Cornell Law Review

Volume 75
Issue 1 *November 1989*

Article 3

Social Movements Law and Implementation: A Clinical Dimension for the New Legal Process

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SOCIAL MOVEMENTS, LAW, AND IMPLEMENTATION: A CLINICAL DIMENSION FOR THE NEW LEGAL PROCESS

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Lawyers seeking to implement the goals of social movements ("social movement lawyers") use litigation, legislation, and administrative advocacy to get discrete legal responses from the judicial, legislative, and regulatory branches of government, respectively.[1] They also use moral confrontation techniques, dialogue and networking to influence government policy and public opinion and to coordinate the activities of the three branches of government in the process of policy implementation.

The networks social movement lawyers create as they go about this work depend on verbal and written exchanges of information as well as on positive law for their stability and coherence. Such exchanges of information are also characteristics of the model "interpretive communities" which are central to the intellectual movement known as the New Legal Process.[2] According to New

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I wish to thank William Eskridge, Phillip Frickey, Ray Marcin, Frank Michelman and Martha Minow for criticism and comments. I also wish to thank my research assistants Matthew Bradley, Kelly Breur, Alan Dumoff, Jeri Ezra, and Gretchen Lucken. All the mistakes are mine.

1 On the interplay of the three branches of government in creating public policy, *see generally* Harold A. McDougall, *Lawyering and Public Policy*, 38 J. LEGAL EDUC. 369 (1988). *See also* Douglas W. Kmiec, *Of Balkanized Empires and Cooperative Allies: A Bicentennial Essay on the Separation of Power*, 37 CATH. U.L. REV. 73 (1987), and Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592 (1986).

2 The term "New Legal Process" has been coined by Professors Eskridge and Frickey to describe a resurgence of ideas associated with "Legal Process" as originated by Hart and Sacks in materials prepared for a course on legislation at Harvard Law School in the 1950s. *See infra* notes 40 and 95 and accompanying text. *See, e.g.*, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1987) [hereinafter E & F 1]; Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982); Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984); Owen M. Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985) [hereinafter Fiss, *Conventionalism*]; Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1986) [hereinafter Fiss, *The Death of the Law?*]; Owen M. Fiss, *Objectivity and Interpretation*, 34

Legal Process scholars, an interpretive community is a group created by mutual discussion of a common text in an effort to find its meaning.[3] The term originated in the field of literary criticism,[4] but has been appropriated by legal scholars to connote a "discussion group" of legal professionals attempting to find the meaning of a legal text.[5] Of course, legal texts have a bite—state power—not ordinarily associated with literary texts.[6] This fact calls into question the aptness of applying the term "interpretive" to any community organized to deal in legal intervention.

Another term, found elsewhere in legal academic literature, though not used by New Legal Process scholars, may shed light on the activity of such legal discussion groups.[7] The term is "implementation," and it has been used in the legal literature to describe a circular process of debate, political struggle and compromise, operating at all levels of the legal system. Implementation theory tracks the activities of social movements, the institutions and personnel of the legal system itself, and the interest groups whose behaviors the social movements desire to change.[8]

This Article examines the history and evolution of "discussion groups" which aimed to create law and public policy in the area of civil rights. During the Civil Rights Movement of the 1950s and 1960s, such groups created new norms of radical interaction by us-

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STAN. L. REV. 739 (1982) [hereinafter Fiss, *Objectivity*]; Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987). *See also* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983).

3 *See, e.g.*, Cover, *supra* note 2, at 46-48. The origin of this concept seems to lie with Stanley Fish. *See* STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980); *see also* E & F I, *supra* note 2, at 333.

4 S. FISH, *supra* note 3, at 171-72.

5 Fiss, *Objectivity*, *supra* note 2, at 746-47.

6 Brest, *supra* note 2, at 769-70. *But see* S. FISH, *supra* note 3, at 343 (academia presents strong sanctions for the "wrong" interpretation of a literary text). Despite Fish's insight, there remains yet an important distinction. The legal "discussion group" can sanction others who are not party to the discussion. Brest, *supra* note 2, at 770.

7 *See* William H. Clune, III, *A Political Model of Implementation and Implications of the Model for Public Policy, Research, and the Changing Roles of Law and Lawyers*, 69 IOWA L. REV. 47 (1983).

8 Clune offers the following summary and overview of the implementation model:

> (a) *Reformist political fabrication* . . . implementation [is] the result of political struggle and compromise between social movements and the interest groups whose behaviors the social movements desire to change. (b) *Cybernetic interactionism* . . . a continuous process of mutual adjustment among interested organizations . . . . (c) *Recursiveness* [a circular process in which] political forces . . . interact at all levels [of implementation], including continuing disputes over the terms of the underlying legal mandate. (d) *Evolution.* Notwithstanding [its] open and manipulable character [*i.e.*, recursiveness], implementation usually falls into characteristic long-run patterns and may reach stable, dynamic equilibrium.

Id. at 78.

ing dialogue and moral confrontation in a particularly powerful way. In general, they did not rely on the legal system. To the contrary, the legal system was often arrayed against them. I will refer to these groups as "interpretive communities."[9]

In the 1970s and 1980s, these communities began to evolve away from dialogue and confrontation and toward the implementation of civil rights legislation passed in the 1960s as the result of their social movement activity. They retained some of their dialogic and confrontational tactics, but tended to use such tactics for legal implementation rather than moral suasion. I will refer to these groups as "implementive communities."[10] Contrasting the behavior of implementive and interpretive communities will, I believe, suggest that the work of social movement lawyers may add a significant clinical discussion to the New Legal Process.

Parts I and II of this Article briefly review the origins of the "old" Legal Process as a synthesis of legal formalism and legal realism, and the erosion of that synthesis in the face of critiques from the left by the Critical Legal Studies Movement, and from the right by the Law and Economics Movements. In Parts I and II, parallel intellectual trends from the field of physics are used to illuminate differences among these various legal ideologies. The lack of precise correlations between inputs and outputs in a given system ("indeterminacy of outcomes")[11] and the randomness of activity within the system,[12] for example, were key issues in both the erosion of Legal Process and the erosion of Newtonian concepts of physical science. Indeterminacy of outcomes and randomness within the system also featured prominantly in the rise of new theories in the fields of both law and the physical sciences.[13] Part II also introduces the manner in which the conclusions which can be drawn from social movement lawyers' practice transcends left and right critiques of the "old" Legal Process, and also examines the manner in which their practice itself provides an important clinical dimension to the New Legal Process.

Part III continues this theme, using the Civil Rights Movement

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9 *See supra* notes 2-5 and accompanying text.

10 An implementive community, then, is the system-oriented leadership group, sprung from an interpretive community, which seeks to advance the social causes of the community by resort to the legal system, including the courts, legislature, and administrative bureaucracy.

11 *See* Ray Marcin, Schopenhauer's Metaphysical Justice (1988) (unpublished manuscript, copy on file with Cornell Law Review).

12 *Id.*

13 *See* Frank Michelman, *Bringing the Law to Life: A Plea for Disenchantment*, 74 CORNELL L. REV. 256, 263 (1989) [hereinafter Fiss, *Disenchantment*] (American judges generally absorb the thinking of elite American intellectuals).

as a clinical case study of how social movements "implementing" their policy objectives within the framework of the New Legal Process address the issues of randomness and indeterminacy which bedeviled the "old" Legal Process and which encouraged its detractors from both left and right. The Civil Rights Movement in its first phase used moral confrontation and dialogue at the street level to overcome randomness and incoherence—the sense that the conditions of African-Americans were the result of random factors beyond anyone's ability to control. Instead, the Movement created connections among previously disparate social actors and built an interpretive community around the issue of civil rights. In its second phase, the Movement used networking and coalition-building at the policymaking level to overcome indeterminacy of outcomes bred by a tripartite, nonparliamentary governmental system based on separation of powers. Part IV concludes the Article by suggesting that communities formed at the juncture of social movements and government policy might prove to be useful models for New Legal Process scholars to study.

I
NEWTONIAN THINKING IN LAW AND POLICY

Before the twentieth century, intellectual trends in physics and in legal ideology both conceived of the universe as an ordered machine made of separate parts, fit together in predictable ways and following certain laws of motion. In this Newtonian vision of the universe, outcomes were predictable and directly correlated with inputs. This view of the universe has powerfully influenced American legal ideology since the American Revolution. Since the beginning of the twentieth century, however, many of Newton's theories have been superseded in physics by theories which concede that the universe often acts at random, but which note a surprising interconnectedness between such random phenomena.[14] Legal scholars, however, did not begin to question the predictability of our legal system until somewhat later. At that point, modern developments in the physical sciences began to appear in the view of the universe fashioned by legal ideology as well. The following is an outline of how the New Legal Process, Critical Legal Studies and the Law and Economics Movements have attempted to address randomness and indeterminacy in the legal system.

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14 *See, e.g.*, ALBERT EINSTEIN, RELATIVITY, THE SPECIAL AND GENERAL THEORY (Robert W. Lawson trans. 1959).

A. Newtonian Thinking in the Study of Law

From the beginning of the colonial period, Americans have thought of the social movements in which they participate in legalistic terms.[15] The colonial lawyers who created the ideological framework for the American Revolution were strongly influenced by "Newtonian" thinking.[16] Newtonianism depicted a clock-like universe in which randomness (such as that which characterizes human behavior) was not considered.[17] James Madison, chief architect of the Constitution, created a Newtonian government machine of separated powers, "its checks and balances clicking like the parts of a steam engine."[18] His stated purpose was to establish a rule of law capable of checking random human behavior which might stem from unbridled communitarian self-government. His assumption seemed to be that political freedom as communitarian self-government and political freedom as the rule of law were not fully compatible.[19]

At the Harvard Law School of the late nineteenth century, Dean Langdell set out to mold the study of law in the image of Newtonian science, divorcing it from the subjectivity and political ferment of the "real world."[20] Langdell proposed to the academy at large, and Harvard University in particular, the thesis that appellate court judges functioned like Newtonian scientists and applied identifiable

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15 *See* Maxwell Bloomfield, *Constitutional Values and the Literature of the Early Republic*, 11 J. AM. CULTURE 53 (1988).

16 *See* Alvin Toffler, *Making Sense for Our Chaotic World*, Washington Post, Oct. 19, 1986, at H3, col. 1.

17 *See id. See generally* LAWRENCE W. FAGG, TWO FACES OF TIME 1-23 (1985) (comparing the Newtonian, deterministic march-of-time idea with the new views of quantum mechanics).

18 Toffler, *supra* note 16, at col. 1; *see also* Bloomfield, *supra* note 15, at 55 n.15 (Hamilton compared the Constitution's overall arrangement to the Newtonian solar system).

19 Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1500-01 (1988) [hereinafter Michelman, *Republic*]. The first such social movement was the American Revolution, during which the law replaced the overturned monarchy as a symbol of cultural and ideological unity. Bloomfield, *supra* note 15, at 53; *cf.* Fiss, *Conventionalism*, at 197 (law has a "special claim for our respect"). *But see* Michelman, *Republic*, *supra*, at 1508 n.53. Newtonian legalism strongly contradicts the idea of today's social movement lawyers that law is properly grounded in human social interaction.

20 Robert MacCrate, President-Elect of the American Bar Association, Remarks delivered at American Association of Law Schools Section on Clinical Legal Education (Jan. 3, 1987) ("As leading law schools gradually won their place in the university, they moved . . . from the practical to the theoretical . . . [and] sought the total substitution of law school study for any requirement of law office experience.").

This created some discomfort in the profession of legal education. *See* Anthony Chase, *American Legal Education Since 1885: The Case of the Missing Modern*, 30 N.Y.L. SCH. L. REV. 519, 521 (1985); *see also* Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 638 (1968) (inherent tension in law professor's striving to be both an "authentic academic" and a trainer of students for private practice).

and predictable principles of law with consistent results.[21] As Professor Lon Fuller later described the approach, "[where the elements of law] appear in combination, the lawyer's task is to analyze the case into these basic elements, and then to deduce from them the decision of the controversy, just as the physicist or chemist might deduce the qualities of a substance from its molecular structure."[22]

In rendering the subject matter predictable and uniform, however, Langdellian "scientific jurisprudence" imposed a Newtonian philosophical system upon the law at a time when such thinking was nearly obsolete in the natural sciences.[23] Newtonian theories in the natural sciences gave way as discoveries of interconnections among matter, light, and energy suggested a picture of the universe bound together in an organic whole.[24] Ironically, the apprenticeship model which Langdell eschewed provided the student with an organic view of the law and its practice which was more consistent with new directions in the natural sciences than did the Langdellian curriculum.[25] Single-minded adherence to Newtonian ideas in jurisprudence obscured connections among law, politics and community which suggested a picture of society bound together in an organic whole.[26] Issues regarding the law's proper role in building, as well as disciplining the community were denied their proper emphasis.[27]

Sociological Jurisprudence[28] and Legal Realism,[29] two later ju-

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21 Chase, *supra* note 20, at 519. It took 15 of the 25 years Langdell was Dean at Harvard Law School, 1870 to 1895, for the case method to take root.

22 Clark Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1072 (1986).

23 *See* Marcin, *supra* note 11, at 22 (citing HEINZ R. PAGELS, THE COSMIC CODE: QUANTUM PHYSICS AS THE LANGUAGE OF NATURE 11 (1982) (the work of physicists like Bohr, Heisenberg, and Planck in quantum mechanics drastically revised the mechanical view of the universe associated with Newton).

24 Robert Stevens, *Legal Education: The Challenge of the Past*, 30 N.Y.L. SCH. L. REV. 475, 480 (1985) (ABA concerned that Langdell's case method "would destroy the concept of law as an integrated series of interrelated, objective rules").

25 Marcin, *supra* note 11, at 23 (citing H. PAGELS, *supra* note 23, at 11-21); *see also* JEREMY RIFKIN, ENTROPY—A NEW WORLD VIEW 221-25 (1980) (entropy law superseding Newtonian mechanics in the natural sciences).

26 *See* Michelman, *Republic*, *supra* note 19, at 1508-09 (constitutional limits on the exercise of sovereignty require the separation of law from politics).

27 John Henry Schlegel, *Langdell's Legacy Or, The Case of the Empty Envelope*, 36 STAN. L. REV. 1517, 1530 n.33 (1984); *see also* Michelman, *Republic*, *supra* note 19, at 1501 (law and politics stand in circular relation to one another, as "both outcome and input, both product and prior condition").

28 Sociological Jurisprudence, a school of legal thought of which Dean Roscoe Pound was the founder, emphasized the place of law in its social context. *See generally* Benjamin Andrew Zelermayer, *Benjamin N. Cardozo: A Directive Force in Legal Science*, 69 B.U.L. REV. 213, 238-41 (1989).

29 Legal Realism, a school of legal thought associated with luminaries such as Jerome Frank and Karl Llewellyn, is conceived of as an opposing school to that of legal formalism. Legal realism attacked legal formalism's notion of judges as impartial rule-

risprudential schools, addressed some of Langdell's shortcomings, laying a foundation for the kind of contextual, community-based approach we now associate with social movement law.[30] Sociological Jurisprudence faulted the Langdellian approach (sometimes called "formalism")[31] for its failure to take note of law's social context—the historical, political, economic, social and psychological details of the community in which law is made.[32] Realists extended the critique, arguing that such factors which created the community created the law as well.[33] Realists argued that these factors affected legal outcomes as strongly as precedent itself.[34]

With so many factors influencing legal outcomes, however, none could be regarded as "determinative" in the way precedent had been. No Newtonian rule "scientifically" applied to the facts could guarantee a fair, or even an efficient, outcome.[35] This question of "indeterminacy" as a flaw in Newtonian legal theory was not solved by the Realists, only identified insofar as the legal system is concerned.[36] The question remains, and it is a troubling one. Is it possible to create a Newtonian, rule-based system sufficiently comprehensive of social context to fairly "determine" the outcome of community disputes?

B. Public Policy: The Post-Industrial Challenge to Newtonian Law and Legal Thinking

The chaos of the Great Depression suggested that Newtonian

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appliers rather than conscious decision-makers, and encouraged more deference to the political solutions of the legislature. *See, e.g.*, Steven M. Quevedo, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 CALIF. L. REV. 119 (1985).

30 Essay, *Critical Legal Studies: Beyond Skeptical Jurisprudence*, 11 J. CONTEMP. L. 345 (1984) (authored by Jennifer M. Dowd).

31 *See* Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239, 240 (1983); *see generally* ERVIN H. POLLACK, JURISPRUDENCE 521-633 (1979).

32 Note that Roscoe Pound, the originator of Sociological Jurisprudence, trained Charles Hamilton Houston, one of the most important lawyers in the early Civil Rights Movement, at Harvard Law School. *See infra* notes 119-21 and accompanying text. Sociological evidence proved critical in the favorable outcome of Brown v. Board of Educ., 347 U.S. 483 (1954) (*Brown I*), thus establishing a direct line from Houston's activities at Howard University Law School. *See infra* notes 121-33 and accompanying text. *See generally* GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).

33 Teubner, *supra* note 31, at 240.

34 *See, e.g.*, Byse, *supra* note 22, at 1073; Chase, *supra* note 20, at 533; Dowd, *supra* note 30, at 346-47.

35 *See* Clune, *supra* note 7, at 105 ("massive discretion is created by the indeterminacy of the operating legal system, including everything from the need to adjudicate particular cases to the unsupervised field-level discretion of administrative agents").

36 Godel had already asserted the hypothesis in mathematics: a system of explanation cannot be simultaneously complete and consistent. Ergo, there must be indeterminacy in any system of explanation.

separation of powers was an inadequate legal formula for governing an increasingly interdependent society.[37] New Dealers, many of them Legal Realists, sought to solve this problem by using the administrative bureaucracy to coordinate the three branches of government.[38] The New Deal's answer to the query of whether it is possible to create a rule-based system comprehensive enough to "scientifically" determine the proper outcome of community disputes was thus to create a fourth branch of government.[39]

In the 1950s, Professors Hart and Sacks developed "Legal Process" course materials at Harvard Law School which sought to blend the policy-oriented approach of the Realists and New Dealers with the rule orientation of the Formalists.[40] Legal Process views each branch of government from a common set of assumptions: that policy is indeed the province of the law, that policy is made by the clash of interested parties, and that the results of policymaking will be rational if the clash proceeds according to rules. Lobbying groups of equal power clash in the legislature.[41] Litigants of equal power, intelligence, and resources, represented by lawyers with no conflict of interest, clash in the adversary system.[42] Even bureaucracies are disciplined by interest-group politics.[43]

The Legal Process paradigm assumes that the activities of each branch of government are rational insofar as those activities did not stray beyond the "institutional competence" of the branch. The branch's "institutional competence" is limited to that range of policy decisions which it can handle by dint of its resources, orienta-

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37 *See* Kmiec, *supra* note 1, at 76 (lamenting the hard road those interested in positive government must follow given the division of authority at the national level).

38 *See* David E. Van Zandt, *The New Legal Realism*, 33 Yale Law Report No. 2, at 2, 3-4 (Spring 1987) (alliance of New Dealers and Realists); *see also* Kmiec, *supra* note 1, at 77 (diffuse power secures liberty, but practice integrates dispersed power into workable government); Kurland, *supra* note 1, at 593 (checks and balances suggest joinder, not separation, of powers); Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 451 (1986) (New Deal as parliamentary government).

39 *See* REXFORD G. TUGWELL, THE EMERGING CONSTITUTION 592-621 (1974) (advocating a new constitution including regulation and planning as the fourth and fifth branches of government, respectively); *see also* Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 219-33 (1986) (New Deal regulatory state consolidated by passage of the Administrative Procedure Act in 1946, finally defeating conservatives such as Roscoe Pound who waged a ten-year campaign against New Deal regulation).

40 *See* William N. Eskridge, Jr. & Philip P. Frickey, *Legislation, Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 694 (1987) [hereinafter E & F II] (describing the origins of the Legal Process movement).

41 *Id.* at 697 n.16.

42 Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 513 (1986).

43 Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1284 (1984).

tion, and mode of organization. Legal Process formulated rules to help the various branches stay within the boundaries of institutional competence. Such rules were thought to ensure that the branches could rationally resolve disputes between subjectively motivated, essentially adversarial parties.

The legislature, for example, could distill rational outcomes from conflicting interests if it heard all interested parties and conducted informed, deliberative, and efficient proceedings.[44] Legal Process adherents developed similar rules for the other branches of government. For example, the Federal Rules of Civil Procedure set up a model for adjudication which relaxed pleading and made information more accessible, but which remained decidedly rule-based.[45] Similarly, the Administrative Procedure Act used a rnle-based model to govern administrative action.[46]

Legal Realists had challenged formalism by demonstrating that rules could not fairly and consistently determine outcomes.[47] Legal Process adherents countered by arguing that rules could still control the processes by which outcomes were reached: rules of legislative process, rules to govern litigation, and rules of administrative procedure. Legal Process scholars thus did not abandon the dominant Newtonian legal vision of rules as a means of transforming a group of atomized individuals into a rational machine.[48] However, they did shift the focus of attention from what the machine produced to how it operated. Legal Process adherents believed that perfect outcomes, unattained by inexorable rules, could yet be achieved by perfected scientific processes.[49]

II

THE LIMITS OF LEGAL PROCESS THEORY

The Legal Process synthesis of formalism, realism and the New Deal does not sufficiently address the significant ways in which individuals are connected other than by the rule of law. The relations among people stemming from their individual roles as lawyers, judges, legislators, and citizens are certainly important. Equally important, however, are the relations among individuals which stem from their social "group" roles, as members of families, churches,

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44 E & F II, *supra* note 40, at 696.

45 *See* Resnik, *supra* note 42, at 494 n.1 (details of development and adoption of Federal Rules of Civil Procedure); *id.* at 541 (Federal Rules inspired by belief that "better procedures produced better facts which in turn yielded preferable outcomes").

46 *See* Gellhorn, *supra* note 39, at 221.

47 *See* E & F II, *supra* note 40, at 695 ("Some of the legal realists had mocked the determinacy and objectivity of formal rules.").

48 *Cf.* Dowd, *supra* note 30, at 347.

49 E & F II, *supra* note 40, at 698.

races and ethnicities, economic classes, and social and historical movements.[50]

Such group connections are a constant source of inter-group tension. Group connections are inevitably part of any social process, making it very difficult to "tame" such processes by means of formal rules, even those rules which seek only to regulate processes rather than determine outcomes. At the same time, group connections account for intra-group cohesion, introducing another political element which is as difficult to subdue as inter-group tension. In attacking the synthesis of rules and relationships proposed by Legal Process, the school of Law and Economics has followed the theme of inter-group conflict. Critical Legal Studies, on the other hand, has pursued the theme of intra-group cohesion.

A. The Law and Economics Challenge and the Social Movement Lawyer's Response

Scholars from the Law and Economics movement depict legislation as a dynamic equilibrium in which law grows out of a series of compromises fueled by legislators' desires to be re-elected, the expedient accommodation of special interests,[51] and lobbying by individuals and groups. Legislators do not respond evenly to all lobbyists in the Law and Economics view. They act most decisively when a well-organized and politically influential group demands protection from a law which will cause the group direct harm.[52] Like other residents of this universe, legislators act out of informed self-interest. However, some legislators and lobbyists act ideologically, altruistically, or on the basis of incomplete information—*i.e.*, at random.[53] Because a process with significant random elements is political rather than rational, Law and Economics scholars generally recommend that judges eschew an activist role in "rationalizing" the legislation the process produces. Judges, in their view, have no business upsetting a political balance achieved by elected representatives of the people.[54]

The Law and Economics model captures some essential elements of the legislative process which are observable from a clinical

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50 *See generally* Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417 (1984) (certain individual rights should be interpreted as communal rights).

51 E & F II, *supra* note 40, at 702-03.

52 *Id.* at 704-05.

53 *Id.* at 704.

54 *Id.* at 707-08. This position has caused some to view the Law and Economics movement as a revival of Langdellian formalism, and a right-wing attack on Legal Process. *See, e.g.*, Brest, *supra* note 2, at 765. *But see* MARK V. TUSHNET, RED, WHITE AND BLUE 196 n.17 (1988) (recent development of a "liberal reformist law-and-economics").

perspective.[55] The legislation which emerges on Capitol Hill is often vague and incoherent, the result of a process which tries to please too many people with too many rules.[56] However, this hardly means that courts and agencies should retire from the field. To the contrary, legislators often see the other branches as *part* of the political process. For example, they may leave issues ambiguous so courts will have a broad range of discretion for statutory interpretation, or specifically delegate extensive discretion to administrative agencies precisely to duck clashes between opposing interest groups and instead pass them on.[57] Madison's Newtonian scheme of separate branches of government has thus largely been subverted into a random system, in which outcomes are difficult even to predict, much less determine.

Social movement lawyers in Washington have developed tactics to function in the context of this random, indeterminate system and ensure that their constituencies are not totally marginalized by government randomness. They view the legislature as a forum where they can create frameworks around which to shape public policy, but they trust no one branch of government with the entire project.[58] Rather, social movement lawyers track legislation with which they are concerned (and which they often initiate) as it courses through the policy system. They monitor administrative agencies' implementation of such laws, and are prepared to challenge regulations at the agency level and in court, review the results through oversight, and alter the results through amendment and new legislation.[59] They also litigate directly under new statutes, and remain prepared to lobby for oversight hearings, amendments, and new legislation to modify results they obtain in court.[60] This type of cross-branch ac-

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55 *See* JOHN W. KINGDON, AGENDAS, ALTERNATIVES AND PUBLIC POLICIES 122-23 (1984) (policymaking process as a "primeval soup," in which ideas float around as molecules floated around in the "primeval soup" before life began).

56 *See* Robert Sherrill, *The Only Game in Town*, Washington Post Book World, Apr. 3, 1988, at 2, col. 3 (review of HEDRICK SMITH, THE POWER GAME: HOW WASHINGTON WORKS (1988)) (members of Congress cannot handle the plethora of hearings, votes, and caucuses, so they delegate to the unelected—lobbyists and staff).

57 E & F II, *supra* note 40, at 705-06.

58 *Id.* at 717 ("Creative lawmaking by courts and agencies is needed to ensure rationality and justice in law."); *see also id.* at 721-23 (citing Calabresi, Dworkin, and Fiss for new rationales supporting judicial activities and Mashaw, Sunstein, Stewart, and Strauss on creative roles for administrative agencies).

59 Transactions are thus not confined within Newtonian chambers, hermetically sealed one from the other; rather, they penetrate the barriers between separated powers. This penetration is facilitated by informal relationships and by the goals of the system. *See generally* Cover, *supra* note 2, at 40-44 ("jurispathic" courts).

60 E & F II, *supra* note 40, at 717-25; *see also id.* at 724 (the adherent of the New Legal Process "rejects a view of lawmaking as a series of one-shot declarations of rules and, instead, sees lawmaking as a dialectic and evolutive process").

tivity, in which social movement lawyers often collaborate with one another, as well as network and engage in dialogue with public officials, provides a clinical and practical dimension of the New Legal Process.[61]

B. The Challenge of the Critical Legal Studies Movement[62]

Some Critical Legal Studies scholars have posited a basic contradiction between the claims of the individual and the claims of the community, which contradiction could not be resolved by Newtonian, "rule-based" techniques.[63] Choices among the claims of the community, they contend, are political, arbitrary, and ad hoc.[64] In their view, positive-law rules, far from resolving such disputes with institutional competence and rational procedures, create a false community which is really a mask for social domination. Where Legal Process proposed rules to set rational limits for institutionally competent decisionmakers, CLS denounced the use of rules as susceptible to manipulation to "produce the results that social, political, and personal factors dictate."[65] "Institutional competence" is thus illusory.[66]

CLS views Legal Process as perpetrating a hoax: that community can be created without departing from a rule-based regime.[67] Legal Process is thus a prime CLS target, to be "deconstructed," "delegitimated," and "trashed."[68] CLS adherents assert that judi-

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61 By crossing the boundaries between separate branches, social movement lawyers help transform the national government from a closed system to an open system, the latter being much less likely to burn itself out and/or suffer energy loss through entropy. *See* RIFKIN, *supra* note 25, at 241-44. In open systems, evolutionary advancement is possible. *Id.* at 241.

62 Byse, *supra* note 22, at 1081. For a history of CLS, see John Henry Schlegel, *Notes Toward an Intimate, Opinionated and Affectionate History of the Critical Legal Studies Movement*, 36 STAN. L. REV. 391, 403-11 (1984).

63 Byse, *supra* note 22, at 1081.

64 *Id.; see also* Dowd, *supra* note 30, at 350; Michael A. Foley, *Critical Legal Studies: New Wave Utopian Socialism*, 91 DICK. L. REV. 467, 483 (1986) ("CLS critiques the notion of law as a formal, rational, objective, value-neutral system existing independently from the social-political order in which it is located.").

65 Byse, *supra* note 22, at 1082.

66 *But see* Richard M. Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505, 530 (1987) (CLS rejects doctrinaire Marxism because CLS adherents do not believe that legal outcomes are determined by the class system alone).

67 *See* Bruce A. Ackerman, *Foreword: Talking and Trading*, 85 COLUM. L. REV. 899, 899 (1985) ("liberal" view: legal discourse is both "alienating and liberating" because both intimacy and subjugation are renounced). *Compare* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 570 (1986) ("radical" view: synthesis of individual and community).

68 Foley, *supra* note 64, at 468-83. Deconstruction aims to expose the false assumptions and questionable reasoning of liberalism. Delegitimation works to uncover the intimate (and presumably illicit) relationship between law and politics. The purpose of "trashing" is to challenge hierarchy and order as well as rules, clearing the way for a

cial review is political,[69] that legislation is foisted upon a passive and ignorant majority by a Congressional elite,[70] and that agencies are self-contained and out of control.[71] Such CLS positions have created a perception that they attack Legal Process from the left.[72] Some view CLS as a Marxist movement, others as a nihilist movement.[73]

Many social movement lawyers would formally reject CLS's stark portrayal of the law and public policymaking process. They accept the chaotic, even venal milieu existing in the Capital and would dismiss alternative formulations of democracy as utopian and a waste of valuable time. However, social movement lawyers may grudgingly accept the CLS view when off-hours talk turns to "burn out." The power game in Washington has so many rules, "so many intangible sources of power, so many playing fields . . . that there is no reasoned plan to it."[74] Such political fragmentation "obliterates any sense of coordinated substantive purpose" and makes it difficult for social movement lawyers to sustain their activities without some type of networking and community-building *among themselves*.[75]

The fragmentation and chaos observed in the Capital corroborates that part of CLS theory which views law as derived from objective social occurrences and subjective social perceptions, and thus "wholly contingent and subject to change."[76] Such disorder and entropy can be clinically approached only by abandoning the closed, rule-based system of the Formalists and Legal Process adherents and substituting theories that view society as an open system which is not rule-based—*i.e.*, a community.[77]

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fundamental change in human relationships. *See also* Alan D. Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1230 (1981); Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 321-22 (1984).

69 *See* Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1503 (1985).

70 *See, e.g.*, Sherrill, *supra* note 56, at 2, col. 2 (the electorate is powerless and "TV-addled").

71 *See* Frug, *supra* note 43, at 1284.

72 *See, e.g.*, Brest, *supra* note 2, at 765.

73 Brest, *supra* note 2, at 765 (CLS attacked as the "new nihilism"); Fiss, *The Death of the Law?*, *supra* note 2, at 10; Fiss, *Objectivity*, *supra* note 2, at 740.

74 *See, e.g.*, Sherrill, *supra* note 56, at 2, col. 1 (chaos, despair, stalemate and disarray, fraud, greed, incompetence, and "endless ventilation of the same spent themes" too much a part of the Washington policymaking arena); *see also* Clune, *supra* note 7 (massive discretion created by indeterminacy of legal system in operation).

75 Clune, *supra* note 7, at 107.

76 Byse, *supra* note 22, at 1082.

77 The "post-industrial" indeterminacy of CLS thus provides an important counterpoint to the Newtonian determinacy of the Formalists, which still survives in the Legal Process synthesis of formalism and realism. *See* Toffler, *supra* note 16, at H3, col. 1 ("Newtonianism" of the industrial era challenged by "Post-industrial" science which focuses on the instability and disorder characteristic of the modern world). *But see* Frug,

Critical Legal Studies believes that Legal Process, because it is rule-based, discourages visions of how such community might be achieved.[78]

CLS scholars assert that Legal Process encourages us to believe that adequate levels of social organization may be achieved merely by following rules.[79] CLS maintains, to the contrary, that rules manage social conflict by repressing the need for personally meaningful experiences of autonomy, individuality, morality and community.[80] CLS thus opposes any legal discourse which replaces the existential value of human individuality, intimacy, and solidarity with a reliance on rules.[81] But CLS has as yet failed to identify a way in which the kind of community necessary to overcome the entropy of the present system can be established, or even to tell us much about its identifying characteristics.[82]

What is needed is a paradigm which approaches law as it is socially experienced, that is, as a pattern of random encounters. Actors in the law and policymaking system group together, disperse, and come together again in ways not fully explicable by rule-based theories such as the "old" Legal Process. But this does not mean that every attempt to make sense out of this system must self-destruct in nihilism. New ways of looking at the world, which have their antecedents in intuition[83] and experience,[84] seem more and more promising. Useful paradigms also exist in the natural sciences, where relativity has displaced Newtonianism, portraying a world "full of numerous unrealized tendencies for action . . . contin-

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supra note 43, at 1320-21 (liberal world wholly ingrained—makes it difficult to recognize/accept new forms of organization).

78 Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 69 (1984).

79 Foley, *supra* note 64, at 476 & 483.

80 Dowd, *supra* note 30, at 352.

81 Foley, *supra* note 64, at 481.

82 *See* Fiss, *Conventionalism*, *supra* note 2, at 194; Cover, *supra* note 2, at 44; *see also* Foley, *supra* note 64, at 494 (CLS has not progressed beyond assertion that law is an extension of politics). *But see* Singer, *supra* note 78, at 69 (sketch of values to be pursued in new community); *compare* Warren Lehman, *How to Interpret a Difficult Statute*, 1979 WIS. L. REV. 489. Part of this failure may stem from the fact that Critical Legal Studies, like all legal theories and ideologies discussed thus far with the exception of Legal Realism, does not have a clinical component.

83 Marcin, *supra* note 11, at 32 (science progressing "toward an aim which the poetic intuition may appreciate, but which the intellect can never fully grasp").

84 There is a "logic of experience" which seems to combine intuition and intellect. *See* GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: CLINICAL INSTRUCTION IN ADVOCACY 303 (1978) ("logic of experience" a thought process developed from intuition, creativity, and imagination through disciplined experience); *see also* Clune, *supra* note 7, at 53-54 (connecting notions of the "logic of experience" with the development of "systems theory" in the psychotherapy and cybernetics fields).

ually on the move, growing, merging, dying."[85]

Our legal and policy system reflects the chaos and entropy of the material world.[86] That random, indeterminate world now defies description by Newtonian jurisprudence and its succeeding legal ideologies.[87] Events are random but are nonetheless connected. The actions of a single person—say, a Rosa Parks—can have consequences, positive and negative, far beyond the purview of Newtonian theories of causation. One approaches such a world by appreciating that it is not composed of isolated "building blocks" but rather "appears as a complicated web of relations between various parts of the whole."[88] This in fact is how the Civil Rights Movement was built.

The system, though perhaps indeterminate, is not necessarily unpredictable. "Possibilities" or "probabilities" take the place of rules, and actors make choices based on available resources and likely outcomes rather than a "sure thing." The presence of randomness and indeterminacy in the legal and policymaking system thus does not indicate that we cannot control outcomes, and therefore should consider ourselves less responsible for them. To the contrary, our sense of responsibility needs to extend beyond its present limits, because our behavior can have consequences far beyond those discernible through the lens of Newtonian science.[89]

This blind spot in the Newtonian model underscores our need for a paradigm which encourages us to take individual responsibility for the consequences truly stemming from our own behavior, and not just as atomizcd actors connected only by rules of formalistic law. Taking responsibility for the consequences of individual choice which manifest themselves at the collective level is facilitated when individuals see themselves as part of a community. Members of such a community perceive social reality in terms of "weblike, interconnected, and intersubjective dynamics."[90] The community is

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85 Marcin, *supra* note 11, at 28.

86 On the chaos of the material world, see JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE (1987).

87 *Cf.* K.C. Worden, *Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 AM. U.L. REV. 1141 (1985) (systems theory proffers the emptiness of randomness as the only alternative to mechanistic connections).

88 Marcin, *supra* note 11, at 31.

89 As a social movement activist named Shelly Smith put it,

> life is an infinite game of chess, in which there are an infinite number of complex moves possible. The choice is open, but [each] move contains within itself all future moves. One is free to choose, but what follows is the result of one's choice. From the consequences of one's action there is never any escape.

Newsletter of the 14th & U Street Coalition, January 1988, at 3.

90 Worden, *supra* note 87, at 1143 ("female voice" reasoning inseparable from the contextual web of relationships within which it operates).

bound together by a "morality based on the values of continuity, communication, and interdependence . . . valuing relationship over right, subjectivity over objectivity, and care over conquest."[91]

In contrast, the law and policy system may ignore a social movement lawyer who does not use "rights talk,"[92] even though the use of such rule-based dialogue has a tendency to alienate the social movement lawyer from her community, her ultimate constituency.[93] It is a cruel paradox—one which is not resolved by eschewing rights talk, certainly, but neither is it resolved by ignoring the pressure rights talk exerts to push social movement lawyers in elitist and ultimately self-defeating directions. Social movement lawyers can bridge this paradox by keeping open lines of dialogue with constituents of the social movements while using rights talk in their dealing with actors in the legal system.[94]

C. The Response of the New Legal Process to Challenges of CLS and Law and Economics, and a Critique of Fiss's Interpretive Community

The New Legal Process is an attempt to update the "old" Legal Process and create a jurisprudential form which can withstand criticism from the left (CLS) and the right (Law and Economics). This attempt is primarily associated with Professor Owen Fiss. Professor Fiss attempts to manage the ambivalence about community surfaced by these critiques with a model "interpretive community," largely comprised of legal professionals. These professionals are bound together by ongoing conversation about the meaning of legal rules. Fiss's conception of community is problematic, however. It cannot withstand the intellectual forces described in Sections A and B above. Fiss's conception needs a clinical focus.

Actual participation in a community which provides a context for moral and political behavior, and which has some power to influence social outcomes, helps social movement lawyers make sense of the entropic disorder and incoherence identified by the Law and Ec-

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91 *Id.* (moral dilemma is context-bound and entails personal choice rather than equational abstraction).

92 *See, e.g.*, Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1978) (discussing need of minorities to continue to use rights talk despite blandishments of CLS adherents to the contrary).

93 *See, e.g.*, William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1236 (1989); Randall L. Kennedy, *The Racial Critiques of Legal Education*, 102 HARV. L. REV. 1745 (1989) (critique of authors mentioned *supra* note 92).

94 Arthur Kinoy, *The Role of the Radical Lawyer and Teacher of Law*, in LAW AGAINST THE PEOPLE 267, 287 (Robert Lefcourt ed. 1971).

onomics and Critical Legal Studies theories.[95] The "republican" tradition in law, perhaps more than the liberal "Newtonian" tradition, emphasizes such coherence, connectedness, and community.[96]

The Constitution was a compromise between the liberal, Newtonian thinking of a Madison and the republican, pre-industrial thinking of a Jefferson.[97] Both currents are evident in the Constitution.[98] While liberalism seeks a balance of power among branches,[99] republicanism looks to the legislature to discern, articulate, and instill the values and norms of the community.[100] Each has its limits.[101] Moreover, tension between the two has been manifest since the very beginning of United States history.[102]

Liberalism in law, as it developed from Newtonian Formalism to Legal Process, virtually ignored the randomness and incoherence which actually occurs in social life, particularly the indeterminacy which stems from conflicts between the individual and the community. Might a republican approach serve such purposes better than a liberal approach? Could social actors in such a community learn to resolve some or even many of their conflicts by dialogne in lieu of rules, clearing the way for comprehensive policymaking to which

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95 Such communities have been called "mediating institutions," *see* Gerald E. Frug, *The City As A Legal Concept*, 93 HARV. L. REV. 1057, 1072 (1981), and "jurisgenerative" communities. Michelman, *Republic, supra* note 19, at 4 & n.28 (citing Cover, *supra* note 2, at 4, 19). Through participation in such communities, one may experience a "collapse" of ego boundaries. *See* MORGAN SCOTT PECK, THE ROAD LESS TRAVELLED (1978); *see also* Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984) ("intersubjective zap"); Marcin, *supra* note 11, at 33 (interconnectedness of the universe observable in the hard sciences).

96 M. TUSHNET, *supra* note 54, at 6-7.

97 The Constitution blunted the Revolution's republican thrusts toward liberty and equality to accommodate businessmen, landowners, and professionals who demanded protection from the power of the masses in the legislature. The Articles of Confederation, with their emphasis on the power of the legislature to articulate community values, embraced republicanism but were viewed as inhospitable to property interests. Bloomfield, *supra* note 15, at 3; *see also* M. TUSHNET, *supra* note 54, at 13-15; Bloomfield, *supra* note 15, at 5 (Constitution shows influence of Montesquieu); Michelman, *Republic, supra* note 19, at 1508 & n.53. Certainly the Constitution is very different from the Declaration of Independence in this respect. *See* Bloomfield, *supra* note 15.

98 Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985); *see also* Kmiec, *supra* note 1, at 74 (common purposes of the Republic stated eloquently in the Constitution's preamble).

99 Madison vigorously distrusted power concentrated in the legislature, *see* Kurland, *supra* note 1, at 596, and cautioned against the danger of powerful factions seizing control of it. *Id.* at 597-98. He implored government officials to resist the legislature's encroachment. *Id.* at 600 (citing THE FEDERALIST No. 51, at 349 (James Madison)).

100 Sunstein, *supra* note 98, at 29.

101 Liberalism has become rule-oriented, while republicanism has suspicious associations with limited franchise and the inequality of wealth. *See infra* note 174 and accompanying text.

102 *See* Bloomfield, *supra* note 15, at 12 (Jefferson's election ended a constitutional crisis through the peaceful transfer of power from one ruling group to another).

virtually the entire community would adhere?[103]

Large-scale social movements such as those concerned with the need for comprehensive policy in the areas of civil rights, the environment, peace, and women's rights have forcefully articulated such visions of community as an addition to, or substitute for, the Newtonian governmental schema associated with liberalism.[104] The great social movements of the 1960s and 1970s created community through dialogue and other forms of human interaction, struggling toward a republican community on a national scale.

Professor Fiss has advanced the thesis that a community created by conversation occurring wholly within the legal process might constitute an "interpretive community" which could give a legal text, whether statute or court opinion, a legitimacy stemming from consensus beyond that which is possible to achieve by the imposition of positive law.[105] This paradigm, aimed primarily at CLS, answers not only the CLS view that Legal Process is merely a smokescreen for instrumental use of positive law by powerful factions, but also the CLS view that positive law cannot create community out of social incoherence.

A principal shortcoming to Professor Fiss's notion of an "interpretive community," however, is that the community thus defined is made up of lawyers and judges who wield state power. Thus, the community is not only exclusive, but also has the capacity to use state power to coerce the compliance of any who disagree with its interpretations.[106] Indeed, state institutions such as courts would not even be involved in the dialogue were it not for a basic conflict in society and among its individual members which discussion has not resolved.[107] When the liberal state creates a single normative world, it does so not through interpretation, but through political domination.[108]

For this reason, the social movements of the 1960s and 1970s are more deserving of the term "interpretive community" than the association of legal professionals described by Professor Fiss.

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103 *See* E & F I, *supra* note 2, at 333; Michelman, *Disenchantment*, *supra* note 13, at 266 (some measure of the organic view of the community associated with republicanism is necessary for comprehensive policymaking).

104 Clune, *supra* note 7, at 108.

105 Fiss, *Objectivity*, *supra* note 2, at 744-45 (interpretive community is one which recognizes designated rules as authoritative), and at 750 (to view adjudication as interpretation "makes law possible"); *see also* Brest, *supra* note 2, at 767 (paraphrasing Fiss).

106 Brest, *supra* note 2, at 770-71; *see also* Cover, *supra* note 2, at 40-44 ("jurispathic" courts).

107 Brest, *supra* note 2, at 769; *see also* Cover, *supra* note 2, at 40 ("[T]he jurisgenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence.").

108 Cover, *supra* note 2, at 43.

These social movements sought to expand their membership and to secure adherence to their norms through dialogue, nonviolent confrontation and force of example.[109] They sought to create a single normative world through moral suasion, by unifying the interpretation of system actors of moral standards, rather than by coercing compliance with an elite's interpretation of moral standards and duties. That they ultimately could not incorporate all members of the larger civil community is not an indication of their failure, but rather a clear indication that there may be a limit to the physical size which any such community can reach without loosening the bonds that tie it together.[110]

Contrasted with Fiss's idea of an interpretive community as primarily involving legal professionals is Cover's idea that interpretive communities of lay persons create law within themselves, a process which can be actually hindered, rather than facilitated, by participation in the legal system.[111] Cover conceives of law as a system of meaning, rather than of power. While law as power may frame the development of such a community, it is the moral power of human interaction and struggle which gives the community its force, its particular "nomos."[112]

The following section shifts from an examination of theory to practice: Juan Williams's excellent narrative of the Civil Rights Movement[113] is summarized in order to illustrate the development of the "nomos" of an interpretive community, and the legal implementation of that nomos.[114]

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109 *Cf.* Fiss, *Conventionalism*, *supra* note 2, at 184 (Fish views the interpretive community not as source of authority for disciplining rules, but rather a source of shared understandings), and at 190 (Fish argues that "instinctive form[s] of knowledge" rather than rules cause an interpretive community to cohere). On such instinctive forms of knowledge, see *supra* note 81 and accompanying text.

110 *See* Cover, *supra* note 2, at 34 (interpretive communities turn to the state at the void into which their bonds cannot reach); *see also* Frug, *supra* note 94, at 1070-71 (estimating that 40,000 members is a viable size for a republican community, using Greek city-states and smaller East European cooperatives as examples).

111 *See* Cover, *supra* note 2, at 18 ("[T]here is a radical dichotomy between the social organization of law as power and the organization of law as meaning . . . ."); *see also id.* at 6 n.11 (hermeneutics destroyed "in the necessarily apologetic functions of an officialdom").

112 *Id.* at 9 ("The tradition includes not only a corpus juris, but also a language and a [set of] myths [which] establish . . . paradigms for behavior.").

113 JUAN WILLIAMS, EYES ON THE PRIZE (1988).

114 As a field worker for the Student Non-Violent Coordinating Committee, I lived some of the history that Mr. Williams narrates, and thus I add my own experiences to his.

III
ON IMPLEMENTATION AND INTERPRETATION: CIVIL RIGHTS AND THE NEW LEGAL PROCESS

A. The Civil Rights Movement: Building An Interpretive Community

The Civil Rights Movement, which Cover would call a "redemptive" rather than an "insular" community,[115] is a direct descendant of the abolitionist movement of the 1800s, which considered the Constitution's compromises on the issue of slavery a betrayal of the rights of Americans of African descent.[116] There was a great deal of groundwork done—legal, political, and social—to create the conditions for the Civil Rights Movement.[117] It was necessary to convince the American people that segregation, like slavery and the black codes before it, violated a higher law. That higher law was natural law, central to the republican tradition and, though compromised in the Constitution, it remained strong in the Declaration of Independence, the Bill of Rights, and the spirit of the American Revolution.[118]

Charles Hamilton Houston, one of the most prominent black lawyers of this century, was a 1922 Harvard Law School graduate and a protegé of both Roscoe Pound, the originator of Sociological Jurisprudence,[119] and Felix Frankfurter, a prominent Legal Realist and a "social movement" lawyer in his own right.[120] Houston took Pound's theories to Howard Law School, where he worked to get the school accredited by the AALS and to create a cadre of black lawyers trained in activist constitutional law and sociological jurisprudence.[121]

Houston wanted Howard to produce black social engineers, who could use the law in the social movement for civil rights launched by the founding of the NAACP in 1909.[122] The NAACP had begun amassing data on segregation and its consequences while Houston was still at Harvard. By 1933, the organization had developed a legal strategy for combatting the doctrine of "separate but equal" which had held sway since *Plessy v. Ferguson*.[123] In 1935,

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115 *See* Cover, *supra* note 2, at 10, 47.

116 *Id.* at 35-36.

117 *See generally* G. MCNEIL, *supra* note 32 (overview of the role of leading legal tacticians in Civil Rights Movement).

118 Kinoy, *supra* note 94, at 283-84.

119 J. WILLIAMS, *supra* note 113, at 4.

120 *See* RICHARD KLUGER, SIMPLE JUSTICE 115-16 (1976).

121 J. WILLIAMS, *supra* note 113, at 5, 7. Thurgood Marshall was one of his top students. *Id.* at 7.

122 *Id.* at 8-9.

123 163 U.S. 537 (1896).

Houston took a leave of absence from Howard to direct the NAACP's legal campaign.[124] Houston planned to first attack segregation in the graduate schools and then work his way down to the elementary school level. Typically, separate graduate schools were not provided in the South, because so few blacks advanced beyond undergraduate degrees. Using this strategy, Houston and Marshall achieved significant victories.[125] In 1946, Marshall founded the NAACP Legal Defense Fund to pursue more of these cases.[126]

Houston's illustrious career as a lawyer did not blind him to the essential connection between legal strategy and social movement, however.[127] In 1948, Houston left the NAACP and helped initiate a school strike among poor blacks who protested the separate but unequal conditions in the black schools of Washington, D.C.[128] It was this school strike movement which led to the consensus in the black community of the day that segregation had to be demolished, rather than merely challenged as "unequal."[129]

Local whites threatened and intimidated the plaintiffs in early school segregation lawsuits.[130] Black parents pressed their rights regardless, spurred on by their concern over the damage segregation was doing to their children.[131] They were not satisfied with legal strategies alone, and interest in direct social action such as school strikes continued unabated. Students in Virginia struck in 1951.[132]

Brown v. Board of Education[133] used the circuits of the legal system—since the Revolutionary War the country's primary network of cultural and ideological legitimation—to send out a message that segregation was wrong. For the black professionals of the Legal De-

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124 J. WILLIAMS, *supra* note 113, at 10.

125 *See* McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (black at University of Oklahoma Graduate School must receive same treatment as students of other races); Sweatt v. Painter, 339 U.S. 629 (1950) (black admitted to University of Texas Law School); Gaines v. Canada, 305 U.S. 337 (1938) (black admitted to University of Missouri Law School).

126 J. WILLIAMS, *supra* note 113, at 16.

127 *Id.* at 15.

128 *Id.* at 16.

129 *Id.* at 17-18. The strike eventually spun off a segregation suit, Bolling v. Sharpe, 347 U.S. 497 (1954), which was incorporated with the first *Brown* case for hearing in 1953. 345 U.S. 972 (1953).

130 J. WILLIAMS, *supra* note 113, at 19.

131 Dr. Kenneth Clark's tests with black and white dolls provided key sociological evidence in the *Brown* decision. *Id.* at 20, 23. Dr. Clark showed black children a white doll and a black doll, asking them to associate positive and negative characteristics with each. The black children associated the black doll with negative characteristics, the white doll with positive. The last question in the interview was "Which doll is most like you?" at which point the children invariably showed signs of extreme stress. *Id.*

132 *Id.* at 25.

133 347 U.S. 483 (1954) (*Brown I*).

fense Fund, the decision affirmed the legitimacy of the legal system.[134] Mississippi Senator James Eastland denounced *Brown* for its reliance on sociological evidence, however.[135] The Court itself later blunted the *Brown* ruling with the formulation "all deliberate speed" (apparently a concession by Chief Justice Warren to Justice Stanley Reed, who had threatened to dissent from the otherwise unanimous *Brown* opinion).[136]

Professor Fiss considers "all deliberate speed" a foray into political strategy which undercut the interpretive role of the Court.[137] Another view might be that the Court is not an interpreter but a lawmaker, and that the politics of compromise is a natural part of the Court's job description.[138] Whether one's view is one of disappointed optimism about the Court, or redeemed skepticism, it is certainly true that the limitations of the *Brown* decision caused many blacks and civil rights workers to develop a very ambivalent attitude about the legal system and its utility compared to tactics of direct social confrontation. The lawlessness of their oppressors further undermined the faith of black people in the legal system.[139]

The lynching of Emmett Till, a black Chicago elementary school student while on summer vacation in Mississippi in 1955, was a case in point. Till's attackers were acquitted after a seventy-five minute deliberation by an all-white, all-male jury and all the black witnesses to the killing who testified had to leave the state.[140] Till's murder, and more pointedly, the denial of justice in his case, galvanized black people all over the country.[141] Attempts to intimidate blacks, so long successful, began to have the opposite effect, inciting increased resistance instead.

The leadership of the Civil Rights Movement shifted from lawyers to organizers who relied on extra-legal tactics to construct a social reality which would conform to the *Brown* vision. During the nine years from the first *Brown* decision to the 1963 March On Washington, this new strategy electrified the nation. Spirited civil rights demonstrations, sit-ins, and freedom rides, along with ruth-

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134 *See* J. WILLIAMS, *supra* note 113, at 34-35.

135 *Id.* at 38.

136 Brown v. Board of Educ., 349 U.S. 294, 301 (1955) (*Brown II*); *see* J. WILLIAMS, *supra* note 113, at 33. Further, the *Brown* Court declined to overrule *Plessy v. Ferguson*. *Brown I*, 347 U.S. at 495. *See* Michelman, *Republic*, *supra* note 19, at 1524 n.120.

137 Fiss, *Objectivity*, *supra* note 2, at 760-61.

138 *See* M. TUSHNET, *supra* note 54, at 120-21.

139 Not only did the Ku Klux Klan threaten violence, the newly-formed urban, middle-class White Citizen's Councils worked to disrupt jobs, credit, and mortgages of blacks associating with civil rights advocates. J. WILLIAMS, *supra* note 113, at 39.

140 *Id.* at 45.

141 *Id.* at 44. (According to a newspaper survey, five of every six black radio preachers devoted their sermons to the Emmett Till case).

less opposition to such efforts, marked the period.[142]

The Civil Rights Movement gained momentum, placing more and more blacks in direct confrontation with the system of segregation, official and unofficial, public and private. Within a year of Emmett Till's murder, the Montgomery bus boycott had started.[143] Black children who were Emmett Till's age in 1955, and read about his death, were the eighteen- and nineteen-year-olds who in 1959 started the sit-ins and freedom rides which eventually contributed to the collapse of Southern segregation.[144]

As the tide of the social movement's direct confrontation tactics rose through the first half of the 1960s, ambivalence about the legal system grew more acute. Civil rights workers were very much aware of the assistance the *Brown* judges had given the Civil Rights Movement, but they were also aware of the harm done by local judges who issued injunctions against strikes and demonstrations.[145] The federal bureaucracy, the National Guard, the Federal Bureau of Investigation and Congress stepped in to assist civil rights advocates only with the greatest reluctance and delay. FBI agents assigned to protect civil rights workers were often Southerners who, like FBI Director J. Edgar Hoover, were convinced that the Civil Rights Movement was a Communist plot.[146]

B. The Turn To Implementation[147]

Nomos establishes community paradigms for acquiescence as well as for resistance, and more importantly, provides ways to navigate the continuing tension between fighting and giving in.[148] At some point, a social movement confronts the reality that it cannot replace the civil community. It cannot grow too large without losing its moral coherence, and risks disintegration should it attempt to expand too far.[149] There was a limit to the number of people in our civil community the Civil Rights Movement could "redeem" in moral and racial terms. At the same time, a social movement's op-

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142 *Id.* at 197.

143 *Id.* at 57.

144 *Id.* The black press played a key role in molding black opinion. *Id.* at 50-51.

145 *Id.* at 173.

146 *Id.* at 179. Martin Luther King, Jr., felt that Robert Kennedy's Justice Department actually worked to undermine the Civil Rights Movement in Albany, Georgia. *Id.*

147 Implementation theory in law and the social sciences is linked to "systems theory" in the natural sciences. For a description of systems theory, see generally LUDWIG VON BERTALANFFY, GENERAL SYSTEMS THEORY (1968), LUDWIG VON BERTALANFFY, PERSPECTIVES ON GENERAL SYSTEMS THEORY: SCIENTIFIC-PHILOSOPHICAL STUDIES (1975) and EDGAR F. HUSE & THOMAS G. CUMMINGS, ORGANIZATION DEVELOPMENT AND CHANGE (3d ed. 1985).

148 Cover, *supra* note 2, at 6 ("To inhabit a *nomos* is to know how to *live* in it.").

149 *Cf. id.* at 44.

position may be prepared to use violence, and the state's protection may be required to avoid bloody conflicts. Ironically, the Civil Rights Movement leadership needed the coercive power of the state to create conditions under which they could continue to employ non-violent techniques.

Despite the "jurispathic" tendencies of the state encountered by civil rights workers on the front lines and in the courts, the Movement's leadership eventually sought the state's assistance in order to achieve some closure on their objectives.[150] The Civil Rights Movement began by using legal ideology to articulate its aims, but wound up modifying its aims in order to enhance its participation in the legal system.[151]

There were dissenters from this process. For some time after the Civil Rights Act of 1964 addressed the issue of segregation in public accommodations,[152] the Student Nonviolent Coordinating Committee (SNCC), the most radical wing of the Movement, continued to stress nonviolent direct action.[153] Even SNCC acceded, however, to Attorney General Robert Kennedy's recommendation that the Civil Rights Movement focus on voter registration. In fact, SNCC's determined drive to register voters in Mississippi laid the groundwork for the Voting Rights Act of 1965.

The Congress of Federated Organizations (COFO) focused the strength of SNCC, the Congress of Racial Equality (CORE),[154] the Southern Christian Leadership Conference (SCLC),[155] and the Na-

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150 *See id.* at 11 & n.30 (state becomes central when commitment is required).

151 According to Heisenberg's uncertainty principle, developed in physics, any actor joins the system in which he or she operates or even studies, and must be aware of his or her own effects. Social movements may in this sense be considered part of the legal system as soon as they attempt to influence the path of the law. J. RIFKIN, *supra* note 25, at 221-22; *see also* Cover, *supra* note 2, at 43 ("[I]t would be strange indeed to find the redemptive constitutionalist unwilling to concede the superior practical effects of securing the acquiescence of judges, legislators, and governors in the radical revisions that he offers up as the only true constitutional meanings.").

152 Memo, Leadership Conference on Civil Rights (June 1987), at 1 [hereinafter LCCR 1]; *see also* J. WILLIAMS, *supra* note 113, at 226. The Civil Rights Act was signed into law on July 2, 1964.

153 J. WILLIAMS, *supra* note 113, at 200-01 (SNCC Chairperson John Lewis's speech at the march was toned down considerably in response to objections from Cardinal O'Boyle and entreaties from Martin Luther King, Jr., among others). *See generally* HOWARD ZINN, SNCC: THE NEW ABOLITIONISTS (1964).

154 The Congress of Racial Equality was formed in the late 1940s and was originally an organization dedicated to the integration of all public facilities. One of CORE's most important strategies was the "Freedom Ride," during which groups of African-American and European-American students rode buses together across several Southern states, in violation of the laws segregating public facilities in those states. *See* AUGUST MEIER & ELLIOT M. RUDWICK, CORE, A STUDY IN THE CIVIL RIGHTS MOVEMENT 1942-1968 (1973); *see also* Note, Berghman v. United States, 59 TULANE L. REV. 793, 793-94 (1985) (authored by Michael Kaplan).

155 The Southern Christian Leadership Conference, an organization of African-

tional Association for the Advancement of Colored People (NAACP)[156] on voting discrimination in Mississippi, considered the most recalcitrant of Southern states. "Freedom Summer," as it was called, brought middle-class white college students to Mississippi by the hundreds to help in the voter registration effort.[157] Of the 800 students participating, 600 were white and 300 were women.[158] The presence of these white and female students broadened the base of the Civil Rights Movement tremendously. Moreover, many of these students went on to initiate social movements in their own right, addressing questions of war and peace, the rights of women, environmental quality, and community development and empowerment.[159]

The Mississippi Freedom Democratic Party (MFDP), created by COFO, challenged the credentials of the regular Mississippi delegation at the 1964 Democratic National Convention and attempted to seat an integrated delegation in its stead. However, President Lyndon Johnson had already promised Mississippi Governor Paul Johnson that the regular delegation would be seated.[160] A proposed compromise, which would seat the regular delegation and two of the MFDP delegates, was crafted by Hubert Humphrey and Walter Mondale. The compromise proved unacceptable to both sides, and ended with a sit-in by the MFDP.[161] SNCC, especially, was bitterly disappointed by the result, and began to evolve into a militant black nationalist organization. By 1968, the Civil Rights Movement had split into a middle-class, system-oriented professional group and a rag-tag band of students and militants, alienated from the legal process, whose proposed solutions to the race problem became more extreme as their numbers dwindled.[162]

American ministers throughout the Southern United States, was formed as a result of the Montgomery, Alabama bus boycott initiated by Ms. Rosa Parks. *See generally* DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (1986).

156 The National Association for the Advancement of Colored People is the nation's oldest civil rights organization. It was founded in Niagara, New York, in 1906 by a group of leaders of both African and European descent. *See* Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 12 (1985).

157 J. WILLIAMS, *supra* note 113, at 228.

158 *Id.* at 230.

159 These movements have also developed legal and policymaking apparatuses just as the Civil Rights Movement has done.

160 J. WILLIAMS, *supra* note 113, at 234.

161 *Id.* at 243. Soon after this, SNCC made contact with Malcolm X, a prominent black nationalist leader. *Id.* at 262. Stokely Carmichael, SNCC Director, was a co-founder of the Black Panther Party. *Id.* at 291.

162 These groups focused inward, and eschewed participation in the larger socio-legal system. Some advocated repatriation to Africa.

The Civil Rights Movement began as an effort to create a community which not only could transform its members into people with power and dignity, but which also could change the social world in which its members functioned.[163] As such, it was destined to develop a "transformational politics" which could not be "contained within the autonomous insularity of the [movement] itself."[164]

The more effective the Civil Rights Movement grew at the street level, the more options opened for it on the policymaking level. A determined voter registration effort by the organizations which remained in the civil rights mainstream, launched in Alabama in 1965, met with violence, brutality, and murder. The resulting atmosphere made federal action inevitable. Seventy million Americans watched President Johnson's speech as he presented the Voting Rights Act of 1965 to Congress on March 15, 1965.[165] Southern legislators began to fall in line, and the Voting Rights Act was passed on August 6, 1965.[166]

Blacks began to register to vote in record numbers. Prominent blacks were appointed to key positions in the national government, and several new Congressmen as well as the first black Senator since Reconstruction were elected. All over the South, the fervor of the Civil Rights Movement among the masses of black people focused on campaigns for political office from mayor to dogcatcher. The days of the social movement known as Civil Rights, with its emphasis on confrontation, dialogue, and the use of such techniques to win converts, were over.

In its place, another sort of community developed which focused on government and had system-oriented blacks as its political base.[167] This new community actually functioned much more like the interpretive community described by Professor Fiss, which has positive law as its focus as well as dialogue. The juxtaposition of this new civil rights community with its more discursive predecessor will demonstrate that "implementive," not "interpretive," is the more apt term for a community of this type.

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163 *Cf.* Cover, *supra* note 2, at 33 ("Redemptive Constitutionalism").

164 *Id.* at 34.

165 J. WILLIAMS, *supra* note 113, at 278.

166 Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)).

167 J. WILLIAMS, *supra* note 113, at 286-87. Such "legalization" may not always have had felicitous results. *See* E & F II, *supra* note 40, at 712 (CLS argument that lawyers representing the poor and unrepresented may even act as a pacifier of the victims of oppression); *see also* President Reagan's parting shot at the Civil Rights Movement, claiming that its leaders perpetuate ideas of oppression to keep themselves employed. *60 Minutes*, (CBS television broadcast, Jan. 15, 1989).

C. The Leadership Conference on Civil Rights: An Implementive Community

As the Civil Rights Movement relinquished some of its larger goals to pursue more modest goals within new legal frameworks, civil rights lawyers came to Washington to guard the structural changes in the legal system the movement had achieved.[168] A key feature of their strategy has been the development of a network which connects the public with the three branches of the federal government through dialogue as well as the use of legal machinery. They created a web of relationships which became as important as the "rules" in creating and effecting policy.[169] This network, the Leadership Conference on Civil Rights, continues today as a lobbying and policymaking association of more than one hundred civil rights organizations, church groups, and labor unions.[170]

The Leadership Conference on Civil Rights has characteristics which are not accounted for by Legal Process as Hart and Sacks envisioned it. For example, the Conference readily penetrates the boundaries of institutional competence which Hart and Sacks saw as separating the different branches of government.

Similarly, the Conference surpasses the vision of the Critical Legal Studies and Law and Economics approaches. The Conference is not a mere faction or self-interested lobby of the type which dominates the Law and Economics/Public Choice model.

Law and Economics, which characterizes statutes as "mere deals between private groups and the legislature,"[171] cannot fully explain the civil rights legislation sponsored by the Conference. CLS, concentrating on false communities created by alienated lawyers, cannot explain the Conference either. A sense of the importance of human relationships seems to have carried over from the

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168 *See, e.g.*, the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 23 U.S.C. § 1447 and in scattered sections of 42 U.S.C.); the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)), and the Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631 (1982)). *See* Clune, *supra* note 7, for discussion of the various professional roles available to "civil rights lawyers," at 115-17 nn.175-79 and accompanying text (law prophets), and at 116 n.175 ("second generation" administrative law reformers).

169 E & F II, *supra* note 40, at 706.

170 These organizations include, but are not limited to: the NAACP, the United Auto Workers, the National Council of Churches, the National Council of Senior Citizens, the American Association of Retired Persons, the American Civil Liberties Union, the National Council of Negro Women, the National Urban League, the United Steelworkers, the National Women's Political Caucus, the Disability Rights Education and Defense Fund, the National Council of La Raza, the Women's Legal Defense Fund, and the NAACP Legal Defense Fund.

171 E & F I, *supra* note 2, at 331.

social movement from which the Conference sprang. Its members view law and policymaking not simply as tools to manipulate for desired ends,[172] but rather as part of a larger process by which shared values are created and expressed and a sense of community is reinforced.[173] The Leadership Conference, seeking ways to involve the public at large in the setting of social norms, is also struggling against the type of lawyer's elitism CLS finds so objectionable.[174]

Finally, the characteristics of Leadership Conference are not adequately captured by the work of New Legal Process scholars such as Professors Fiss and Cover, but rather seem to point toward a synthesis of their respective work. The Leadership Conference is not the elite group of legal professionals which populate Fiss's interpretive community, yet it is also not simply the jurisgenerative group of nonlawyers envisioned by Cover's interpretive community. Where the Civil Rights Movement sought to engage the entire nation in dialogue, its law and policymaking offshoot now precipitates conversations binding interest groups and institutional actors together, sometimes excluding, rather than including, others.[175] Legal "corpus, discourse, and interpersonal commitment" have melded in a new kind of nomos, which has one foot in the redemptive community of the Civil Rights Movement and the other in the highly charged, awesome power of the national government.[176] In an attempt to demarcate its uniqueness, let us refer to the Leadership Conference not as an "interpretive community," but rather as an "implementive" community.[177]

Important, but beyond the scope of this Article, is a detailed look at the inner workings of this community, of what Cover would call its "paiedeic" nature.[178] What activities are necessary for par-

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172 E & F II, *supra* note 40, at 714 n.69 (judicial review).

173 *Id.* at 714 n.67 (recommending reconstitution of the legislature to "encourage broader community participation in the community's public discourse").

174 *See* Larry G. Simon, *The New Republicanism: Generosity of Spirit in Search of Something to Say*, 29 WM. & MARY L. REV. 83, 90 (1987) (criticizing Horwitz for contending that an objective public interest can be identified apart from the individuals who make up the public); *see also* Marcin, *supra* note 11, at 3 (criticizing civic republican tradition as based on a restricted franchise and exclusion of those not equal in wealth); *cf.* Michelman, *Republic*, *supra* note 19, at 1502 nn.30-31.

175 E & F II, *supra* note 40, at 717; *see also id.* at 718-19 (civil rights laws, environmental protection statutes, and deregulation initiatives better explained by public-regarding rather than interest-group theories). The job of the social movement, in contrast, was to foment both confrontation and inclusion, thus furthering the social dialogue.

176 Cover, *supra* note 2, at 12.

177 On this process, see Clune, *supra* note 7, at 68-70. Professor Kingdon calls these "policy communities." J. KINGDON, *supra* note 55, at 123-28 (detailed discussion of the operation and composition of such communities).

178 Cover, *supra* note 2, at 12.

ticipation in the implementive community?[179] How does a "common body of precept and narrative" evolve?[180] What is the "common and personal way" in which members are "educated into" the nomos of the community?[181] How is a "sense of direction [and] growth . . . constituted as the individual and [the] community work out the implications" of their inner values and of the external law and policy which they seek to create?[182]

Saving such considerations for a future article, I will instead examine what Cover called the "imperial" aspect of nomos.[183] In this aspect, the community considers its norms universal, and seeks to enforce them through external, legal institutions. While every nomos has both a paideic as well as an imperial mode, here we examine only the external conflict and contrast between the nomos of the Leadership Conference and those public and private actors whom it seeks to influence and/or control.[184] The narrative is that of a key civil rights struggle of the Reagan Era—the Civil Rights Restoration Act.

1. *The Civil Rights Restoration Act: A Clinical Case Study*

The political pressure generated by the 1963 March on Washington for Jobs and Freedom, the 1964 Mississippi Freedom Summer, and the activities of the MFDP at the 1964 Democratic National Convention made the Civil Rights Act of 1964 possible.[185] Title VI of the Civil Rights Act of 1964 prohibited the use of federal tax dollars to fund institutions which engaged in racially discriminatory practices, but the Act left the duty of federal funding recipients to refrain from discrimination ambiguous.[186] Did an entire institution have to be free of discrimination in order for any part of it to qualify for federal funds, or was the nondiscrimination directive applicable only to the specific program receiving federal aid?[187]

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179 *See, e.g., id.* at 14 ("Any nomos must be paideic to the extent that it contains within it the commonalities of meaning that make continued normative activity possible. Law must be meaningful in the sense that it permits those who live together to express themselves with it and with respect to it.").

180 *Id.* at 12-13.

181 *Id.* at 13.

182 *Id.*

183 *Id.*

184 *See, e.g., id.* at 13-14.

185 *See supra* notes 160-62 and accompanying text.

186 Title VI (codified at 42 U.S.C. § 2000d (1982)) provides: "No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

187 The Education Amendments of 1972, 20 U.S.C. § 1682 (1982), for example, limit the loss of federal funds due to discrimination to "the particular program, or part thereof, in which such noncompliance has been . . . found."

The essence of implementation techniques such as legislation is compromise between opposing forces and accommodation to the imperatives of the legal system itself. Later statutes sponsored by the Leadership Conference, which prohibited discrimination based on sex (Title IX),[188] handicap[189] and age,[190] all contained the identical compromise. These additions to the scope of civil rights protections were spurred by a nation-wide dialogue in which discrimination on the basis of sex, handicap, or age became unacceptable.[191] By turning to legislative implementation of their goals, however, the social movements which spurred these causes declared themselves part of the system.[192]

2. Grove City College v. Bell[193]

Federal agencies, through their administrative regulations, first addressed the uncertain scope of the antidiscrimination statutes.[194] During the Carter Administration, federal agencies made the scope of the duty not to discriminate quite broad, thus supporting the forces which favored antidiscrimination. The Reagan Administration, on the other hand, favored conservative forces, especially in the area of sex discrimination, and sought to narrow the scope of Title IX.

Grove City was initiated by a private college against President Carter's Attorney General, Griffin Bell, to combat the expansive in-

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188 Title IX of the Education Amendments of 1972, § 901(a), prohibits sex discrimination in educational programs or activities receiving federal funds. *See* Pub. L. No. 92-318, 86 Stat. 373 (codified at 20 U.S.C. §§ 1681-83 (1982)).

189 Section 504 of the Rehabilitation Act of 1973 prohibits recipients of federal funds from discriminating against disabled persons. Pub. L. No. 93-112, 87 Stat. 394 (codified at 29 U.S.C. § 794 (1982)).

190 The Age Discrimination Act of 1975 prohibits discrimination on the basis of age in the delivery of services and benefits supported by Federal funds. 42 U.S.C. §§ 6101-6107 (1982).

191 This development contradicts public choice theory. *See* E & F I, *supra* note 2, at 332 ("Public choice theory . . . indicate[s] that the legislature and the executive pay insufficient attention to problems affecting marginalized groups . . . .").

192 *See* Minow, *supra* note 2, at 1874-75 (rather than fragmenting the group, creating rights strengthens the community by institutionalizing relevant dialogue and by promoting an understanding of the individual's relationship to the community—in essence, just in claiming rights, one admits membership in a larger group).

193 465 U.S. 555 (1984).

194 Section 902 of Title IX directs agencies providing federal assistance to promulgate regulations requiring that recipients comply with the law, and requiring termination of assistance to noncompliants. 20 U.S.C. § 1682 (1982). *See, e.g.*, 40 Fed. Reg. 24, 128 (codified at 34 C.F.R. § 106 (1981)).

Title IX enforcement authority was transferred to the newly-created Department of Education by § 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677-78 (1979) (codified at 20 U.S.C. § 3441 (1982)). Before 1980, the Department of Health, Education and Welfare administered the Act and wrote the regulations.

terpretation of Title IX imposed by Carter Administration regulations.[195] It addressed the question whether the entire college was covered by Title IX because some of its students received Basic Educational Opportunity Grants from the Department of Education.[196] The case was decided by the Supreme Court during President Reagan's first term.

The majority held that Title IX barred sex discrimination only in a "program or activity" that received federal aid, not the entire educational institution.[197] The only federal aid the college received was for student scholarships. Therefore, the Court reasoned, only the student financial aid office need comply with Title IX. Discrimination carried on against women in other parts of the university was beyond the reach of the statute.

Since "program or activity" language also appears in Title VI of the 1964 Civil Rights Act,[198] section 504 of the Rehabilitation Act of 1973,[199] and the Age Discrimination Act of 1975,[200] the majority also implicitly narrowed the scope of each of these laws. In fact, the Court so interpreted section 504 in a decision handed down on the same day as *Grove City*.[201] The Department of Justice moved quickly to use the *Grove City* interpretation in all of its enforcement activities regarding discrimination on the basis of race, sex, handicap, and age.[202] The Department of Education suspended investigations in "hundreds of cases."[203] Similar policy shifts took place in the Department of Health and Human Services and other federal agencies.[204]

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195 By the time the suit reached the Supreme Court, the Reagan-era Department of Education had retreated from the expansive view prevalent during the Carter Administration. 465 U.S. at 561-62.

196 *Id.* at 559.

197 *Id.* at 570-76.

198 42 U.S.C. § 2000j (1982).

199 29 U.S.C. § 294 (1982).

200 42 U.S.C. § 6101 (1982).

201 Consolidated Rail v. Darrone, 465 U.S. 624 (1984) (involving employment discrimination against a disabled person).

202 LCCR I, *supra* note 152, at 2. *See* Suzanna Sherry, *Issue Manipulation by the Burger Court: Saving the Community from Itself*, 70 MINN. L. REV. 611, 650-51 (1986) (Burger Court generally intervened in civil rights dialogues to subordinate the rights of the individual to the perceived interests of the majority); *see also* Note, Grove City College v. Bell *and Program-Specificity: Narrowing the Scope of Federal Civil Rights Statutes*, 34 CATH. L. REV. 1087 (1985) (authored by Dianne M. Picné); Note, *Title IX of the 1972 Education Amendments: Harmonizing Its Restrictive Language with Its Broad Remedial Purpose*, 51 FORDHAM L. REV. 1043 (1983) (authored by Claudia S. Lewis).

According to Professor Sherry, the Warren Court was the mirror opposite of the Burger Court, intervening as in *Brown I* to prevent minority rights from being subordinated to the will of the majority. Sherry, *supra*, at 652.

203 LCCR I, *supra* note 152, at 2.

204 *Id.*

3. *The Legislative Response*

The Leadership Conference on Civil Rights decided to sponsor legislation designed to overrule the Court's interpretation of the "program or activity" language of the various civil rights statutes. The legislation would establish that if any part of an institution receives federal funds, the entire institution must comply with antidiscrimination law.[205] Thus, the definition of "program or activity" would include the entire institution. The new law would require that Grove City College not discriminate in any part of its operations in order to receive federal funds in its student financial aid office. This first attempt of the Leadership Conference to overturn *Grove City*, the Civil Rights Act of 1984, passed the House by a vote of 375 to 32,[206] but stalled in the Senate after a filibuster by opponents as the 98th Congress came to a close.[207]

Legislative attempts in the 99th Congress foundered because of disputes regarding the reach of the bill in the area of abortion rights and the extent to which the proposed law would cover religious institutions. These disputes took shape in a fight over two amendments offered by conservative Republicans to the proposed "Civil Rights Restoration Act." One, an "abortion-neutral" amendment, would insure that institutions receiving federal funds would not be forced to perform abortions. The Leadership Conference, however, read the language as repealing "longstanding regulations protecting students and employees against discrimination in education programs if they [chose] to have an abortion."[208] The other would exempt religiously "affiliated" institutions as well as religiously "controlled" institutions from Title IX coverage.[209] The conservatives ostensibly engaged in this legislative maneuvering to enhance the position of religious groups such as the United States Conference of Catholic Bishops.

The "abortion-neutral" amendment especially threatened to fragment the Leadership Conference and undermine the interpretive community around civil rights.[210] The United States Catholic Conference, a staunch member of the Leadership Conference on Civil Rights, suddenly found itself split off from the other members

205 19 H.R. 5490, 98th Cong., 2d Sess., 130 CONG. REC. H7052-57 (1984).

206 *Id.*

207 The companion Senate bill, S. 5508, was tabled by a vote of 53-45. 130 CONG. REC. S12,640-43 (1984).

208 LCCR I, *supra* note 152, at 2. This amendment was offered by Representatives Sensenbrenner and Tauke, of the House Judiciary and Education and Labor Committees, respectively.

209 *Id.*

210 On the origins of the "interpretive community" on civil rights, see *supra* notes 115-46 and accompanying text.

of the Leadership Conference, especially the women's groups. Key spokespersons in the Leadership Conference on Civil Rights and in the Catholic Conference developed a consensus which cleared the objections of both sides in time to re-introduce the Civil Rights Restoration Act in the 100th Congress.[211] Despite extreme portrayals of the bill's impact by conservatives,[212] the bill passed both houses and President Reagan's eventual veto was overridden.[213]

D. The Role of the Supreme Court in the New Legal Process

The Supreme Court seems to play an important role in shaping the dialogue of the community envisioned by New Legal Process scholars such as Professors Michelman and Fiss.[214] Criticism of the Court's role in this aspect of the New Legal Process continues from the left[215] and the right.[216] Fiss's conception of the Supreme Court as prophet seems rooted in the distinctive historical role the Warren Court played as it opposed government compromises of individual and minority rights, particularly during the Civil Rights era.[217] After Warren's resiguation, however, the Supreme Court began to take on a decidedly more conservative cast. The Leadership Conference, operating in the legislative and regulatory as well as judicial arenas, has in some instances been able to outflank the more conservative Court of today, as evidenced by the confrontation over *Grove City.*

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211 *See* Letter from United States Catholic Conference to President Reagan (Mar. 8, 1988) (expressing satisfaction with "abortion-neutral" character of bill).

212 Helen Dewar, *Vote on Veto of Civil Rights Bill Stalled*, Wash. Post, Mar. 18, 1988, at A4, col. 1 (one allegation was that transvestites would have to be given positions as day care instructors); *see also* Editorial, *No Reason to Veto*, Wash. Post, Mar. 16, 1988, at A22 (allaying fears that hospitals will be required to perform abortions or churches will be forced to ordain women); Helen Dewar, *Religious Leaders Assail Moral Majority's Scare Tactics over Civil Rights Bill*, Wash. Post, Mar. 19, 1988, at A8, col. 1 (attacking the Moral Majority's allegations that the new bill would qualify drug addicts, active homosexuals, and transvestites for federal protection as handicapped).

213 *See, e.g.*, Ethan Bronner, *Rights Gains Holding Their Own*, Boston Globe, Mar. 29, 1987, at 1, col. 1 ("In broad terms, Reagan's assault on three decades of civil rights legislation has failed; affirmative action for women and minorities has proven to be too firmly embedded in American life for him to dislodge it.").

214 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 88 (1980) (judicial power used to perfect majoritarian processes); Michelman, *Disenchantment, supra* note 13, at 262 (judges make their contribution to the politics of law by carrying on with tbe work on the people's behalf, wben the judges are in a better position to do so than are others); *see also* Fiss, *Objectivity, supra* note 2, at 755 (judiciary bas a "special competence to interpret a text such as the Constitution, and to render specific and concrete the public morality embodied in the text.").

215 *See generally* M. TUSHNET, *supra* note 54, at 150-58 (contending that faith in judges as part of a continuing dialogue with the legislature and tbe public is misplaced, that judges are first and foremost creatures of the positive law system).

216 *See generally* Fiss, *The Death of the Law?, supra* note 2, at 2-8.

217 *See id.* at 15. *But see* Cover, *supra* note 2, at 57-58 (citing Bickel).

However, when President Reagan nominated Judge Robert Bork to be Associate Justice of the Supreme Court, the Leadership Conference grew alarmed. According to William T. Coleman, Jr., a black Republican[218] who had supported Bork's nomination to the D.C. Court of Appeals,[219] Bork was determined to overrule settled Warren Court cases which "recognized in the Constitution . . . fundamental liberties that Americans legitimately consider to be their birthright."[220] Further, Bork "propose[d] step by step to reduce drastically the scope of the equal protection clause of the 14th Amendment."[221]

Bork's departure from his general program of judicial restraint to argue that the Court should actively overturn certain cases upholding federal civil rights statutes particularly troubled the Leadership Conference.[222] Bork proposed similar judicial activism to overturn state-mandated affirmative action programs.[223] Even though Bork "repeatedly insist[ed] that aggrieved individuals and groups should seek redress through the legislative process rather than the courts,"[224] he also consistently opposed Congressional legislation to promote racial equality.[225]

The Leadership Conference considered Bork a real threat, and organized broad-based and effective opposition. Millions of Americans watched the Senate hearings on television, where the Leadership Conference's characterization of Bork as a "rigid ideologue, far outside the mainstream of American public opinion," was confirmed for many.[226] The Leadership Conference framed a dialogue involving people from a plethora of backgrounds and regions of the country, examining values and principles inherent in our Constitution

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218 *See* Elizabeth Drew, *Letter from Washington*, THE NEW YORKER, Nov. 2, 1987, at 154 (Coleman is a "highly successful black attorney who . . . served in Gerald Ford's cabinet").

219 William T. Coleman, Jr., *Why Judge Bork is Unacceptable*, N.Y. Times, Sept. 15, 1987, at 35, col. 1.

220 *Id.* at col. 2 (fundamental liberties endangered by Bork included "a right of married people to use contraceptives; a right of people not to be sterilized against their will; a right to marry, establish a home and bear children; a right to be taught a foreign langnage and a right of parents to send their children to private schools").

221 *Id.*

222 *Id.* at col. 3. (Bork questioned the constitutionality of the public accommodations provisions of the Civil Rights Act of 1964, the Voting Rights Act of 1965 and the 1970 Amendments to the Voting Rights Act.)

223 Editorial, *The Case Against Bork*, THE NEW REPUBLIC, Oct. 5, 1987, at 10.

224 Coleman, *supra* note 219, at A35, col. 3.

225 *Id.*

226 Memo, Leadership Council on Civil Rights (August 1987), at 2 [hereinafter LCCR II]; *see also* Drew, *supra* note 218, at 154 (Bork's belief that there was no constitutionally-protected right to privacy and his opposition to "virtually every Supreme Court decision that advances civil rights" came through in "thirty hours of Bork's testimony").

and in our society.[227] Millions of people nationwide not only discussed the nomination of a Supreme Court Justice but important issues of civil rights and civil liberties as well.

A poll taken by the American Federation of State, County and Municipal Employees (AFSCME) in August, 1987 showed the success of the mobilization and outreach effort by the Leadership Conference: Large numbers of Americans were "very concerned" that Bork would sponsor a retreat on civil rights and privacy.[228] Southern whites who, as a group, once might have welcomed Bork, now would "not necessarily support him."[229] A poll by the Roper organization, taken after Bork completed his testimony, showed that not only did Southerners, white as well as black, oppose Bork, but many conservatives opposed him as well.[230] The political and legal techniques developed by the Leadership Conference for implementation purposes effectively combined with the residual moral authority of the Civil Rights Movement from which it sprang for a resounding victory.[231]

However, the victory was one of "implementation" rather than "interpretation." In the Bork struggle, there was confrontation, but no dialogue between those who opposed Bork and those who supported him.[232] The nomos represented by the Leadership Conference had incorporated the broadest base of the adherents it could incorporate without shattering.[233]

The Leadership Conference could not create a consensus which stretches across our civic community, despite the exclusion of Bork from a key policymaking position within it.[234] Bork's replacement, a seemingly much gentler Justice Kennedy, has voted to re-examine

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227 *See* Memo, Leadership Council on Civil Rights (Oct. 14, 1987), at 1 [hereinafter LCCR III].

228 Drew, *supra* note 218, at 152.

229 *Id.* at 153 (Southern whites did not want to re-open civil rights issues any more than did Southern blacks).

230 *Id.* at 154. In fact, the Bork nomination may be seen historically as the factor which split the Reagan consensus—a "tenuous and uneasy alliance" between conservative moralists and young libertarians who "don't want the government messing around in their private lives." *Id.* at 153.

231 President Reagan apparently failed to effectuate the conservative social agenda of his most ardent supporters. *See* Nadine Cohodas & Mark Willen, *Angry, Defiant Bork Insists on Senate Debate*, CONGRESSIONAL QUARTERLY, Oct. 10, 1987, at 2437 (conservative agenda included "an anti-abortion constitutional amendment, a sharp curtailment of affirmative action and prayer in public schools").

232 For Martin Luther King, Jr., even racist Southern sheriffs were part of the dialogue. J. WILLIAMS, *supra* note 113, at 182.

233 Michelman, *Republic*, *supra* note 19, at 1521 n.111.

234 *Cf.* Cover, *supra* note 2, at 16 n.41 (discussing how the Massachusetts Bay Colony maintained its holistic integrity through the expulsion of members like Roger Williams and Anne Hutchinson).

established civil rights precedents[235] and restrict affirmative action programs,[236] just as Bork would have done. Bork is gone, but the ideology he supported is not. Where can the Leadership Conference go from here?

IV
CONCLUSION: COMMUNITY BUILDING THROUGH THE NEW LEGAL PROCESS

The search for community through social confrontation and dialogue ("interpretation") and through manipulation of the law and policy system ("implementation") exist in intimate dialectic with one another.[237] Interaction in public life can create common understanding which makes resort to law less necessary,[238] and which points toward a broad nomos in which "law is predominantly a system of meaning rather than an imposition of force."[239] Legal intervention and implementation can shape public dialogue in ways which will remain necessary until that distant future point at which the ideal of full inclusive community might be achieved.[240] The continuing interplay between interpretation and implementation helps ameliorate the downsides of rule of the people and rule of law, respectively.[241]

Traditional ideas of law as a Newtonian system have been overwhelmed by technological, economic, and ideological changes in American society.[242] These changes have provided opportunities to bring Americans closer together as a community, as well as to divide them. Continuing disagreements on issues such as civil rights have also provided opportunities for dialogue out of which new norms evolve.[243] Participants in this dialogue—which includes policymak-

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235 *See* Patterson v. McLean Credit Union, 485 U.S. 617 (1988) (voting to re-examine Runyon v. McCrury, 427 U.S. 160 (1976)).

236 Moore v. Richmond, 109 S. Ct. 439 (1989).

237 *See* Michelman, *Republic*, *supra* note 19, at 1504-05 (dialectic between rule of law as security and rule of the people as activity).

238 Tushnet argues that when we become a community we will no longer need activist judicial review, for example. *See* Marcin, *supra* note 11, at 14-15 & n.33; *see also* Michelman, *Disenchantment*, *supra* note 13, at 265-67.

239 Cover, *supra* note 2, at 12.

240 At such a point, law as we know it might no longer be necessary, but probably would be replaced by something analogous to the customary law form now existing on the international level. Until that point, social movements can create pockets of such all-inclusive communities, internally governed by custom and remonstrance, and forbearance, rather than resort to majority rule. *See* MANUEL CASTELLS, THE CITY AND THE GRASSROOTS: A CROSS-CULTURAL THEORY OF URBAN SOCIAL MOVEMENTS (1986).

241 Michelman, *Disenchantment*, *supra* note 13, at 258.

242 *See* Sherrill, *supra* note 56, at 2 (discussing the effect of communication, special interest PACS, and the growing federal bureaucracy on political decisionmaking).

243 *See* Minow, *supra* note 2, at 1867 ("rights represent articulations . . . of claims that

ing officials in the different branches of government as well as a wide range of interested and informed observers—make law and policy through this continuing process of discussion.[244]

The ideal of a national republican community of shared values, the original aim of the American Revolution, was dulled by the compromises of the Constitution. Public values which all in our civic community can share are not self-evident in the Constitution.[245] In an important way, social movements have sought to create the shared republican values suggested by the Constitution and expressed more forcefully in the Declaration of Independence. Social movements cannot achieve a total incorporation of the civil community into their interpretive community. Social movements which simultaneously adhere to their principles and engage the civic community in dialogue, however, may alter the civil community's base-line assumptions on issues such as peace, the environment, poverty, the family, crime, drugs, and health.

The activities of implementation groups, such as the Leadership Conference, may thus point toward the creation, issue by issue, of "implementation" communities, for a practical, clinical dimension of the New Legal Process. This clinical dimension could involve professionals in the law and policy implementation system and members of the general public in an open and comprehensive dialogue on social direction, standards of performance, and the definition of ethical behavior.[246]

Clearly, such a conversation can and should range far beyond the Supreme Court and, indeed, beyond the legal profession as a whole. Fiss advances a preeminent role for the Court because of the

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people use to persuade others . . . about how they should be treated and about what they should be granted").

244 E & F I, *supra* note 2, at 333.

245 *See* Cover, *supra* note 2, at 17 (meaning of the Constitution will always be "essentially contested" because of the "diverse and divergent narrative traditions within the nation."); *see also* Fish, *supra* note 2, at 1346 (indeterminacy in Court's articulation of "public values" a reflection of the fact that such values derive from the political and social visions that are always competing with one another for control of the state's machinery). *But see* Fiss, *Conventionalism*, *supra* note 2, at 192 (arguing that legitimate choices can be made among these meanings); *see also id.* at 196 (convergence of law and politics a distinctive feature of the American legal system).

246 *See* Peck, *supra* note 95, at 316-24 (calling for a "community presidency" to lead the country, that is, a managerial team including the vice-president and all cabinet members, who would be selected before the Presidential election and would campaign as a team with the Presidential aspirant). *But see* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1071 (1984) (Constitution's explicit commitment to the institutions of contract, private property, and state's rights pose stark limits to the viability of interpretative communities as a means of social organization). This process, already beginning with the proliferation of nonprofit "implementation" groups in the nation's capital, points toward a modern version of Jeffersonian republicanism. *Cf.* Patrick Esmond White, WPFW Radio talk show (Feb. 21, 1989).

special position of judges as authoritative interpreters of the law,[247] and criticizes the "nihilism" of those who do not recognize the state—and especially the judge—as a legitimate source of normative interpretation.[248] Cover's response would be that the delegitimation of the judge's claim to normative interpretation does not create a nihilistic void, but rather opens channels for hermeneutic dialogue.[249]

Federal courts have certainly not been the sole institutional actors in the implementive dialogne around civil rights law.[250] The institutional actors in that dialogue have extended far beyond the three principal branches of the federal government. Policy-making agencies and officials of government—federal, state, and local—may be called upon to implement federal civil rights law, both by official pronouncement and by force of example.[251] Members of the United States Congress, the President, members of state legislatures, state governors, city council members, and federal department officials all participate.[252] Private participants of various stripes, including corporate executives, labor union officials, and school administrators, join the public actors. If conversation about civil rights can broaden in this way, it can focus more on the capacity of civil rights norms to teach us and to strengthen our society's moral and economic dimension, and it can focus less on positivist clashes for power.[253] A worthy aim for the Leadership Conference is to broaden the dialogue to include more and more people, gradually moving towards a social solidarity based on something other than rights, entitlements, and rules.[254] Such a dialogue could itself grow more extensive, touching on social issues such as labor, management, the environment, human services, national defense, the economy and the budget as well as civil rights. Such a dialogue could

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247 *See* Fiss, *Objectivity*, *supra* note 2, at 755-56 (judicial interpretation not only "legitimates the use of force against those who refuse to accept [the court's] interpretation . . . but [also makes] an ethical claim to obedience . . . because the judge is part of an authority structure that is good to preserve.").

248 *Id.* at 762-63.

249 Cover, *supra* note 2, at 44.

250 *Compare* Fiss, *The Death of the Law?*, *supra* note 2, at 15 (Warren Court responsible for belief in the existence of public values). What about Rosa Parks? *See* Michelman, *Disenchantment*, *supra* note 13, at 259 n.21.

251 *Cf.* WILLIAM A. KAPLIN, THE PROCESS OF CONSTITUTIONAL INTERPRETATION: ROLES FOR LAWYERS AND SIGNIFICANT OTHERS 2 (1987).

252 *Id.* at 3.

253 E & F I, *supra* note 2, at 333.

254 *See* Fish, *supra* note 2, at 3 (agreement is not a function of rules but rather of the fact that assumptions and procedures are so widely sbared as to appear the same to all); *see also* Michelman, *Republic*, *supra* note 19, at 1529 (pursuit of political freedom through the law means constantly expanding the number of people in the dialogue).

help rejuvenate our political community.[255]

At present, our civil community embraces everyone within our national boundaries, but its "members share no common awareness . . . ."[256] Our civil community exists in constant tension between "what is and what might be," and depends for its existence upon "a line of human endeavor that brings [the two] into temporary or partial reconciliation."[257]

The clinical dimension of the New Legal Process, exemplified by the actions of the Leadership Conference on Civil Rights, is a law and policymaking process, put in operation by social movement lawyers. On the plane of legal ideology, it has a place in our jurisprudence: It examines current knowledge and context (Legal Realism), in the light of closely held, "self-evident" community values (Republicanism), against a backdrop of legal tradition (Legal Formalism). The clinical dimension of the New Legal Process creates a community in which relations among people, shared experience, and moral example compete with positive law as a means of resolving disputes.[258] It uses dialogue to overcome the entropy and confusion perpetrated by the closed nature of the law and policy system, particularly separation of powers and excessive reliance on rules, which has bedeviled previous legal ideologies.[259] At the same time, it uses rules to restrain the energy released by open confrontation in a community which has not yet found ways to include all its proper members.[260]

The alternatives to coordination of our national agenda through the type of dialogue suggested by the New Legal Process range from the nation continuing in a "mildly unhappy and improbably feasible mix of disconnected substantive goals and programs" to the nation degenerating into an "insupportable condition of entropy and confusion."[261] A national dialogue about necessary social

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255 Michelman, *Republic*, *supra* note 19, at 1528-32.

256 Cover, *supra* note 2, at 14.

257 *Id.* at 39.

258 *See* Minow, *supra* note 2, at 1862 ("[t]he interpretive approach permits debate over legal and political choices without pretending a social harmony that does not exist and without foreclosing social changes as yet unimagined"); *see also* Michelman, *Disenchantment*, *supra* note 13, at 256 (referring to this process as the "politics" of law).

259 *See* Cover, *supra* note 2, at 39-40 (dialogues used to overcome the constitutional interpretation which supported slavery).

260 *See* Fiss, *Objectivity*, *supra* note 2, at 755.

261 Clune, *supra* note 7, at 109. An example of the latter would be a budgetary crisis (resulting when the compromises worked out by thousands of separate implementations are simply too costly and it is difficult for the system to identify acceptable interprogram tradeoffs). *Id.* at 110.

choices could reinforce our democracy.[262] Social movement lawyers and academics who interact with and study social movements can facilitate that dialogue, but cannot carry it on alone.[263]

262 *See id.* at 111 n.167 (in systems analysis terms, the goal is the best policy determination through the most open and diverse process possible while at the same time keeping the risk of inappropriate decisions within acceptable limits).

263 *See* E & F II, *supra* note 40, at 723 (New Legal Process dialogue should not be limited to professionals); *see also* Brest, *supra* note 2, at 771.