sensitive to the efficiency-quality problem... I cast my vote for quality."

This third type of dispute-resolution work is clearly the voice of a reformer, an advocate, but one whose skepticism of adjudication is based on a perceived lack of flexibility and attention to "quality" and "caring" goals. Thus, rather than arguing for identifying rules of dispute behavior, associated with the first two types of behavioral research, Menkel-Meadow's position is characteristic of the pragmatic stance of legal realism and its "simplistic positivism" or "commonsense humanism" (see Hunt, 1978: 49).

Three consequences of legal realism in alternative dispute-resolution studies stand out. The first is the overriding concern with policy formation. Most of these studies push the policy of alternative dispute resolution, often without a clear statement about the implications of expanding state intervention [13]. Bush's (1984: 893) focus on determining the appropriate forum for handling specific categories of disputes is orientated to the needs of policy-makers and dispute-resolution practitioners who are in the business of making decisions about where to refer disputes.

Second, rights are treated as fixed and normal. It is in fact this formalist characterization of rights that gives common sense appeal to talk of settlement. Rights are cast as "law centered", "state-centred" rather than socially constructed at a number of different levels (see Santos, 1987).

The third consequence of realism, and most striking for us, is the omission of social relations in the analysis of law. Bourdieu (1987) and Dezalay (1987) write about the legal profession's own absence from its analysis of law and the tendency to fuse or blur the "symbolic order" and "the order of objective relations between actors and institutions in competition with each other for control of the right to determine the law" (Bourdieu, 1987: 212). We agree and would further contend that realism in alternative dispute resolution research fails to examine the struggle that is taking place in informalism over the "right to determine the law" [14]. The social relations and institutional authority that constitute the alternative dispute-resolution movement are denied, ignored, if not concealed by the positivism of behavioral research on ADR.

Post-Realism: A Guide to the Politics of Law

What comes after the modern realist system of authority in law is like what comes after modernism in architecture. There are claims to the contemporary position but none has dominated the terrain. The ones which do come out on top will of course get the commissions. The debate is well underway in law and the claims to the constitution of the post-modern abound. We consider briefly the work of some social scientists and some critical legal scholars.

Discussion of post-realism in the United States began with the recognition that law is a characteristically political process rather than one determined by neutral principles [Stumpf, 1988]. Like most of us schooled in the tradition of political jurisprudence from professional childhood the perspective seems to have demonstrated its authority. Indeed, Stumpf (1988: 37) suggests the basis for our impatience with the neo-realism of Critical Legal Studies in noting that we are inclined to "read most of critical legal thought with a big yawn, concluding that law professors, or at least a vocal minority of them, have finally joined the club. [Since 1955] these notions have been commonplace in political science, Pelzson."

In the debate there are several different meanings attached to the term post-realism. One is articulated by Sperlich, a political scientist who gave the title post-realism to an article he wrote in response to O'Brien's work. Sperlich defined realism in terms of what it supported, studies of what judges actually do rather than what they say and evaluations of the effects of judicial decisions. His view of post-realism, although never directly defined, urges that courts should not develop ways of validating scientific evidence for social policy. By suggesting that after realism (i.e. post-realism) judges should ignore social science findings about the behavior of law, Sperlich seeks to purify law in the tradition of analytical or formal jurisprudence.
Tushnet, in the tradition of Critical Legal Studies, takes realism as a period in the history of legal thought more than an ongoing, hegemonic structure of legal power. Tushnet calls law and economics post-realism, thus suggesting that what comes after realism is the rejection of indeterminacy for science. Sperlich, on the other hand, interprets realism very differently as a science or quest for science. Thus he uses the term post-realism to describe arguments against the use of social science in law.

These usages of the term post-realism refer to the relationship between law and science. Our position, however, is one that suggests that we move beyond the scientific debate which is after all the dominant debate in the realist tradition. Positivism is at the heart of the realist enterprise. Realists say the law is what the judges say it is and that behavior or what the judge wants to do accurately reflects the reality of the legal processes. This double-barreled quality of realism is the key to its significance in the academy, what we might call the "realism about realism". Our concern has been with the authority in law that is wielded by the appropriation of modern understandings in the interest of maintaining established legal authority. This form of positivism is the key to the contemporary picture of the powerlessness of law. Fitzpatrick (1987: 121) has linked positivism to what he calls the "liberal cosmology" which he describes as providing "...a particular protection of law's innocence". The point is that the purported separation of law from material life distracts us from the responsibility of law for the constitution of social relations and ultimately for much of material life.

An approach sometimes called "relational", helps to embed legal thought in human relations and social institutions (Hunt, 1987). It is an effort to transcend the limitations of a liberal framework in order to liberate at least scholarship on law. This attention to social relations is emphasised here as a basis for moving from a "realist" to a constitutive picture of law. A post-realist perspective that embodies a constitutive picture of law would work from an "external theory" (Hunt, 1987) which would treat categories such as "the double standard" and "original intent" in appellate review or "dispute" and "settlement" in informalism as social and political inventions, not as indeterminate social products. Indeterminacy, we have shown in both spheres, is part of the dominant ideology in contemporary judicial scholarship. In this form of pluralism, with its emphasis on remedy and the degradation of the law on the books, some critical scholars have avoided the implications of their position in the process of avoiding general theories.

Absent from the behavioral studies in appellate courts and alternative dispute resolution is an analysis of the political and social relations; for example, the interests of the bar in structuring judicial selection. Mediation programs are often described in the way McEwen & Maiman (1984) tell us about the program they study: "A mediation program which began in the fall of 1977 in several small claims courts in Maine ... The program grew out of an experiment in which a group of academic humanists who had received training in the rudiments of dispute resolution offered their services as mediators in the state's busiest small claims court" (McEwan & Maiman, 1984: 16). Other ADR studies are even less attentive to the actors and institutions. They merely talk about "forums" that offer disputants "choices" (Bush, 1984) and "satisfying" experiences (Menkel-Meadow, 1985).

A constitutive perspective on law that emphasises the role of social relations in generating law enables socio-legal research to go beyond the social constructivist view of law (i.e. law is social) (13) that has been for so long the legacy and authority of legal realism. In the area of alternative-dispute resolution, a constitutive approach puts the speaker and authority of law, legal institutions, and the legal profession back into the picture of informalism (Harrington, 1985; Hofrichter, 1987; Brigham, 1987; Dezaal, 1987; Harrington & Merry, 1989). Behavior without social relations strips away the social struggles around the legal meanings. As Santos (1987) argues, there is another view of legality that has sprung from legal pluralism which enables us to comprehend the non-formal, non-centralised characteristics of law. He argues that the constitution of our "legal life" takes place in the "intersection of different legal orders ... interlegality" (Santos, 1987: 298). His thesis develops a conception of law as "a network of legal orders" which are "reproduced by multiple mechanisms of acculturation and socialization" that establish "what is and what is not law" (Santos, 1987: 299, 298).

We have sought to look at law from outside the lawyer's description to understand better the way law has been constituted in legal settings. To this end we have attempted to build on the insight of some in the interpretive tradition while emphasising that a very specific conception of the relationship between ideas and communities of interpretation is a sometimes overlooked part of this tradition. While the indeterminacy critique which is such a popular part of the interpretive turn is central to the realist aspirations we are examining, it is our hope that the focus on institutions and communities creating legal authority will provide a guide for socio-legal research.

Notes
1 We agree with Hunt's position that the "anti-epistemology" of Rorty seeks to "renounce theory in favor of conversation" but is unable to avoid the problem of "claims to truth and correspondence to reality", because "no conversations can be free of theory" (Hunt, 1987).
4 In law, as in buildings and clothing, commentary is subject to the dictates of fashion and the new realism, in harking back to ideas of the 1930s and 1940s closely resembles a move in fashionable dress called "retro".
5 Fitzpatrick in his insightful commentary on an earlier draft pointed out that this has been a characteristic orientation since the Enlightenment.
References


*Realism and its consequences*


**Cases**