

## Articles

### Critical Empiricism: A Comment on David M. Trubek & John Esser, Gerd Winter & Volkmar Gessner<sup>\*</sup>

By William C. Whitford<sup>\*</sup>

#### A. 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 & 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.

---

<sup>+</sup> For a fuller description of what I have elsewhere called the problem of conceptualism, see William C. Whitford, *Lowered Horizons: Implementation Research in a Post-CLS World*, 1986 *Wisconsin Law Review* 755, 767-72. The argument I develop later to justify the utility of observation is a refinement of an argument first stated in that earlier article (*Id.*, 769). The earlier article is a revision of a paper I delivered at the Conference in Bremen that gave birth to this book.

<sup>\*</sup> B.A., University of Wisconsin, 1961; LL.B, Yale University, 1964; Emeritus Professor of Law, University of Wisconsin. Author: *Contracts: Law in Action*, 3rd ed. 2010 (with S. Macaulay, J. Braucher & J. Kidwell)(LexisNexis); *Consumer Credit, Debt and Bankruptcy* (co-edited with J. Niemi and I. Ramsay), Hart Publishing (U.K.) 2009; *Relational Contracts and the New Formalism*, 2004 *Wisconsin L. Rev.* 631; *A Comparison of British and American Attitudes Towards the Exercise of Judicial Discretion in Contract Law*, in Hugh Collins & David Campbell (eds.), *Implicit Dimensions of Contracts* (Hart Publishing, U.K., 2003); *Ian Macneil's Contribution to Contracts Scholarship*, 1985 *Wisconsin Law Review* 545; numerous other articles on bankruptcy, consumer protection, law of contract, law and society. Email: [whitford@mailplus.wisc.edu](mailto:whitford@mailplus.wisc.edu)

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 groupings 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.<sup>1</sup> 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.<sup>2</sup>

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 naive 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?<sup>3</sup> It seems clear that the authors of both papers believe that, in spite of the

---

<sup>1</sup> 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.

<sup>2</sup> 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 misreading 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.

<sup>3</sup> 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

problems, something can be learned from observation.<sup>4</sup> Indeed, Winter & Gessner go to some lengths to discuss what kinds of empirical research should be undertaken. But neither paper makes a positive case for the Utility of observation, which I regard as the essential component of empirical research. I now attempt to make that case.

The foundation of my case for observation is a plea that we acknowledge the experience of learning. Learning, as I use the term, is the experience of believing that one has acquired an enhanced ability to describe the causal relationship between different events. Because learning involves increased understanding of causal relationships, it implies an ability to predict the future with greater accuracy. Prediction is a critical skill if we are to be able to exert greater control over our social environment.

The phenomenon of learning, as I have defined it, seems to me to account for experiences we have all had. In family life, we learn behaviors that will avoid or alternately stimulate disagreement, depending on our wants at the moment. Basketball and football teams learn what offenses seem to work best against different defenses. Lawyers learn what kinds of statements to particular appellate judges are most likely to be persuasive. Note that none of these examples of learning imply an ability to predict the future with absolute certainty, just with a greater probability of accuracy than previously was possible. Furthermore, this belief in an enhanced predictive ability is fully compatible with an appreciation that one's new understanding is only tentative, to be displaced in the future by other new insights, perhaps further enhancing predictive capacity or perhaps more appropriate to the changed circumstances of a new age.

The second step in my justification of observation is to link observation to learning. Learning is acquired in different ways, not all based on observation. We feel as though we are learning when through exercise of deductive mental processes we discover new implications of propositions already accepted. Use of this analytic technique appears to account for many of the law review articles that profess that if the goal is maximization of resources, then the legal rule should be  $x$ , whereas if the goal is equality in the distribution of resources, then the rule should be  $y$ .<sup>5</sup> Other types of learning experiences can be considered "transformative". Learning is transformative, as I use the term, when it leads to

---

learnable in other ways. See Mark G. Kelman, *Trashing*, 36 STANF. L. REV. 293 (1984); G. Edward White, *From Realism to Critical Studies: A Truncated Intellectual History*, 40 SW. L.J. 819 (1986).

<sup>4</sup> Trubek & Esser, this issue, 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.

<sup>5</sup> Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981).

understandings about the nature of the world that could not be deduced solely from preexisting understandings.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> 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 desires of the observer inevitably affect the product of observation? I believe we accept this proposition because after reflection it seems an accurate account of experience that we have all had. My case for the learning and observation as a source of learning are similarly based.

---

<sup>6</sup> 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 they are not logically compelled from pre-existing knowledge. The second part of this comment discusses whether little insights can qualify as "critical empiricism".

<sup>7</sup> 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".

<sup>8</sup> Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963).

Observation is the essential ingredient in what I consider empirical research. For one who acknowledges the utility of observation, what implications are there for the practice of empirical research if one also accepts that all observation is value laden? It is possible for the researcher to be self-consciously aware of the possibility of the value laden character of her/his work, and perhaps even of some of the values themselves. Awareness can beget becoming modesty, and it may help limit misinterpretation of results by reminding both the researcher herself and any consumer of published results of the research of its contingent and probabilistic nature. In an earlier article<sup>9</sup> I argued that an awareness of the value laden character of observation should cause the researcher to prefer studies that are aimed at more particular propositions (*i.e.*, more emphasis on studies of particular locales at particular times, less emphasis on studying propositions about common features of a wide set of social practices), and that make more use of "softer" sources of information (more in depth interviews, less statistics, less emphasis on reproducibility of results), than has been in fashion in social science research of the past few decades.

### **B. The Politics of Empirical Research**

There has been a lengthy debate about what should be meant by the term "critical empiricism". It may be that the term should be restricted to empirical research that is self-consciously aware of its value laden character, a view I associate with Trubek & Esser. Winter & Gessner, on the other hand, believe that the subject matter of empirical research should bear on whether the term "critical" is appropriately used in describing the research, a view that has also been expressed in America.<sup>10</sup> To be "critical", according to this view, research must be directed at discrediting the assumptions underlying the existing legal order (*e.g.*, that law is effective), or at expressing the point of view and advancing the interests of under-represented groups. Research designed to discover better ways to achieve some specific policy objective does not qualify.

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"<sup>11</sup> 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

---

<sup>9</sup> Whitford, *supra* note \*, 776-79.

<sup>10</sup> See Austin Sarat & Susan S. Silbey, *The Pull of the Policy Audience*, 10 LAW & POLICY 97 (1988).

<sup>11</sup> See David Kennedy, 58 S. CAL. L. REV. 251 (1985).

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.<sup>12</sup>

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.<sup>13</sup> 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 co-opter rather than the co-opted.<sup>14</sup> Not all

---

<sup>12</sup> This point is discussed extensively in Trubek & Esser, this issue, and is the basis on which they direct their strongest criticism at the work of the Amherst group. On the subjectivity of causation, see Mark G. Kelman, *The Necessary Myth of Objective Causation Judgments in Liberal Political Theory*, 63 CHI.-KENT L. REV. 579 (1987).

<sup>13</sup> 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)

<sup>14</sup> 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., JOEL HANDLER, *THE DISCRETIONARY DECISION* (1986); HERMAN GOLDSTEIN, *RESHAPING THE POLICE FUNCTION: THE PROBLEM-ORIENTED APPROACH* (1989).

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.