THE THEORY OF CRITICAL LEGAL STUDIES

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'I if we, dear, know we know no more
Than they about the law,
If I no more than you
Know what we should and should not do
Except that all agree
Gladly or miserably
That the law is'
(W. H. Auden 'Law Like Love')

1. A PROGRESSIVE INTERVENTION

Critical legal studies is the first movement in legal theory and legal scholarship in the United States to have espoused a committed Left political stance and perspective. A left-wing academic trend of considerable breadth in the field of law is in itself worthy of attention, but one which has assumed an organized form and has already made a marked impact loudly demands careful scrutiny.

The emergence and growth of the Conference on Critical Legal Studies (CCLS) is to be warmly welcomed. It raises the prospect of generating an impact on legal scholarship that outreaches the impact of Realism in the 1920s and 1930s. It also has the potential of forcing itself upon the calm and untroubled world of legal scholarship in such a way as to require the latter to engage in a thorough-going debate about the nature and direction of legal scholarship and education.

This essay sets out to assess the significance and import of the critical legal studies movement. It seeks to do this not by standing aside from the commitment of the movement but adopts and supports its partisanship. The approach adopted

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2 Duncan Kennedy defines critical legal studies as 'the emergence of a new left intelligentsia committed at once to theory and to practice, and creating a radical left world view in an area where once there were only variations on the theme of legitimation of the status quo'; D. Kennedy, 'Critical Labour Theory: A Comment' 4 Ind Rel LJ 503, 506 (1981). In characterizing this 'legal leftism' Kennedy elsewhere insists that 'our methodology is linked, however obscurely, to our left politics. We're trying to do radical legal scholarship', 'Cost Reduction Theory as Legitimation' 90 Yale LJ 1275 (1981). The movement is 'a full frontal assault on the edifice of jurisprudential writing and thought', Allan Hutchinson & Patrick Monahan, 'Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought' 36 Stan L Rev 199-245 (1984). 'There is, at long last, a "left" in legal academia, equipped with nascent theory', Ed Sparer 'Fundamental Human Rights, Legal Entitlements and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement' 36 Stan L Rev 509-622 (1984).
is one of committed support for the goals of the critical project; where I am critical I am motivated by a desire to further and advance what is not only a powerful challenge to orthodox scholarship but one whose greatest significance lies in its presentation of an identifiable alternative; an alternative which is not only within legal scholarship but which at the same time has much to say about the politics of law and, more broadly, about the shape and character of a future alternative society.

The critical legal studies movement is too young to require a writing of its intellectual and political history. The present objective will be to identify the distinguishing features of the movement paying special attention to its theory and methodology. The focus on theory and methodology imports an assumption, which should be made explicit, that the long-term viability of the movement and the potential for its application to the politics of law depends upon its attaining and sustaining a degree of theoretical and methodological coherence.

The critical legal studies movement in the United States exhibits both homogeneity and diversity. Its homogeneity arises from the distinctiveness and visibility that results from the organization linkages provided by the existence of the Conference on Critical Legal Studies (CCLS). Most critical authors publicize CCLS by carrying an opening footnote which mentions the existence of the CCLS and gives a contact name and address. Conference members display their connectedness rather self-consciously by footnoting their indebtedness to fellow participants in all their writings. The Conference has sought to give itself a public existence and visibility, not only by its own conferences, but through its intervention in other conferences. It has also sought to develop and maintain a public alliance with radical lawyers through its relations with the National Lawyers Guild. The publication of the *Politics of Law: A Progressive Critique* as a joint venture between the Conference and the National Lawyers Guild, provides a text that comes close to being a manifesto for the critical legal studies movement. This homogeneity is in itself directly and consciously political; it

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3 A very sympathetic analysis of the genesis and trajectory is provided in D. Livingston, unsigned note, 'Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship' 95 *Harv L Rev* 1669-90 (1982); and more critical account is provided by Allan Hutchinson and Patrick Monahan, *supra* n 2. See also D. Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism' 36 *Stan L Rev* 575–622 (1984).

4 The quest for theoretical and methodological coherence is not a call for theoretical and methodological uniformity. It is clear from the most preliminary reading of critical legal texts that there is a considerable degree of diversity in both method and theory. The question is rather whether there exists a degree of compatibility which allows for development through internal dialogue. Others have already arrived at the conclusion that the internal differences are such that 'the divergences within the group are so fundamental as to demand their disbandment', Hutchinson and Monahan *supra* n 2, 24.

5 It is not entirely flippant to notice that a preliminary test of whether an article or book is to be regarded as falling within the critical movement is whether it carries an attribution to Duncan Kennedy.

involves the transplantation of 'movement' political ideas and lessons into the field of legal scholarship.

The diversity of the critical legal studies movement is just as distinctive. There is a readily identifiable communality of starting-point in the critique of liberal legalism and a common awareness of the importance of theory and methodology which is a reaction against the generalized atheoretical character of mainstream legal scholarship. But beyond this point the theoretical inspiration and roots that inform their writing reveals a remarkably wide trawl of twentieth-century radical and revisionist scholarship.\(^7\)

I shall be particularly concerned to address the question of the theoretical orientation of critical legal theory. The problem can be posed in the following fairly stark terms: does critical legal theory achieve new, imaginative and liberating theoretical syntheses or is its work marred by a jumbled, incoherent eclecticism? In order that the answer to this question should not be prejudged let me hasten to insist that I do not believe that there is a 'one right answer' to the problem of theory. But I am concerned about the preconditions and problems associated with theoretical synthesis.\(^8\) I propose a burden of proof which imposes on the synthesizer the obligation to establish the compatibility of the theoretical elements that are combined. The problems of theoretical synthesis or syncretism involve a recognition that theories exhibit specific incompatibilities which make simple appropriation or fusion of distinct theories impossible. The problem can be captured by the medical analogy of the problems of rejection of tissues from donors in transplant surgery. The success of critical legal studies will be in part determined by the extent to which they succeed in bringing together the diverse theoretical traditions on which they seek to draw.

Lurking behind the question of the theoretical coherence of the critical legal studies movement is the brooding omnipresence of Roberto Unger. His work is widely acclaimed and extensively footnoted by most critical scholars but I will argue that this is a deferential bow towards a theoretical integration rather than a genuine source of a theoretical inspiration that is systematically explored and deployed to underpin the critical project. Unger himself moved onto the stage of critical legal theory in a typically ambiguous appearance with his lengthy address to the ninth CCLS conference in 1982.\(^9\) I will consider the extent to which his intervention should be taken as adequately describing let alone representing the situation of contemporary critical legal theory.

I will follow this discussion of the theoretical and methodological practices of the

\(^7\) The inventory of theoretical acknowledgement is wide and varied; the more frequently cited are: Habermas, Sartre, Marcuse, Piaget, Freud, Levi-Strauss, Lukacs, Gramsci, Althusser, Poulantzas, Foucault.


critical legal studies movement with some proposals designed to offer a general theory and methodology for the critical study of law.

II. THE CRITIQUE OF LIBERAL LEGALISM

The liberalism against which critical theory directs its critical energies is the liberal theory which has generated the philosophy of legalism and the associated jurisprudence of legal positivism that has so decisively implanted itself in both the academic, the political and the popular discourse of contemporary capitalist democracies. The central features of this powerful doctrine of legalism are: (a) the separation of law from other varieties of social control, (b) the existence of law in the form of rules which both define the proper sphere of their own application and (c) which are presented as the objective and legitimate normative mechanism whilst other normative types are partial or subjective, and (d) yield determinant and predictable results in their application in the juridical process. It is the view which Talcott Parson made more historically specific in his formulation that 'law when developed to the requisite level, furthers the independence of the normative components of the social structure from the exigencies of political and economic interests and from the personal, organic and physical-environmental factors operating through them.'

The legal theory of the Anglo-American tradition has exhibited a remarkable degree of continuity. The substance of contemporary debates and controversies exhibits a lineage which can be traced back to the variant models of bourgeois political relations developed by Hobbes and Locke. The interplay and reworking of their differential emphases upon the proper relation between state and civil society has been the backcloth against which the repeated play-off between rationalist natural law theory and legal positivism has taken place. It is the persistence of these themes which have so dominated the terms of debate that it has become increasingly oppressive in the sense that it has colonized the intellectual and political space of discussion about the relationship between law, state and society.

The sense of excitement and expectation generated by the emergence of critical legal studies is in large part due to the promise it holds out of replacing this dominant tradition of liberal legalism. It explains in no small degree the self-consciousness of the critical theorists of their linkages to the Realist tradition. The significance of Realism for the critical movement is enshrined in

10 Parson, Societies: Evolutionary & Comparative Perspectives (1966) 37.
11 Critical authors present a range of positions in assessing the degree and intimacy of the relationship to American realism. Thus, for example, Dave Trubek with his prior commitment to a neo-Realist model for the sociology of law in ‘Toward a Social Theory of Law’ 82 Yale LJ 1-50 (1972) stresses the continuity between realism and critical theory: D. Trubek, supra n 3. A similar emphasis on the realist connection is found in D. Livingston, supra n 3; Alan Freeman presents his defence of the method of ‘trashing’ as ‘a continuation of the Realist project’, A.
the insistence that, after Realism, legal theory could never be the same again. As Elizabeth Mensch argues: 'The best of the realist critique, however, cut so deeply into the premises of American legal thought that no amount of enlightened policy making and informed situation sense could ever really put Humpty Dumpty together again."

The intervening period between the realism of the 1930s and the emergence of critical legal studies in the late 1970s has been as a series of unsuccessful attempts to recover from the shock of realism some basis for a legal theory which articulates an image of the objectivity of the legal process, even though the explanation offered by post-realism had to be more complex than that provided by a doctrine of rule following. The post-realist revisionism sought to harness the implications of the indeterminacy of legal rules to a legitimating notion of the fluidity and responsiveness of the legal system. The post-realist revisionism provides the immediate focus for critical scholarship. Over a wide range of fields of substantive law the critical scholars take as the starting-point for their interventions the manifestations of this post-realist revisionist legal scholarship.13

The critique of orthodox legal scholarship draws upon a more generalized critique of liberalism and thus constitutes one of the major points of unification of critical legal studies. The core of this critique is the contention that the claim made by liberalism to resolve the persistent and systematic conflict between individual and social interests through the mechanism of objective rules within a framework of procedural justice is inherently flawed. Mediation between conflicting interests at best offers only a pragmatic response to social conflict which can achieve nothing other than a set of results which reflects the unequal distribution of power and resources whilst claiming to act in the name of a set of universal social values. Critical legal theory thus grounds itself on the critique of

(continued from page 4)


12 E. Mensch, 'The History of Mainstream Legal Thought' in Kairys (ed), supra n 6, 27. Later in the same essay she concludes 'after Realism, American legal theorists had, as it were, eaten of the tree of knowledge, and there could be no return to the naive confidence of the past', ibid 29.

the historical project of the Enlightenment which is perceived as offering a rationalist and consensual solution to the problem of social order.\textsuperscript{14} It is in this context that I suggest that we can understand the ambiguous relationship between Roberto Unger and the critical legal studies movement.

Unger provides a general theoretical critique of liberalism whilst at the same time insisting upon the inadequacies of the existing alternatives, the 'secular doctrines of emancipation', of which Marxist socialism is the most important. I suggest that sense can be made of Unger's relationship with critical legal studies by recognizing that he provides a coherent critique of liberalism which is widely invoked by critical legal authors. But there is only a very limited acceptance of Unger's own prescription for transcending liberalism. His alternative is itself a 'superliberalism' which stands close to the liberal tradition and holds out the promise of realizing the prospect of individual emancipation which liberalism itself has proved incapable of delivering.

Unger himself is explicit, his alternative represents a superliberalism. It pushes the liberal premises about state and society, about freedom and dependence and governance of social relations by the will, to the point at which they merge into a larger ambition: the building of a social world less alien. . . . [It] represents an effort to make social life resemble more closely what politics (narrowly and traditionally defined) are already largely like in the liberal democracies: a series of conflicts and deals among more or less transitory and fragmentary groups.\textsuperscript{15}

It is important to emphasize that it is 'liberalism' as an intellectual construct rather than as an historically grounded system of social relationships which is the subject of this critique. Unger himself recognizes that his general critique 'treats liberal doctrine as a set of interlocking conceptions whose relationship to society is disregarded. The study of the internal structure of the theory has been pursued at the cost of an awareness of theory's social significance.'\textsuperscript{16}

Unger's project is to provide a 'total criticism' of liberalism that goes beyond the 'partial' critiques of, amongst others, Marx and Weber. Liberalism is constructed as an ideal type culled from the lineage of Hobbes, Locke, Hume, Spinoza, Rousseau and Kant without it corresponding to the intellectual position of any one author.\textsuperscript{17} This ideal typical liberalism is characterized by a series of connected 'antinomies' or dichotomies which constitute the 'deep structure' of liberal thought. These antinomies revolve around the dualism between 'self' and 'society', or between autonomy and community. These dichotomies express

\textsuperscript{14} Unger's influence within CCLS is primarily through his earlier text \textit{Knowledge & Politics}, (Free Press, NY 1975), whilst his apparently more immediately relevant work \textit{Law in Modern Society} (Free Press, NY 1976) has attracted very little interest from critical legal scholars.

\textsuperscript{15} R. Unger, \textit{supra} n 9, 602.

\textsuperscript{16} R. Unger (1975) \textit{supra} n 14, 145. He seeks to remedy this admitted deficiency, but his attempt to establish the relationship between the theoretical construct and social reality has little of the brilliance and perceptiveness of his critique of the theory itself.

\textsuperscript{17} R. Unger (1975) \textit{supra} n 14, 8.
themselves in equally unsatisfactory liberal psychology and political theory; for example, in psychological theory the primary antimony of liberalism is that between desire and reason and in political theory that between state and civil society or between the public and private spheres. Whilst Unger himself makes great efforts to hold on to the interrelationship between these various antinomies and indeed to assign priority amongst them other critical scholars are more eclectic and, apparently, casual in their adoption of one or more Ungerian antinomies as the organizing focus of their writing.\(^{18}\)

There is an important problem associated with analysis founded upon such dichotomous conceptualization. However useful an analytic device may be for ordering the complexity of legal phenomena, dichotomies have a nasty habit of being self-perpetuating or inescapable. This mode of analysis leads to what Alan Freeman has aptly described as one in which the critical scholar is tempted to ‘devote great effort to exposing contradictions . . . and then to go home’.\(^{19}\) Unger's texts are persistently but indeterminantly cited but remain undebated and unquestioned. Ungerian theory is invoked as inspirational source but a deep silence remains over its relationship or compatibility with the other theoretical and methodological components of critical legal theory.\(^{20}\)

It is not my present purpose to embark on an evaluation of Unger's relationship with critical legal studies. Such a task would necessitate a consideration of the changes in his position which can be glimpsed in his published address to the CCLS annual conference.\(^{21}\) My contention is that we need to understand the role of Roberto Unger as being other than the general theorist of the movement. Rather his significance is that he provides a readily available critique of liberalism which resonates with some of the major themes of the critical writers' engagement with the prevailing orthodoxy in legal scholarship.

What is worthy of comment is that the critique of liberal legalism tends to operate at a somewhat general level. Significantly absent is a direct engagement with the most influential modern versions of contemporary liberal jurisprudence. To make the critique of legal liberalism work more effectively what is required is a

\(^{18}\) For example, Duncan Kennedy organizes his analysis of legal formalism through the dichotomy between rule making and rule applying, ‘Legal Formality’ 2 J Legal Stud 351–98 (1973). Kennedy’s later analysis of Blackstone is more Ungerian in its focus on ‘the fundamental contradiction’ within which ‘relations with others are both necessary to and incompatible with one freedom’, ‘The Structure of Blackstone’s Commentaries’ 28 Buff L Rev 205 (1979). Olsen’s impressive study of contemporary ‘family’ law is organized around the antimony of the private and the public, Olsen supra n 13. Whereas for Mark Tushnet the major contradiction is, respectively, between objectivity and subjectivity and between sociality and individuality, ‘Legal Scholarship: Its Causes & Cures’ 90 Yale LJ 1205, 1206 (1981) and Tushnet, supra n 13.

\(^{19}\) A. Freeman, supra n 11, 1229.

\(^{20}\) A significant and wide-ranging contribution to understanding the relationship between Unger and critical legal theory is provided by Allan Hutchinson and Patrick Monahan ‘The Divine Comedy of Roberto Mangabeira Unger’ (unpublished paper 1983).

\(^{21}\) Unger, supra n 9. This text contains no explicit acknowledgement of shifts in its author’s position or rejection of earlier views.
thorough engagement with what may be styled the heartland of modern legal liberalism. The same attention that has been devoted to key figures of early legalism, such as Blackstone, now needs to be directed toward H. L. A. Hart, Ronald Dworkin and John Rawls. Not only are these clearly powerful and influential embodiments of the tradition, but they also represent significant developments of that tradition in that they seek to overcome some of the criticisms that have been directed against it. Furthermore, to tackle the heartland of contemporary liberal legalism would exemplify that most effective strategy of intellectual engagement, namely, the taking on of one's opponents in their strongest manifestations. The general critique of liberalism needs to be concretized through an interrogation of its modern representatives.

Attention can now be focused upon a number of the substantive themes taken up and developed by the practitioners of critical legal studies. The diversity within the movement is such that these themes are represented with differential weight in its exponents. I will start with a consideration of the relationship between critical legal studies and Marxist theory because I am concerned to argue that the absence of a public discussion of this issue has tended to detract from a clear formulation of the theoretical problems with which the movement is seeking to grapple.

III. CRITICAL LEGAL THEORY AND MARXISM

The conception of liberalism as revolving around a linked set of antimonies is taken up and made operational by critical scholars. Gerald Frug expresses the conception with clarity: 'Liberalism is not a single formula for interpreting the world; it is instead, a view based upon seeing the world as a series of complex dualities.' What is clear in this formulation is that the liberalism under discussion is the philosophy of liberalism. But a distinctive and problematic feature of critical legal studies is that the object of critique, liberal philosophy, slides over into using the same conceptual categories in the critique of liberal capitalist society. What occurs in this process is that the conceptual categories through which liberalism seeks to understand the world become converted into real relations; it comes to appear as if the dualities of liberal thought are sociological categories through which we can make sense of contemporary society. The critique of philosophy is transmogrified into the critique of modern capitalist society. The price that is paid for this slippage from philosophical to sociological discourse is that the categories of liberal thought are taken as identifying characteristics of contemporary capitalism. In order to understand how this intellectual path has been so willingly trodden by critical scholars it is necessary to consider the relationship between critical legal theory and Marxism.

The influence of Marxist scholarship in the United States has been very limited. It is significant for an understanding of critical legal theory to note that just as Marxism begins to have some influence on radicalized intellectuals during the 1970s, this occurs precisely at the time when the Marxist tradition itself is going through its most significant internal upheaval of recent times.\(^{23}\) The period in which critical legal studies comes into existence is one in which its radical political perspective encounters a bewildering variety of internal variation, differentiation and sectarianism within contemporary Marxism. This made the adoption of any single strand of modern Marxist theory unlikely, but more importantly, reduced the general attraction of Marxism as the alternative intellectual paradigm. Secondly, the strand of Marxism which has had the greatest influence within critical legal theory focuses upon the processes of legitimacy and of hegemony. This strand, even in its early formulation by Gramsci, and even more clearly in the case of the Frankfurt School of ‘critical theory’, was concerned to search for linkages with other intellectual traditions; the most important of these being with European sociology, especially that of Max Weber. The core concerns with legitimation, domination, hegemony and consciousness which underpin the critical legal project raise precisely the exciting and challenging theoretical project of synthesizing different intellectual traditions. The implicit theoretical basis of critical legal theory rests upon the project of theoretical synthesis or syncretism.

It is a distinctive paradox of critical legal theory that, whilst sharply distinguishing itself from the apparently atheoretical tradition of orthodox legal scholarship, it has to date only gone as far as practising, what can be labelled, ‘theoretical adoption’. Critical theorists have differentially ‘adopted’ a wide range of available theoretical positions. They have not as yet engaged in any systematic way in the practice of ‘theory construction’, in contrast to ‘theory adoption’. There is little evidence in their published work of any explicit theoretical debate about the merits of any of the adoptions so far proposed. Rather there is evidence, which I shall discuss more fully below, that Duncan Kennedy and to a lesser extent Peter Gabel, who can both be taken as representative of wider trends within the movement, have moved to a more overt hostility towards the exercise of theoretical construction.\(^{24}\) The paradox then is the coexistence of a theoretical self-consciousness, in itself novel in the realm of legal scholarship, with the absence of any real theoretical debate or engagement. Whilst this theoretical paradox characterizes the present situation in critical legal theory I want to suggest that there is an incipient theorization taking place which has already been given a name, that of ‘constitutive theory’\(^{25}\) but whose development has only been

\(^{23}\) This upheaval has many dimensions but for present purposes we can identify it as the split between orthodox and western Marxism and between Soviet communism and eurocommunism.


approached circuitously and whose consideration should be postponed until the relationship with Marxism has been explored.

The relationship of critical scholars to Marxist theory, whilst exhibiting individual variation,\(^\text{26}\) has one common feature: critical theorists are agreed on their rejection of 'Marxist instrumentalism'.\(^\text{27}\) The error of instrumentalism or reductionism lies in positing both a necessary and direct connection between class interests on the one hand and either the content of legal rules or the outcome of the legal process. There is less agreement as to whether this objection also includes the more substantial thesis that the connection between class interest and law is not direct but one which asserts itself as a general tendency in the long run or, as it is more generally posed, 'in the final analysis' or 'in the last instance'. This alternative and more sophisticated formulation, which derives from that element of the Marxist tradition which has been much debated within modern Western Marxism under the label of 'relative autonomy' does not fall victim to the same criticism as simple instrumentalism.\(^\text{28}\) What underlies the critique of orthodox Marxism is better conceived as a critique of economism which places the primary focus of analysis upon exploring the connection between law and economic class relations (the social relations of production). Positions of this type rest upon an assumption of the existence of separate spheres designated by labels such as 'law', 'society', 'economy'. This imposes a framework of the form 'What is the nature of the causal relationship between law and economy/society?'. As Bob Gordon argues: 'the big theoretical problem for writers who see the world this way is to work out the secret of that relationship'.\(^\text{29}\)

Such problematics suppress the more powerful theoretical insight that law is inextricably mixed in the totality of social relations and institutions. The articulation of constitutive theory is confronted with the major problem of finding the appropriate conceptual language to adequately explore the way in which law is imbricated in the social totality.\(^\text{30}\)

\(^{26}\) Some of the CCLS activists have a closer connection than others with debates and developments in Marxist theory; thus Karl Klare was associated with the Marxist humanism of the journal *Telos* during the 70s and Mark Tushnet with the short-lived journal *Marxist Perspective*, whilst for others Marxism has played a much less significant role in their intellectual formation, e.g. Morton Horwitz and Duncan Kennedy.

\(^{27}\) The critical theorist who comes closest to adopting, but not espousing, an instrumentalist position is Morton Horwitz who significantly is the critical scholar least concerned about the question of the connection with Marxism.

\(^{28}\) Problems associated with the theory of relative autonomy have not been widely canvassed in critical legal literature although they were discussed in Karl Klare's influential essay 'Law Making as Praxis' *supra* n 25 and by Mark Tushnet, 'A Marxist Analysis of American Law' in *Marxist Perspective* 96 (1978).


\(^{30}\) One major task that confronts constitutive theory is to critically examine the most sophisticated version of economistic Marxism advanced by Jerry Cohen in *Karl Marx's Theory of History*, (Oxford University Press, London 1977); see in particular Chap VIII.
IV. LEGITIMATION AND LEGAL IDEOLOGY

One of the most distinctive derivations from modern Marxism which characterizes critical legal theory has been the shift of focus from economic relations to the focus upon political and cultural relations. Central to this concern is ideology, conceived as a mechanism which forms the consciousness of agents. Underlying this preoccupation with ideology is a concern with the question: how is it that those who are systematically disadvantaged by the existing order nevertheless accept the legitimacy of the institutions and values which perpetuate their subordination? The concept of ideology, and its associates 'legitimation' and 'hegemony', provide the means through which the persistence of relations founded on inequality and subordination are explored. The initial hypothesis is that law can be fruitfully analysed as an ideological form, and that 'legal ideology' plays some contributory role in the reproduction of human subordination.

The manner in which the concept of legitimation is invoked creates considerable theoretical problems for critical legal theory. It takes the form of a functional theory of legitimation in which the grounding assumption is made that legal ideology is effective in constructing the perception and consciousness of the dominated in contemporary capitalist societies.

The exposition of the legitimation function persistently makes a 'leap' of the greatest importance from the realm in which legal ideology is produced, and where it forms the dominant discourse, in courts and law offices, to the realm of the wider society. The leap is made from the legal consciousness of judges and lawyers to the consciousness of those outside the institutional apparatus of law. This 'leap' is well caught in a characteristic formulation by Karl Klare. 'Legal discourse shapes our beliefs about the experience and capacities of the human species, our conceptions of justice, freedom and fulfilment, and our visions of the future (my emphasis AJH).'

The leap is enshrined in the innocent but problematic term 'our'; if 'our' refers to judges, lawyers or legal academics then the formulation is

31 Alan Hyde has provided a powerful critique of the way in which the concept of 'legitimation' has been deployed in recent sociology of law and critical legal studies. It is possible to agree with the substance of his critique without adopting his conclusion that the concept of 'legitimation' should be abandoned; rather I suggest that the problem is not the concept itself but rather the functional theory of legitimation within which it is invoked. A. Hyde, 'The Concept of Legitimation in the Sociology of Law' 1983 Wisconsin L Rev 379-426. I have discussed the application of the concept of ideology in legal analysis, and made some suggestions for overcoming some of the weaknesses identified by Alan Hyde, in 'The Ideology of Law' 19 Law & Soc Rev 101-126 (1985).

32 K. Klare, 'The Public/Private Distinction in Labor Law' 130 U Pa L Rev 1358 (1982). A very much more assertive view of the necessary effectivity is put forward by Peter Gabel: 'Legal thought originates, of course, within the consciousness of the dominant class because it is in this class's interest to bring it into being, but it is accepted and interiorized by everyone because of the traumatic absence of connectedness that would otherwise erupt into awareness' (my emphasis AJH). P. Gabel, 'Reification in Legal Reasoning' in Spitzer S (ed), Research in Law and Sociology (1980) Vol. 3, 25, 26. See infra, 14.
entirely uncontroversial. If 'our' is used as the democratic plural to refer to mass or popular consciousness then the claim made is both more important and more controversial. It is certain that Karl Klare neither intends nor would defend a direct causal link between the ideology of judges and that of the labor union members with whom his study is concerned; but what is missing is attention to the problem of mediation through which ideology is struggled over and recombined with other ideological elements.

The formulation of the legitimation thesis in its broadest and strongest sense involves positing a transference of legal ideology from the arena of its production to the level of everyday social relations. This claim raises both theoretical and empirical problems. Theoretically it raises the problem of 'mediation', through what processes is legal ideology transmitted from the specialist arenas of legal discourse to install itself in popular consciousness? What changes or transformations does it undergo in the process? Empirically it raises the naive but important question: is there any evidence that the population in general or some particular section, for example, Klare's focus upon the labor unions as recipient of labour law ideology,33 is influenced by the ideological products of the legal process? Now Klare is not unaware of the problem, he footnotes the fact that

an important limitation of the critical labor law approach is its relative neglect, thus far, of the important task of drawing out empirically the interrelationships and connections between the intellectual history of collective bargaining law and the social history of the post-World War II labor movement.34

Presented in this way the problem is reduced to a concern for empirical evidence and, it is hoped, confirmation of the assumption of the effectivity of legal ideology. Conceived in this way the task of establishing empirical corroboration can be safely relegated to a future agenda. But even if the problem is seen as being 'only empirical' there is no reason at all to assume that the evidence is readily at hand or that it will fit into a functional theory of the transmission of ideology. One only has to look at Michael Mann's pioneering study of the consciousness of subordinate classes which suggests a bifurcation of consciousness in which some general value orientations mingle with more concrete values relating to everyday experience. Mann concluded: 'It is not value-consensus which keeps the working class compliant, but rather a lack of consensus in the crucial area where concrete experiences and vague populism might be translated into radical politics.'35

However, if the problem of establishing the connection between legal discourse and popular consciousness is recognized as being a theoretical problem it cannot

33 As David Trubek notes 'Klare assumes that the justificatory messages in this elite literature (of labour law doctrine) have a direct influence on worker and union decision-making, he is able to assert that there is a relationship between the creation of a labour law ideology and the relative passivity of American unions in the post-War period'. D. Trubek, supra n 3, 611.
be postponed in this way because it goes to the very heart of the issue of whether the legitimation process has been adequately conceived. Rather than presuming a causal relationship between legal ideology and popular consciousness consider for a moment an alternative formulation: legal ideology is itself a product of a dominant or hegemonic political culture which directly produces the forms of mentality or social consciousness of the population. Within such a theoretical account legal ideology does not mediate between a dominant ideology and a popular consciousness; it is itself a more or less accurate replication or reflection of that external process. My intention is not to offer such an alternative theorization but merely to insist that it is consistent with critical theory in every respect other than the assumption of the causal relationship between legal ideology and popular consciousness.

The implications of this discussion of legal ideology and legitimation go to the very heart of the critical legal project. Critical scholars assume, what I will call, the effectivity of legal ideology. But they have not established either an adequate theorization of or an empirical demonstration of the connection between legal ideology and the formation of popular consciousness. I will offer some suggestions as to how this significant gap in the critical enterprise may be filled in the penultimate section.

V. LEGAL IDEOLOGY AND LEGAL CONSCIOUSNESS

Despite the centrality of the ideological analysis of law for critical theory there are a number of significant but undiscussed differences amongst critical scholars. But more important than internal differences is the extent to which, despite the sophistication of some parts of critical analysis, in particular with respect to the ideological content of historically changing legal doctrine, this most visible achievement stands on weak and shaky theoretical foundations which require urgent attention if they are to provide a more secure basis for critical scholarship.

The first problem concerns the relationship between ideology and consciousness. The concept 'legal consciousness' plays a central role in critical legal scholarship. Its centrality resides in the frequency with which it is invoked in work written under the critical imprint; but I want to argue that the concept has not been rigorously developed. It is employed in two distinct variants and the critical scholars have not shown an awareness of this differential usage nor, consequently, have they discussed its implications.

Legal consciousness is deployed in both a 'narrow' and 'broad' version. The narrow conception of legal consciousness identifies it with the consciousness of legal professionals, including both judges and practitioners within its ambit. Duncan Kennedy generally adopts a 'narrow' position which identifies legal

36 David Trubek goes even further and characterizes the concept as 'the central tenet of the critical legal studies creed', supra n 3, 592.
consciousness as 'the body of ideas through which lawyers experience legal issues'. It is 'the particular form of consciousness that characterizes the legal profession as a social group at a particular moment'. The significance of the concept for Kennedy is that it provides an alternative both to liberal accounts of judicial reasoning and the equally unsatisfactory instrumentalist view positing a direct connection between legal doctrine and the interests of economically or politically dominant classes. This narrow conception of legal consciousness is very closely related to an analysis of legal doctrine employing a theory of relative autonomy.

The 'broad' conception of legal consciousness identifies it as a specific form of consciousness held widely in society; those outside direct contact with legal institutions and processes are none the less suffused with legal consciousness. Peter Gabel argues that: 'Legal domination arises within the consciousness of every person as a sort of legitimating repression. . . . Legal thought originates, of course, within the consciousness of the dominant class because it is in this class's interest to bring it into being, but it is accepted and interiorized by everyone.'

The two conceptions, 'professional' and 'universal' legal consciousness are poles apart and in different respects unsatisfactory. The broad conception of 'universal legal consciousness' ignores the difficulties discussed above concerning the effectiveness of ideology. In assuming an identity and correspondence between the consciousness of the judiciary and of the remainder of society and, in particular, of subordinate classes it lapses into a naïve functionalism and ignores the most important issues about the generation and transmission of ideologies. There is a systematic absence of discussion about the processes of mediation between professional consciousness and the formation of popular consciousness. This is especially important if one holds the view, as I do, that ideologies do not come into existence fully fledged and are not transmitted as complete 'systems' into the vacant consciousness of the subordinated.

The narrow concept of professional legal consciousness gives rise to a quite different range of problems. It is employed in order to advance analysis of the development of legal doctrine which on the one hand 'takes legal doctrine

37 Duncan Kennedy, 'Toward an Historical Understanding of Legal Consciousness' in S. Spitzer (ed), Research in Law and Sociology (1980) Vol. 3, 5, 23; 'lawyers' for these purposes covers academic teachers, practitioners and judges. In a similar usage Elizabeth Mensch identifies legal consciousness in terms of the intellectual schema employed by 'jurists', referring to appellate judges and treatise writers, that is those who employ a conceptual elaboration; E. Mensch, supra n 12.

38 Peter Gabel 'Reification in Legal Reasoning' in S. Spitzer (ed), Research in Law and Sociology (1980) Vol. 3, 26 (my emphasis AJH). David Trubek gives a similarly broad definition of legal consciousness as 'those aspects of the consciousness of any society which explain and justify its legal institutions'; D. Trubek supra n 3, 592.

39 A. Hunt, supra n 31 in which I present an argument for a view of ideology as 'contested' which insists that the formation of popular consciousness cannot be deduced from an elite ideology but is also subject to concrete historical determination.
seriously', by which I mean that it does not seek to account for it through any form of reductionism in terms of class interests. Yet on the other hand it seeks to distinguish itself from orthodox positivist or neo-positivist scholarship by identifying the import and significance of doctrinal development as the production of legal ideology to be understood as mechanism of legitimation or attempts to resolve tensions or contradictions which threaten to disrupt the socio-political assumptions of liberal theory of law as a 'system' founded on a normative coherence of its rules. 40

The concept of professional legal consciousness seeks to mark out both a new methodology of doctrinal analysis and a new strategy for understanding the connection between legal development and the socio-economic context. We can examine this process by looking at two related but distinctive applications provided by Duncan Kennedy and Morton Horwitz respectively.

Kennedy on legal consciousness

Duncan Kennedy elaborates both a methodology for the analysis of legal consciousness and an historical application to the formation of classical legal consciousness in his study of Blackstone's *Commentaries* 41 and in his essay on legal consciousness 42 which I shall call 'critical doctrinal analysis'. Legal consciousness is analysed as a set of concepts and intellectual operations that 'evolves according to a pattern of its own' and 'has its own structure which mediates the influence on particular legal results'. 43 These intellectual practices produce an ordering of myriad elements of law into a systematization through processes of simplification and generalization which function to impose limits, to suggest directions and to provide elements of a judicial style. What is most significant about these processes is the way in which the elements of consciousness 'fit together' to form a 'mode of integration'. 44 Doctrinal changes are analysable as the product of historical shifts or changes in the mode of integration employed by the judges.

This model has the obvious and important implication of stressing the realist message of law-making as a process of social construction as something 'made' by judges; there is for example no natural concept of 'contract', it is constituted by what the judges have decided to include and exclude. The problematic feature of this methodology to which I wish to draw attention is the fact that its explanatory power is limited. It makes possible an account of how a doctrinal development

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40 I intend the distinction between positivist and neo-positivist scholarship to capture the differentiation between a closed system which posits the existence of a finite system of legal reasoning through which rules are handled and manipulated and a more open system, best exemplified by the Realist tradition, which seeks to embrace a view of doctrinal development as contingent.

41 D. Kennedy, *supra* n 18.

42 D. Kennedy, *supra* n 37.

43 D. Kennedy, ibid, 4.

44 D. Kennedy, ibid, 18.
occurred but it leaves open why it occurred. If the analytic capacity of the method is limited to how, it imports a conception of autonomous legal development which is precisely one of the primary objections that critical theory raises against orthodox legal scholarship.

However, Kennedy does not entirely abandon the wider and more challenging project but the methodology he employs is, I shall argue, of limited capacity. The method employed links ‘critical doctrinal analysis’, a concept of ‘fundamental contradiction’ and the concept of ‘motive’. This method may be stated in broad and general terms: capitalist society is characterized by the presence of a fundamental contradiction which manifests itself as a problem in the field of legal doctrine, because of the quest for coherence and consistency, it is the ‘motive’ of judges and treatise writers to resolve or dispel the fundamental contradiction; it is this ‘motive’ which reveals the political significance of legal thinking.

A general feature of this theorization of cued motivation should be noted. It does not offer a causal account that proceeds from changes or movement within the social formation to changes within the legal system, rather the causal mechanism is itself ideological since there is no independent guarantee that the ‘motives’ affecting judges are direct or unskewed reflections of changes within the social formation. The consequence is that it can only provide a theoretical justification for a very limited range of causal propositions. This theoretical limitation on the type of results is, of course, not fatal, it merely restricts the heuristic capacity of the theory.

The application of the theory of cued motivation is best exemplified in Kennedy’s exhaustive analysis of Blackstone’s contribution to the development of liberal legalism. Kennedy’s project is ‘to introduce the reader to a method for understanding the political significance of legal thinking’ with the aim of ‘discovering hidden political intentions beneath the surface of legal exposition’. As he makes clear the whole analysis is based upon a ‘premise’ about legal thinking which is identified as a ‘double motive’: on one side to discover the

45 At this stage I shall postpone discussion of how this fundamental contradiction is identified and whether this concept has any continuing role in critical legal theory.

46 An alternative theorization of legal consciousness is offered within critical theory by Al Katz which though distinct in its formulation has precisely the same theoretical structure as that advanced by Kennedy. Human consciousness, and therefore legal consciousness, is constantly confronted by contradictions (the nature and origin of contradiction remains unspecified) with respect to which there are a limited number of possible responses; these can be analysed in terms of two types of boundaries, ‘vacuum boundary’ (which allows only an either/or choice) and ‘live boundary’ (which allows possibility of mediation or compromise). Now although the concept ‘motive’ is not utilized by Katz his account can be readily translated into such terms; the ‘motive’ which makes sense of the areas of doctrinal development which he considers to illustrate his boundary theory is the ubiquitous search for the ‘middle ground’ that purports to resolve the dilemmas and contradictions. Katz’s theory is thus of the same general form as Kennedy’s; as a consequence I do not intend to examine it separately; Katz, A., ‘Studies in Boundary Theory,’ 28 Buff L Rev 383 (1979).

47 Kennedy, supra n 18, 209, 211.
conditions of social justice, whilst on the other to 'deny the truth of our painfully contradictory feelings about the actual state of relations between persons in our social world'.

Throughout his discussion of Blackstone, Kennedy tends to employ the idea of 'intention' more frequently than that of 'motive'; it thus seems clear that his analysis requires the imputation of an explicit or conscious intent to Blackstone in particular, and by inference to legal actors in general. The flavour of this usage of intention is caught by his characterization that it was Blackstone's 'intention to vindicate the common law against the charge that it was inconsistent with the enlightened political thought of his day' and later that his 'ultimate intention was to legitimate both judicial institutions and the substantive law they enforced'.

This mode of analysis rests on the imputation of intent that is not substantiated. Yet without the insertion of 'motive' the theoretical structure which seeks to move from 'doctrine' to the 'hidden political intention' is undermined. In other words Kennedy's methodology is not able, without an assumed intentionality, to establish the connection between doctrine and its historical context which critical theory promises.

It is instructive to consider Kennedy's own disclaimer.

What I have to say is descriptive, and descriptive only of thought. It means ignoring the question of what brings a legal consciousness into being, what causes it to change, and what effect it has on the actions of those who live it. [W]e need to understand far more than we now do about the content and internal structure of legal thought before we can hope to link it in any convincing way to other aspects of social, political or economic life.

He is clearly being appropriately cautious in the claims that he makes. Yet it is far from clear that he remains within his self-denying ordinance, since his theory of legal consciousness does involve claims about what 'brings a legal consciousness into being', namely, the motives of its progenitor. These motives are not interpreted at the level of individual psychology but involve political hypotheses.

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48 Kennedy, ibid, 210. He is explicit that his paper is concerned only with this second motive of apology or denial, 'but I don't want to be understood to deny the first utopian aspect'. I do not think he should be allowed to evade the problem quite so simply. If the premise of 'double motivation' is taken seriously then it must mean that the two motives coexist and find expression in work written under their sign and that the tension, conflict or contradiction between the two motives must find expression in the substantive analysis. Let's assume that Duncan Kennedy finds time to return to Blackstone and exhaustively analyses his writings from the standpoint of the first motive. There would then be a need for a third article considering the most interesting question of how these motives interact; this is the most interesting question because historically important scholarship is unlikely to have been motivated exclusively by apologetics but will always be found to contain positive insights into the quest for justice alongside or, more accurately, embedded in, its apologetic features.

49 Kennedy, ibid, 234.

50 Kennedy, ibid, 237.

51 Kennedy, ibid, 220—21.
about what 'needs' to be explained, legitimated or vindicated in the particular politico-intellectual context.

The other feature of his disclaimer that requires comment is that whilst the desire to 'know more' is unexceptionable what he does not establish is how this accumulation of knowledge will provide the means to address the 'bigger' questions of the causation and effectivity of legal consciousness. If critical theory accepts this self-imposed limitation it will be unable to advance beyond the first base of doctrinal analysis. It is the reaction, or perhaps more accurately over-reaction, against the charge of instrumentalism that critical theory has focused its attention on doctrinal development without asking the basic methodological question: is 'legal doctrine' the best starting-point? It should be stressed that this interrogation is of the methodology of critical legal studies. It is not intended to detract from what is both one of the most distinctive and one of the most important features of the critical project.

*Horwitz on legal consciousness*

I want to demonstrate that Morton Horwitz's account of legal consciousness, whilst departing in some details from Duncan Kennedy's, shares significant common characteristics. It is, however, more difficult to approach because as befits a self-declared historian he regards history as something to be done rather than delayed in order to engage in theoretical conjecture. Consequently we find no definition of legal consciousness; it is deployed in a matter of fact manner. His most general formulation seeks to insist on its relative autonomy rather than to provide a positive identification.

Legal consciousness in any particular period is not simply the sum of those contemporary social forces that impinge on law. Law is autonomous to the extent that ideas are autonomous, at least in the short run. In addition, the needs of professional interest and ideology have enabled the legal profession to serve as a buffer or filter between social forces and the law.\[^2\]

What emerges clearly is his central concern to link ideology to material interest. His analysis of the transformation of American law that 'enabled emergent entrepreneurial and commercial groups to win a disproportionate share of wealth and power in American society'\[^3\] is dependent upon his ability to establish that there existed an alliance between common lawyers and commercial interests. Once posited, this alliance expresses itself through the development of substantive law which favoured or accommodated commercial interests. Ideology re-enters the

\[^2\] M. Horwitz, *The Transformation of American Law 1780–1860* xiii (1977). The fusion of economic and political interest is epitomized in Horwitz's account of the resistance to and ultimate subjugation of arbitration as an alternative to court handling of commercial disputes at the beginning of the nineteenth century when 'an increasingly self-conscious legal profession had succeeded in suffocating alternative forms of dispute settlement'; Horwitz ibid, 154.

\[^3\] M. Horwitz, ibid, xvi.
analysis as the intellectual foundation and systematization of this transformed substantive law. Legal consciousness, for Horwitz, is the intellectual apparatus which transmuted economic interests into secured legal rules and judgments; legal consciousness is the cloak behind which the mundane and sordid economic interests of capital were not only secured but legitimated.

We can piece together a general model of the role of legal ideology in translating economic interests into legal form from his account of the history of the doctrine of objective causation in the law of torts. His objective is to provide a causal account of the changing conceptualization of the doctrine of causation which makes sense of judicial formulations that appear unconnected with economic interests. His 'politics of causation' argues that the doctrinal debates can be made sense of only in terms which locate them in the context of the material interest of entrepreneurs to restrict the economic costs of capital accumulation and economic expansion. Doctrinal development is explicated as the resultant of the interaction between existing doctrine and policy. It is policy which embodies and gives effect to the legal consciousness of the legal elite of judges and treatise writers. Existing doctrine exhibits a high degree of autonomy such that its development cannot be explained directly in terms of economic interests.

Policy considerations on the other hand are the bearers of more or less explicit economic or political interests. Thus Horwitz places great weight on warnings of 'practical communism' and of the destruction of capitalism directed against the doctrine of objective causation. This legal consciousness is formed on the basis of political or economic calculation and gives rise to a perceived need for doctrinal change. Towards the end of the nineteenth century this manifests itself in the quest for an alternative doctrinal principle, in this case a concept of 'legal causation' relying on the principle of foreseeability which could be incorporated into doctrine in such a way as to reduce the rising economic costs of entrepreneurial activity associated with the industrial injuries of factory production. It is thus legal consciousness which is the bearer of economic interests. This contrasts sharply with Kennedy's view of legal consciousness as the systematized embodiment of liberal theory rather than economic interests. Horwitz's account relies by implication upon a view of legal doctrine as the pragmatic rationalization of judgments of economic interests. It leads also to a methodology for the analysis of doctrinal development which attaches great importance to the search for the explicitly economic or political utterances of judges and treatise writers for here lies the historical evidence of the connection between legal consciousness and doctrinal development.

The contrast between Kennedy and Horwitz in their application of legal consciousness in no way undermines my earlier insistence on the centrality of

54 M. Horwitz, 'The Doctrine of Objective Causation' in Kantor, supra n 6, 201–13.
the concept 'legal consciousness' for critical theory. It does, however, establish that its variant conceptualization and application indicate the degree of the internal variation within the camp of critical legal studies.

IV. THE FUNDAMENTAL CONTRADICTION

The concept of 'fundamental contradiction' plays a central role, along with that of legal consciousness, in providing the general theoretical framework of critical legal theory. I want to argue that it fulfils a role in critical thought which is not made explicit by the critical scholars themselves but is none the less present. Once brought to the surface it helps explain many of the distinctive traits of this new movement. Its hidden mission is to provide a linkage between the two central intellectual strands on which critical legal theory draws. It provides the linkage between Marxism and modern cultural or interpretive sociology.

I shall set aside, for the time being, Duncan Kennedy's recent recantation of the conceptual armoury of 'fundamental contradiction' and 'legal consciousness'. I shall first consider its role in the development of critical legal studies up to the present. Against the objection that there is little point in such a discussion if it has been expunged by its principal architect I will argue that Kennedy's own grounds for conceptual surgery neither justify nor require the elimination of this central concept.

The most general form of the fundamental contradiction is that between 'self' and 'others'. In Duncan Kennedy's words: 'The fundamental contradiction—that relations with others are both necessary to and incompatible with our freedom... is not only an aspect but the very essence of every problem.' The presentation of the fundamental contradiction between 'self' and 'others' is linked to other dichotomies which are either alternative expressions or derivations therefrom: 'subjectivity' versus 'objectivity', 'public' and 'private', and 'state' and 'civil society'.

The concept of fundamental contradiction is central to the methodology of doctrinal analysis pursued by most critical legal authors. The most general form is to seek to demonstrate that with reference to the selected field of substantive law contradictory elements are present. Rules or principles which can be classified

55 P. Gabel and D. Kennedy, supra n 24.
56 Kennedy, supra n 18, 213. The form of 'relations with others' in capitalist society are 'hierarchical structures of power'. In a passage which reveals much about the theoretical and political concerns of the critical theorists Kennedy observes that 'the kicker is that the abolition of these illegitimate structures, the fashioning of an unalienated collective experience, appears to imply such a massive increase of collective control over our lives that it would defeat its purpose' ibid, 212. This presentation of the dilemma of orthodox socialism is what leads him to favour the transformative politics of Roberto Unger, in which 'revolutionary reformism' offers the prospect of a cumulative transcendence of egoism and domination in a quest for the creation of the conditions for 'community'.
57 M. Tushnet, supra n 18.
under the antithesis between individualism and altruism, or the other variant formulations of the contradiction, are present at one and the same time, existing in a competitive and irresolvable tension.

It is possible to detect at least two variant forms in which this type of analysis is deployed. In the first form the tension between individualism and altruism is ubiquitous. Thus Unger's analysis of contract doctrine identifies a limited number of competing principles each matched by a competing counter-principle. A more historicist tendency focuses on doctrinal development and detects a movement backwards and forwards between the supremacy of one side of the contradiction or the other; this analysis produces a periodization of doctrinal development. However, these two variant applications are not sharply distinguished by critical authors nor are they incompatible.

The general significance of doctrinal analysis in the light of the fundamental contradiction is that it provides an account of the contingency and indeterminacy of the legal process. The existence of competing principles creates the ever-present possibility of judicial choice. Critical scholars have not been much concerned with the exercise which preoccupied the Realists of predicting the resultant of the configuration of contingent factors in particular cases. The critical theorists have generally been satisfied to find evidence for a generalized indeterminacy within the legal process.

There is here an interesting contrast between the critical legal authors and Ronald Dworkin's analysis of the judicial process. He focuses his concern on the 'hard case' and repudiates the conventional positivist invocation of the concept of discretion to account for outcomes in hard cases. His insistence on 'one right answer' stems from his sociological premise that political communities exhibit a shared set of value commitments which manifest themselves in a unitary set of principles which the judges are enjoined to first discover and then apply. We can bring the different conceptual apparatus of Dworkin's analysis alongside that offered by the critical theorists. The latter insist that it is not, as Dworkin argues, that rights are merely controversial but rather that opposing potential solutions to hard cases express and exemplify the fundamental contradiction between incommensurable values. Since the

58 R. Unger, supra n 9, 616-48.
59 Kennedy's analysis of the broad trends of doctrinal development suggested the predominance of altruism in the post bellum period followed by the classical period with the dominance of individualism. His periodization of the twentieth century can be read as either a more rapid oscillation between the competing principles or as a period of increased tension between the two organizing principles. D. Kennedy, 'Form and Substance in Private Law Adjudication', 89 Harv L Rev 1685-1778 (1976).
60 R. Dworkin, 'Hard Cases' and 'Can Rights be Controversial?' in Taking Rights Seriously (Duckworth, 1977). The unitary character of Dworkin's principles is given not by some assumption of moral consensus but rather from the institutional or constitutional unity of the nation state.
contradiction between individualism and altruism is unresolvable within legal theory the radical contingency of legal outcomes is an inescapable consequence of liberal legalism.

It is, however, possible to detect a certain ambiguity within critical legal theory concerning the status of the fundamental contradiction. There are two alternative formulations. In the first the fundamental contradiction is itself a product of liberal legalism. It is the very foundation of liberal legalism upon the concept of atomized legal subject and the reduction of all collectivities to the individualized status of legal subjectivity that gives rise to the nightmare of the fundamental contradiction. The second version offers a more universalistic view of the status of the fundamental contradiction. It is seen as being a manifestation of the human condition itself. Both variants are in accord in viewing the incoherence of legal doctrine as resulting from the inevitable failure of liberal legalism to resolve the fundamental contradiction. But the two variants diverge about the possibility of overcoming the fundamental contradiction. The former tends to be sympathetic to those utopian perspectives which hold out the prospect of overcoming the self-others conflict. The second variant tends to regard all legal and political strategies as, at best, pragmatic attenuations of a fundamental feature of the human condition.

The presentation of the fundamental contradiction within critical legal theory reveals important aspects of the broader theoretical influences upon the movement. In particular it throws into relief the linkage between the more Marxian elements of critical theory and its adoption of elements of a general framework of subjectivist or interpretive sociology. The pursuit of this link is one which is both full of great promise and great danger. Its positive feature is the quest which lies at the heart of the history of contemporary Marxism and of the critical social theory associated with the Frankfurt School. In its more overtly Marxist form it is the path charted out by Gramsci with his emphasis on the processes of the production and reproduction of hegemony and the conditions and possibilities of the creation of counter-hegemony. In a different form it is central to the project of the Frankfurt School to embrace the inter-subjective reality of social action, hence the concern with meaning, language, communication and culture. It should be stressed that these different strands of thought all retain a central concern with the analysis of the connection between the processes of economic and class relations and the processes of human consciousness and action. A useful shorthand for identifying these concerns of Western Marxism is that they are all different ways of grappling with one of Marx's most famous and tantalizing aphorisms: 'Men make their own history, but not of their own free will; not under circumstances they themselves have chosen but under the given

61 Habermas identifies the central concern of critical theory with 'society as a system of action by human beings, who communicate through speech and thus must realise social intercourse within the context of conscious communication'; J. Habermas, Theory and Practice (Heinemann, 1974)
and inherited circumstances with which they are directly confronted. The alternative strand, expressed in interpretive or phenomenological sociology, breaks the link between human agency and social determination. Human life is, in Berger and Luckmann's famous title, 'the social construction of reality' which takes place in 'everyday life'. In seeking to escape from a reductionist Marxism critical legal theory has not taken sufficient account of the gulf between these different theoretical traditions. Much of the difficulty revolves around trying to establish exactly which theoretical framework critical scholars adopt. This arises from a tendency to cite the theoretical origins of their positions in a very loose way. Duncan Kennedy, for example, states his object as being to 'introduce the reader to a method for understanding the political significance of a legal thinking, a method that might be called structuralist or phenomenological, or neo-Marxist, or all three together'. Elsewhere he refers to his theoretical position as 'a melange of critical Marxism, structuralism and phenomenology'. Mark Tushnet is equally frank about the eclecticism of the movement's roots which he describes as an ' unholy trinity of semiology, phenomenology and Marxism'.

It must be firmly stressed that to list intellectual influences tells us something about where critical theory is coming from, but it tells us little about what its substantive content is. There is much hard work to be done to move from the listing of influences to the achievement of a coherent and explicit integration. Mark Tushnet proposes a short-cut for the strategy of CCLS 'to develop a body of substantive analyses that is guided by the theoretical perspectives afforded by the trinity [seminology, phenomenology and Marxism], whether or not those perspectives are made explicit. . . . But as those contributions accumulate, they will be seen as presenting a unified alternative'. No amount of accumulating substantive work will reveal a 'unified alternative'; such a desirable result will only emanate from explicit and rigorous attention to the theoretical and methodological tools employed. My judgment is that it is not so important to aim for a 'unified alternative' as it is

63 P. Berger and T. Luckmann, The Social Construction of Reality (1966). For example Bob Gordon argues that 'what we experience as "social reality" is something that we are constantly constructing', 'New Developments in Legal Theory' in Kairys, supra n 6, 287. In a more ambiguous formulation Karl Klare insists that 'we are the ensemble of our social relations and shared meanings, and that our individuality is in many ways defined in relationship to our shared meanings and symbols'; K. Klare, supra n 32, 1419.
64 D. Kennedy, supra n 18, 209.
65 D. Kennedy, supra n 13, 563—64.
66 M. Tushnet, supra n 11, 31.
67 Unger is explicit about the limited theoretical development of both the two strands of critical scholarship he identifies; both 'have yet to take a clear position on the method, the content, and even the possibility of prescriptive and programmatic thought'; R. Unger, supra n 9, 563.
68 M. Tushnet, op cit 31—32; emphasis added AJH.
that there should be a heightened and more self-conscious theoretical debate within critical legal studies.69

VII. FUNDAMENTAL CONTRADICTION VERSUS EXISTENTIAL ZAP

Now that the role of the fundamental contradiction in critical legal theory has been examined we can consider whether it has any place there. It is necessary to do so because the central focus on 'the fundamental contradiction' within the critical legal studies movement has now been renounced by its chief architect. Duncan Kennedy, in his conversational piece with Peter Gabel, 'Roll Over Beethoven', declares: 'I renounce the fundamental contradiction. I recant it, and I also recant the whole idea of individualism and altruism and the idea of legal consciousness.'70 Peter Gabel joins in the renunciation: '[Y]ou [Duncan Kennedy] tied this tin can around our neck. The entire Critical Legal Studies movement has been dragging around that can' (14).

Before considering their reasons for jettisoning the fundamental contradiction and discussing its implications it is perhaps wise to take stock of what is at stake. I have argued that the concept of the fundamental contradiction has been pivotal for the development of the movement; its centrality stems from the fact that the concept of the fundamental contradiction both grounds and expresses the critique of liberal legalism, and in turn locates the critique of legalism in a wider critique of the tradition of liberal social and political philosophy. The concept of fundamental contradiction is foundational for the demonstration of the tendency to incoherence in legal doctrine; it is also pivotal for the contention that the liberal project of reconciling state and civil society, or of overcoming the dichotomy between self and community is unrealizable. Thus to 'recant' the fundamental contradiction does not involve the jettisoning of some marginal feature of critical legal theory; rather it goes to the very core of the nascent critical theory.

It is apparent that the renunciation goes beyond the rejection of particular concepts. Beyond the concepts of fundamental contradiction, legal consciousness, and the individualism/altruism dichotomy it is evident that something more of general significance is at stake. The question is what is being renounced?

The form of dialogue selected by Gabel and Kennedy as their vehicle for their revisionist project, whatever its other merits, does not facilitate the clear identification of either the constituent elements of the argument nor the conclusions arrived at. The dialogic form allows the freedom to a participant to

69 A subsidiary problem that stems from the theoretical eclecticism of CCLS is that it tends towards a rather superficial appropriation of concepts and insights from different theoretical traditions which too often takes the form of a simple listing of influential texts; this approach to theory construction ignores all the most important problems of theory construction that revolve around the compatibility of different conceptual apparatuses.
70 Peter Gabel and Duncan Kennedy, supra n 24, 15. Subsequent references in this section will give page references to this conversation in the text.
formulate positions prompted by the interjection and interrogation of the other. At one stage in the discussion it appears that what is being challenged is the very possibility of theory. But as it moves on it becomes apparent that Kennedy steps back from a root-and-branch rejection of theory as such. But the substance of his amended position is by no means clear. He is certainly clear about his explicit 'antagonism to philosophy' (53). But it is by no means clear what it is that is involved in the rejection of 'philosophy'. I suggest that the concept of 'the fundamental contradiction' is rejected by Duncan Kennedy because it is a deficient form of theorization. Since he also associates the repudiation with other concepts, 'legal consciousness' and 'individualism/altruism', it is not the inadequacy of the specific concepts that is at stake; but rather his critique is directed against the form of theory which employs or produces such concepts. This interpretation is supported by the fact that few if any criticisms of the specific concepts themselves are voiced. Kennedy makes it clear that it is not the 'substantive content of the fundamental contradiction which caused right and left deviationists to pursue their deviations' (16). Indeed he goes further and insists that there is a 'substantive truth' that the 'dead abstraction' of the concept refers to.

The question to be explored is: what deficiencies do Gabel and Kennedy identify in the type or style of theory which had played such a central role in critical legal theory? Peter Gabel's position, as expressed in 'Roll Over Beethoven', has not changed substantially; he remains an advocate of a critical legal theory drawing heavily upon phenomenology. The sharper 'break' is expressed by Duncan Kennedy and therefore in seeking to reconstruct the grounds for his recantation I will focus on the positions he takes up during the discussion.

I suggest that four distinct, but more or less related, critiques of the theoretical enterprise can be identified. These are:

(a) Fear of the body-snatchers.
(b) Theory as overgeneralized, abstract and 'frozen'.
(c) The impossibility of rationalist philosophy.
(d) Against 'privileged' concepts.

(a) Fear of the body-snatchers

The analogy of the 'body-snatcher' and the 'pods', aside from attesting to a nostalgia for old sci-fi movies, expresses two critical points. The one to be discussed at this point is an anxiety about the misappropriation of concepts.71 Concepts, such as 'fundamental contradiction' allow 'the kind of philosophizing that can be seized upon by anyone and anything can be made of it' (15).

I want to argue that this idea provides no grounds for rejecting the type of theorizing under discussion. There can be no personal or corporate property in

71 Reference is to 'Invasion of the Body Snatchers' (1956) in which a small American town comes perilously close to being taken over by aliens who have sent 'pods' to earth which when they are in proximity to sleeping humans take over or 'snatch' the body as repository for the alien beings.
concepts; rather concepts of any interest or importance are 'essentially contested'. And it is through this process of contestation that concepts are refined, modified, changed or abandoned. Anxiety about the way other writers use one's favoured concepts is natural, but this anxiety verges on paranoia when prominent participants in a self-consciously pluralistic movement set themselves up as guardians of the movement's theoretical purity. It is perfectly legitimate to criticize the way in which particular authors employ any concept, but Kennedy does not do this. Confronted with a fear of misappropriation, which is not specified or itemized, he seeks to withdraw the concept.

(b) The frozen pods

So much for the 'body-snatchers'. More important is the problem of the 'pods', which I take to stand for a concern with the way in which the concept of fundamental contradiction has been used in such a way as to render it 'wooden' or 'frozen'. Thus Kennedy comments that for a period the concept played a useful role 'before the body-snatchers turned it into a cluster of pods' (16—17). This imagery seeks to express a concern that to seek to encapsulate complex, transient and contingent reality in intellectual concepts 'freezes' that reality and thereby distorts it. The alternative to conceptually frozen reality is identified as 'small-scale, micro-phenomenological evocation of real experience in complex contextualized ways which one makes it into doing it' (3). To take another example, he insists upon the momentary and variable character of human consciousness; once one pins a conceptual label, such as 'false consciousness', it 'freezes' that reality in the sense that it both distorts and freezes the complex reality which the concept seeks to encompass (43–4).

One facet of Kennedy's concern to stress the indeterminacy and plasticity of individual and social reality leads him to reject all concept formation as reification that 'freezes' reality. The other related strand is the strategy of substituting an alternative and radical re-conceptualization. In objecting to Peter Gabel's concern to expound a programme for realizing 'unalienated relatedness' he is objecting to the programmatic project of advancing a single master concept. In its place Kennedy proposes a radical re-conceptualization by redefining the general objective as generating 'intersubjective zap' or 'making the kettle boil'. What I take to be behind this flamboyant strategy is to select a terminology which is intentionally incapable of being fossilized into rationalist discourse. Rationalist discourse is seen as holding out the false hope that intellectuals can come to agreement on an exact meaning that the concepts of its discourse shall bear. There is a sense in which we 'all know what we mean by' 'intersubjective zap' or 'making the kettle boil'. (But do we? Aren't the 'meanings' so situational that outside that context such colloquial phrases become devoid of meaning?) The merit of 'zap' and 'kettles' is subversive in that their very colloquialism renders the rationalist

project both impossible and vaguely ridiculous. A seminar on ‘alienation’ or ‘unalienation relatedness’ is part of the life-style of intellectuals; but you cannot hold a seminar on ‘the meaning of intersubjective zap’. So the rationalist project is disrupted and disallowed.

(c) Against rationalist philosophy

It becomes clear that the problem to be addressed is not the merits of particular concepts but the form of philosophical discourse of which they are a part. It is easy enough to get the flavour of what Kennedy does not like about rationalist philosophy, but the nature of his objections to conventional philosophical discussion debars him from marshalling the type of objections to that discourse which intellectuals are accustomed to formulating and debating. His objection rests upon ‘a fundamental, profound disagreement about the possibility of theory’ (47). The content of that objection can perhaps best be captured by listing some of the language he employs. ‘Theory’ or ‘philosophy’ is ‘abstract’, ‘over-generalized’, exhibits a belief that it is possible to settle things ‘too high up’ (i.e. at too high a level of abstraction). His objections thus revolve around the problem of abstraction.

His second concern is with ‘effective communication’. I take it that his concern ‘to communicate with people’ (53) stands for ‘... to communicate with people other than professional intellectuals’, and that ‘heavy theory’ is a barrier to such communication. If I have understood his position I suggest we can dispense with this issue fairly quickly since it makes only a trivial point that if you want to engage in effective communication you require a situational sense of where the people you are working with and talking with ‘are at’. Speeches or talk full of ‘heavy’ specialized and esoteric theory are ineffective amongst people who are not professional intellectuals. But who ever said they were? No issue is joined.

The heart of Kennedy’s ‘antagonism to philosophy’ centres around the question of the abstract character of theory and philosophy. The objection against abstraction is that distancing and generalization sacrifices the particularity or specificity of reality. Thus, if the objective of thought is to understand and to change reality, ‘abstraction’ is seen as conflicting with this goal. This is what is involved in his criticism that: ‘you can’t plausibly describe ‘being’ except in the vaguest and most general way. You can plausibly describe relatively contextualized, nonabstract, rich human situations’ (48). What is at stake is a familiar debate within epistemology. Kennedy is asserting the view that only those elements of discourse which are capable of participating in ‘effective communication’ are to count as knowledge. This is a perfectly plausible position within philosophy, but it neither abolishes philosophy nor does he overcome his primary objection to abstraction. ‘Effective communication’ is not free of abstraction, but rather it privileges those abstractions that are part of ‘common sense’ or ordinary discourse. His proposal that non-abstract communication is possible in terms of ‘intersubjective zap’ and ‘making the kettle boil’, despite the
populist style of this language, is not free of abstraction, it simply involves *uncritical* abstractions that are taken for granted and are not experienced as being problematic.

(d) Privileged concepts

The fourth feature of Kennedy's objection to abstraction stems from the contention that theoretical discourse 'privileges' certain concepts. This objection is not to theory as such, but to 'bad theory'. As I have argued above, all discourse, whether 'theory' or 'common sense', privileges concepts. 'Good theory' requires self-conscious interrogation of the concepts employed, of their underlying assumptions and of their interrelationship. 'Bad theory', on the other hand, is distinguished by its mechanical and unreflective deployment of a pre-existing litany of concepts.

The foregoing considerations point to the conclusion that the wholesale abandonment and retreat from both the general theoretical strategy and its embodiment in a particular group of concepts is not necessary. It is not necessary in the sense that the concerns and problems which motivated the jettisoning of the fundamental contradiction can be met without the radical surgery. The body-snatchers/concept-snatchers are no problem and can be allowed to return to the world of science fiction. The problems of abstraction, rationalism and frozen pods can be surmounted through a reflexive view of the role of theory within discourse and a recognition that problems of theoreticism cannot be overcome by a retreat into common-sense discourse.

VIII. THE PROBLEM OF RELATIVE AUTONOMY

There are two general theoretical problems which derive from the eclectic character of the theoretical roots of the critical legal studies movement; they emerge as common features of much critical legal scholarship. The first of these seeks to develop the focus on the need to explore more fully the connectedness of law to social, economic and political relations. It is embodied in the theoretically important but sensitive concept of the 'relative autonomy of law'.

It is necessary to be somewhat tentative about the concept 'relative autonomy of law' because it does not have a very visible presence in critical scholarship. Rather I suggest that it is implicit as what Gouldner called a domain assumption within critical legal theory. Its presence is the result of the dual opposing positions against which it directs its criticism. On the one hand critical theorists reject all positions that assume the autonomy of legal doctrine and, on the other, differentiate themselves from deterministic positions which present law as a reflection of, and therefore reducible to, economic and political forces. Between the

73 Peter Gabel very explicitly commits himself to the 'relative autonomy' position which he links directly to his emphasis upon the legitimation function of law; P. Gabel, *supra* n 32, 49. Karl Klare also is explicit in his adoption of the concept; K. Klare *supra* n 25.
Scylla of autonomy and the Charybdis of determinism lies the haven of relative autonomy.  

Many positions within critical legal theory are reminiscent of Engels' important statement of relative autonomy:

In a modern state, law must not only correspond to the general economic conditions, but must also be an *internally coherent* expression which does not, owing to its internal conflicts, contradict itself. And in order to achieve this, the faithful reflection of economic conditions suffers increasingly. All the more so the more rarely it happens that a code of law is the blunt, unmitigated, unadulterated expression of the domination of a class.

The general thrust of critical legal theory is to insist that liberal legalism fails to achieve or sustain this internal coherence, but like Engels to see this attempt as the reason why law does not and cannot directly reflect economic interests. But before pronouncing the twin enemies of autonomy and determinism vanquished we need to enquire whether the intellectual foundations of the theory of relative autonomy provide the desired safe anchorage.

The attraction of relative autonomy stems from the fact that it appears to allow us to hold on to both ends of the chain at the same time; to assert both the specificity of legal doctrine and, at one and the same time, to assert its connectedness to external socio-economic relations. A very heavy theoretical burden is borne by the concept of relative autonomy. If it is viable it offers a most attractive and compelling solution to a pervasive problem confronting social theory. It is necessary, however, to enquire whether or not it is able to sustain such expectations. Despite the fact that I have over a number of years myself relied on the concept of relative autonomy as the escape route from the dichotomy of autonomy and determinism I am now convinced that it is, at least in the formulations currently available to us, seriously flawed. 

The theoretical deficiency of the concept relative autonomy is that unless it is capable of being linked to some account which specifies the boundaries or limitation of autonomy it can only be understood as constantly running the danger of lapsing into the assertion of either autonomy or determinism coupled with an expression of faith that on the one hand autonomy has determined limitations or, on the other, that determination is tempered or postponed.

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74 The intellectual origins of the concept of relative autonomy are to be found in the rejection by both Marx and Engels of economic determinist interpretations of their general theory. Its most coherent articulation is to be found in the letters of Engels written between 1890 and 1895. Engels to Schmidt 27/10/1890, *Marx-Engels Selected Correspondence* (Moscow 1960) 400.

75 Without engaging in too much self-reflection I should comment that *The Sociological Movement in Law* (Macmillan, 1978) was very dependent on the idea, if not the explicit concept, of the relative autonomy of law; whilst, in collaboration with Maureen Cain, *Marx and Engels on Law* (Academic Press, 1979) began to pose relative autonomy as a problem.

76 The most important attempt to theoretically identify the limits of relative autonomy is that provided by Althusser and Balibar with their discussion of 'determination in the last instance'; *Reading Capital* (New Left Books, 1970) 216–24.
The idea of relative autonomy is a concept in search of a theory. It requires a theory which is capable of providing the supports for the major claim which it makes of the possibility of specifying connectedness without determinism. The theoretical apparatus for an adequate realization is not available. If this is the case then it follows that the concept of relative autonomy cannot be taken as achieving anything more than pointing towards a desired type of analysis.

The implications for critical legal studies are important. In so far as the general trend of work assumes that such a theory of connectedness without determinism either exists already or at least potentially it has not, as yet, tackled a major obstacle that stands in the way of realizing what is one of its most important claims. This claim is that critical legal studies is developing a theory with the capacity to provide a causal analysis of legal doctrine in its connection with socio-economic relations without laying itself open to the charge of determinism.

It is in the face of this theoretical difficulty that Duncan Kennedy argues for a much more modest position on the causal capacity of critical legal theory when he insists that: 'we need to understand far more than we do about the content and the internal structure of legal thought before we can hope to link it in any convincing way to other aspects of social, political or economic life'. Before we accept the self-limitation proposed by Kennedy there are two problems, one internal and the other external, with his formulation. The internal problem is that it imports the assumption that greater understanding or knowledge of legal doctrine is the key to the second and more difficult stage of establishing the 'link' with external social reality. The difficulty is not an empirical one concerning the state of our knowledge but a theoretical one. Whereas relative autonomy expresses a pointer towards a solution to a theoretical difficulty, Kennedy erroneously reduces a theoretical problem to an empirical one.

There are within Kennedy's formulation indications of a possible theoretical solution. There is a hint of the potentiality of structuralist theory; elsewhere in his writings structuralism is invoked explicitly as a source of intellectual orientation, but it remains tentative and undeveloped. Its presence is marked by periodic references to 'hidden structure' and 'deeper patterns' and citation of a structuralist theorist, usually Piaget or Levi-Strauss. Structuralism offers the possibility of establishing a means of specifying a connection between law, through its form or structural characteristics, and economic or political structures. Whilst it is not an avenue that I wish actively to commend it is clear that Kennedy regards it as having a potential although it is one he does not develop.

78 D. Kennedy, supra n 18, 221.
79 D. Kennedy, ibid, 210, 220, 221. Other critical scholars also make passing reference to structuralism; for example, Mark Tushnet refers to legal doctrine as 'structures of thought with internal coherence'; M. Tushnet; supra n 13, 1350. Whereas Peter Gabel although he makes some use of structuralist ideas finds it incompatible with the radical phenomenology which provides his primary theoretical orientation; P. Gabel, 'Intention and Structure in Contractual Conditions' 61 Minn L Rev 601, 606 (1977).
The structuralist strand in critical theory connects with another possible theoretical solution to the general problem of establishing the connection between law and the social totality. A theory of 'internal relations' similarly provides the possibility that each element or constituent of a social totality in itself embodies the general characteristics of the totality; in other words the part is the microcosm of the whole. This perspective offers the possibility that the study of legal doctrine can in itself be undertaken as a study of the wider social relations within which the legal doctrine exists, just as Ollman, the leading modern exponent of a philosophy of internal relations, argues that the commodity form reveals the dynamics of capitalist society. The problem of connectedness is abolished at a stroke, or at least so transformed that the problems associated with the establishment of causal relations conceived as relations between independent social entities have no further relevance.

Within critical legal scholarship there are occasional passages which resonate with a philosophy of internal relations. Thus, for example, Gabel's view of structure as 'a synthesis of elements in which each element is both the complete expression of the whole and a partial constituent of it' is pure internal relations. More generally the account of the theory of legal consciousness which I have criticized for importing the assumption of an identity between the consciousness of the legal elite and that of popular consciousness can be reinterpreted. Read in the context of a theory of internal relations, were it to be made explicit and defended, legal consciousness could be examined as embodying a coherent and articulate expression of the dominant ideology of capitalist society. Its stages and changes could then be read as 'reflections' of either structural changes at the level of the economy, or mediated through ideology, of the dominant consciousness. I suggest that critical legal scholars are more significantly allied to a philosophy of internal relations than is made explicit in their substantive formulations. If this suggestion can be substantiated it offers not a solution but a different perspective, but one which has to confront the challenge that an internal relations theory is but a sophisticated version of determinism.

The second or external problem raised by Kennedy's general position on the connection between doctrine and the social totality is that by explicitly postponing the question he lays himself open to a strategic objection from within the critical legal studies movement. This criticism from the 'Left' is exemplified in Munger and Seron's objection that in abandoning the attempt to establish the link between

80 The most important modern defence and development of Marxism as a philosophy of internal relations is provided in Bertell Ollman, *Alienation: Marx's Conception of Man in Capitalist Society* (Cambridge University Press 1971). It is interesting to note that this text, which is arguably the most important piece of Marxist scholarship to have been produced in the United States, is never, to the best of my knowledge, discussed by the critical legal scholars despite its compatibility with many of their own ideas.

81 B. Ollman, ibid, Part 3.

doctrine and the wider socio-political reality, despite all protests to the contrary, Kennedy 'reinforces the very assumption that it sets out to demystify, i.e. that doctrine develops autonomously'. Yet it is not self-evident that the significance attached by Kennedy to extending doctrinal analysis necessarily reinforces liberal legalism, but it certainly postpones, and thus possibly impedes, the development of a substantive alternative. The major theoretical consequence of Kennedy's postponement or self-limitation is that it accentuates the concern with the critique of liberalism which takes as its primary focus the project of demonstrating the internal incoherence of liberal legalism. It is thus necessary to consider the part played by incoherence analysis within critical legal theory. 

IX. THE PROBLEM OF COHERENCE

One feature more than any other appears to unite the critical legal theorists. They all engage in critiques of mainstream legal thought directed at demonstrating its incoherence. The general form of critical legal writing is that which asserts the incoherence or contradictions of liberal legalism, of specific areas of doctrine, of specific theorists, judges, or treatise writers. Tushnet, for example, seeks to establish the incoherence of the most pervasive styles of judicial reasoning and concludes that it reveals 'the potential for destroying liberalism by revealing the institution's inconsistencies and its dialectical instability'. It is not made explicit why the demonstration of 'inconsistency' cumulatively results in 'incoherence' which in turn can lead to the downfall of liberal legalism. The missing step in the argument is that liberal legalism holds itself out as demonstrating the coherence of legal doctrine which is one plank on which the authority of law, requiring

83 F. Munger and C. Seron, 'Critical Legal Studies versus Critical Legal Theory' 6 Law & Policy 257 (1984). This criticism has real force, but it should be disassociated from the rather 'Leftist' association with a concern for the association of doctrinal analysis with elite law schools; such a criticism is an unnecessary ad hominem which weakens the force of their more important criticism of 'the failure to develop any theory of the relationship between law, as legal doctrine, and the socio-political context of law'.

84 In this essay I have been anxious to examine the critical legal studies movement as a whole. I have not found it necessary to focus on the internal differences, whether theoretical, methodological or political except where specific differences have been relevant to some specific topic under consideration. Since many recent discussions concentrate upon these differences it is necessary to make a brief comment. That there exist differences of substance is not in dispute, but whether there is a clear line of differentiation, as argued most forcibly by Hutchinson and Monahan, supra n 2, is more debatable; they question whether the movement can continue to embrace the divergencies within it. My objection, which leads me to focus on continuity rather than divergence within CCLS is that the differences do not follow the neat dichotomies proposed. There is no consistent division between 'revisionists' and 'non-revisionists' (Hutchinson and Monahan), 'reformist' and 'irrationalist' (Clare Dalton 'Review of Kairys “The Politics of Law”', 6 Hare Women's LJ 229—48 (1983)). The eclecticism of the intellectual inspiration of the movement makes possible a variety of classifications but there is little consistency to the patterns.

85 M. Tushnet, supra n 13, 824.
acceptance and obedience, is founded. Once the claim to coherence is demolished both the confidence of liberal adherents and the grounding of the authority of law are undermined. Whilst intellectual systems are vulnerable to successful prosecution at the bar of logic they are points scored in intellectual battles, but it is far from self-evident that the influence of intellectual positions is irretrievably damaged as a result. Indeed I shall argue that incoherence may be an advantage and count in favour of adaptability for a theory.

We need to ask a naïve question: precisely what does it prove to demonstrate an incoherence or contradiction in an intellectual position? It is a well-established feature of rationalist epistemology that the pursuit of internal coherence constitutes a major form of intellectual legitimation. But since critical theory disputes the very claims of rationalist epistemology in its pursuit of logically gapless intellectual constructs, it is puzzling why the shout of triumph should ring out when incoherences or contradictions are demonstrated. At best such findings have a limited audience, they are directed towards the authors of liberal legalism, who holding to the tenets of a rationalist epistemology, may be shaken in their intellectual convictions. Yet it is apparent that critical theorists claim a much more important role for the demonstration of incoherence.

There are a number of overlapping but contrasting claims made by critical theorists for the method of coherence analysis. First, coherence analysis is widely linked to the major strand connecting today’s critical scholars to the Realist tradition through the stress upon the indeterminacy of the legal process. Judicial reasoning does not and cannot generate determinant results. This denial of the rational determinancy of legal reasoning is an important strand of unity for critical jurisprudence.

Second, the incoherence of legal doctrine is seen as an expression or manifestation of the basic incoherence of liberal political and social theory with its inability to resolve the fundamental contradiction between individual and community. Third, the incoherence of legal doctrine is not merely some deficiency in the intellectual props of liberalism; its incoherence is endemic and attests to the ideological function of legal discourse. Liberal legalism reproduces rather than resolves the basic contradiction; as Hutchinson and Monahan aptly express it legal doctrine embodies the ‘basic contradiction writ small’. To establish contradiction and incoherence challenges the truth-claims of the central tenets of liberal legalism which proclaim the inevitability and naturalness of law, the conflict-resolution function of rule application and the neutrality of the legal process.

The fourth strand involves a more significant objective which connects the practice of critique to social and political objectives. To expose incoherence creates the possibility of overcoming the diverse ways in which law reifies and mystifies the conflictual nature of social reality. Freeman expresses the critical
objective: 'for me the task of a scholar is thus to liberate people from their abstractions, to reduce abstractions to concrete historical settings, and, by so doing, to expose as ideology what appears to be positive facts or ethical norms.'\textsuperscript{87} A more psychologically orientated version is seen in Peter Gabel's proposition that 'the law' emerges within our alienated culture as a kind of quasi-religious belief system which simultaneously compensates for our feelings of loss within these alienated groups and conceals these feelings from us'.\textsuperscript{88} As David Trubek remarks 'this approach assumes that social actors, like psycho-analytic patients can be freed of the constraints of delusions'.\textsuperscript{89}

A fifth and final form of incoherence argument locates the possibility of a politics that goes beyond the critique of mystification. The contradictions of liberal legalism and the ideology it generates consist of rival social visions. These visions are prefigurative in that they contain the possibility of alternative forms of human association. Most explicit in developing this line of thought is Roberto Unger's deviationist doctrine which argues that these 'conflicting tendencies within law constantly suggest alternative schemes of human association'.\textsuperscript{90} His analysis of contract doctrine seeks to demonstrate that alongside the conventional individualistic model of social relations there exists a subordinate and less visible countervision embodying ideals of reciprocity and community. There is an important feature of this strategy which seeks prefigurative alternatives \textit{within} legal doctrine. If well founded it creates the possibility of a 'revolutionary reformism' which, rather than envisaging any overthrow of legal doctrine, seeks to accentuate and develop the alternative images of social life until such time as the alternative altruistic or communitarian principles become the dominant element.

The most interesting application of this methodology is provided by Duncan Kennedy's analysis of 'motives' in contract law.\textsuperscript{91} The prefigurative motive in contract doctrine is that of paternalism which justifies interference with consensual contract terms on the grounds of an appeal to the interests of one or both parties. He declares himself in favour of a programme of advancing paternalism in contract law; 'I would favour an adventurous and experimental programme of left-wing compulsory terms.'\textsuperscript{92} I have strong reservations about associating paternalism with a necessarily progressive identity. My difference with his position stems from a rejection of his definition of paternalism as 'inter-subjective unity of the actor with the other'.\textsuperscript{93} My view of paternalism is strongly influenced by the socialist critique of the experience of European social

\textsuperscript{87} A. Freeman, \textit{supra} n 11, 1236.
\textsuperscript{88} P. Gabel, \textit{supra} n 32, 28.
\textsuperscript{89} D. Trubek, \textit{supra} n 3, 610.
\textsuperscript{90} R. Unger, \textit{supra} n 9, 579.
\textsuperscript{91} D. Kennedy, \textit{supra} n 13; I take it for present purposes that his concept of 'motives' has the same role as Unger's concept of 'principles'.
\textsuperscript{92} Ibid, 629.
\textsuperscript{93} Ibid, 647.
democracy; the paternalism of the societies with histories of social democratic
governments has not been one of unity between state and people, but of
non-participation and lack of identity with 'benefits' handed down from above
reflecting the state’s rather than the recipients’ conception of needs and interests.
This paternalism is one of separation rather than unity which reifies the welfare
state and its institutions as set apart from recipients who are immobilized when
faced with alien bureaucracies. Paternalism involves not unity but a giver–receiver
relationship, a relationship of superiority–inferiority.

Kennedy is not unaware of the difficulty that arises from the lack of identity
between the professional paternalist separated by a wide gulf of experience and
culture from recipients. He seeks to resolve this dilemma by urging the
professional paternalist to take on 'the task of mobilizing the groups on whose part
one may have to act paternalistically'.94 His model of successful non-alienated
paternalism is, as he recognizes, only conceivable in the context of small groups
with face-to-face interaction. As a utopian vision it has something to commend it,
but it is not one which addresses the big questions concerning the transformation
of ever more powerfully aggregated corporate and state power. Like Unger's
espousal of face-to-face 'organic groups' as the transformative possibility of
welfare-corporatism it is a vision of a radicalized community whose integration
involves little beyond a tolerance of alternative life-styles.

The other problem with deviationist doctrine in its quest for a prefigurative
strategy is that it limits the search for alternative visions to the existing body of
legal doctrine. Alternatives that are generated 'outside' rather than 'inside' legal
doctrine are either disallowed or discounted. This issue is closely connected with
the problem of paternalism. Perhaps it is precisely because the alternative vision of
'community' is found inside legal doctrine that it takes the form of paternalism
with its non-participatory and hierarchical characteristics. The programme of
prefigurative politics that is opened up by critical legal theory should avoid the
invitation preferred by Kennedy and Unger to restrict itself to visions of social
alternatives contained within existing legal doctrine.

The function of incoherence

One additional dimension of coherence analysis should be noted. The general
methodology of critical theory assumes that incoherence is an unambiguously
negative attribute of liberal legalism. The general intellectual strategy of liberal
legalism has been to hide and deny its own incoherence. Thus the theory of rights,
from Blackstone to the present, has been concerned to present itself as an ideal
mechanism for the resolution of the conflict of rights. In the contemporary period
liberal legalism has, according to Duncan Kennedy, been slowly awakening to the
horrible realization that the conflict between self and others is permanent and
insuperable. Before we rush to assume that critical legal theory has announced the

94 Ibid, 649.
death throes of liberal legalism we need to ask: isn't it possible that its very internal incoherence and its associated dichotomies are a strength rather than a weakness? Or, to put it more boldly, is incoherence a functional attribute of liberal legalism? The openness of legal doctrine demonstrated by the Realists and reinforced by the critical theorists allows a flexibility in judging, between the competing demands and values generated both internally by legal ideology and by external interests. This process may leave a messy line of precedents behind that can be seized upon by lurking critical theorists and pronounced incoherent. Why should this be regarded as a significant defect in the operation of a legal system? The answer to this question will depend upon the relative importance attached to the production of 'results' in the form of decided cases or to the production of 'doctrine'. Critical theorists tend to place little emphasis on the 'results' of specific legal actions. This, I suggest, is a reaction against a simplistic instrumental theory, of which it is today very difficult to find any adherents, that judges hand down decisions embodying class interests. This is no reason for failing to recognize the argumentative and persuasive role, in particular of the higher appellate courts, in communicating and legitimating specific legal outcomes. The viability and social persuasiveness of these results may be more important than the small price of doctrinal incoherence which is a by-product.

Douglas Hay's justly renowned study of eighteenth-century English criminal law can be understood as providing an empirical illustration of the function of incoherence. The incoherencies and inconsistencies of English criminal law, both procedural and substantive, and the consequential space for discretion created thereby, made possible 'the peculiar genius of the law' with its interplay of terror, justice and mercy.95 Even the resistance to rationalizing reform by the Whig elite can no longer be written off as obscurantism; it takes on a new sense as embodying a distinctive understanding of the eighteenth-century concept of the rule of law, itself significantly different from the formalist conception of the present century.96

I have not sought to establish that incoherence is necessarily functional, but rather to reinsert the need to re-examine critical theory's assumption that to demonstrate doctrinal incoherence is to undermine liberal legalism. My question is not new; it was clearly present in the Realist tradition of rule-scepticism. The implications of doctrinal incoherence are not as unambiguous as the critical scholars tend to assume and require a fuller analysis of the effects and consequences of the interrelation of legal decisions and legal doctrine.

96 'A complete rationalization of the criminal law would remove those very elements of discretion, such as the pardon, which contributed so much to the maintenance of order and deference'; ibid, 57–8.
X. THE CONSTITUTIVE THEORY OF LAW

My argument this far has suggested that the critical legal studies movement has, as yet, not developed an elaborated theoretical perspective. It is a trend founded on a level of agreement around a certain style of critique of liberal legalism and more widely of modern society. There is an underdeveloped theoretical strand which offers the possibility of a more coherent and articulated theory. This alternative is provided by an emergent ‘constitutive theory of law’. This theoretical development must be understood against the background of attempts within the Marxist theoretical tradition to free itself from determinism. David Kairys clearly poses constitutive theory as an alternative to determinism. "But the law is not simply the armed receptacle for values and priorities determined elsewhere; it is part of a complex social totality in which it constitutes as well as is constituted, shapes as well as is shaped."

Before the problems and potentialities of constitutive theory can be discussed further it is important to emphasize a feature of the critical legal studies movement upon which I have not up to this point placed much emphasis. But this in no way detracts from an insistence that a significant strength of contemporary critical legal studies derives from the contribution of the 'new legal history' movement. Not only have leading exponents of the new history, such as Morton Horwitz been active participants within CCLS, but equally there has been an important historical dimension to the work of leading CLS activists such as Mark Tushnet, Duncan Kennedy and Karl Klare. There is here an interesting contrast between Britain and the United States. The work of E. P. Thompson and Doug Hay when they, and others, took up and pursued an interest in the role of the law in eighteenth-century England proceeded in almost complete separation from critical legal scholars. Subsequently the two major texts produced had a profound impact upon radical legal academics and that impact later influenced the theoretical development within the critical legal studies movement in the United States.

The importance of the new legal history is not only that it adds an important historical dimension lacking in most orthodox legal scholarship. But more importantly, for my present concerns, is the theoretical contribution that is being made to critical legal studies. What is apparent is that the new historians are concerned to address fundamental and sharply posed questions of historical causality. Such lines of inquiry serve to sharpen the focus of the theoretical issues

98 D. Kairys, ‘Introduction’ to supra n 6, 5.
confronting critical legal studies. This is nowhere more important than in Bob Gordon's essay 'Critical Legal Histories'. His title is somewhat misleading because his ambit is much broader in that the sustained and powerful critique which he mounts of 'evolutionary functionalism' is central to the concerns not only of legal history, but also of the sociology of law and critical legal theory. Further his essay concludes with an important elaboration and development of the constitutive theory of law.

In considering the interaction of the new legal history and critical legal studies in elaborating a constitutive theory of law it is necessary to consider the way in which this development interacts with debates within contemporary Marxism. It is not simply that Marxism is often the chosen theoretical language, but it is important to recognize that important contributors like Morton Horwitz are explicitly non-Marxist. Rather the interconnection stems from the major questions addressed. These are concerned with exploring the causal interpenetration of legal and economic relations. It is because questions concerning the relationship between economic and non-economic relationships have been so important within Marxism that the looming presence of Marx hangs over the current debates within critical legal theory.

It is now necessary to return to examine the formulation of a constitutive theory of law. The theses that law both constitutes and is constituted has to be pressed further. In this form it verges on the vacuous. A step forward can be taken by interrogating one of the best known formulations with which Edward Thompson concludes Whigs & Hunters. He argues that the daily activities of eighteenth-century English farmers occur 'within visible and invisible structures of law'. The boundary marker is both the physical boundary as well as the legal object reinforced by ancient boundary ceremonies.

Hence 'law' was deeply imbricated within the very basis of productive relations, which would have been inoperable without this law. And in the second place, this law, as definition or as rules (imperfectly enforceable through institutional legal forms), was endorsed by norms, tenaciously transmitted through the community.

Thompson's immediate purpose is to reject all instrumental theories of law as reducible to manipulative instruments of ruling classes. What is most important for our present purposes is his phrase "law" was deeply imbricated within the very basis of productive relations'. Within the canons of Marxist theory he is making the claim that the social relations of production are not logically separable from and independent of the legal superstructure. Rather he argues that the relationships within which productive activity takes place are constituted by legal

99 R. W. Gordon, supra n 29.
100 Ibid, 104–25.
101 E. P. Thompson, Whigs & Hunters: The Origin of the Black Act (Penguin, 1977). It should be stressed that Thompson does not employ the concept of constitutive theory.
102 Ibid, 261.
relations. In addition he is also insisting that the presence of legal elements within the constitution of productive relations has distinctive consequences for the way in which those relations are lived out and struggled over. This point can be illustrated concretely from Thompson's historical material. The English forest peasantry fought tenaciously to defend the customary rights to grazing, timber, etc., not just because they had an economic interest but also because the legal recognition of customary rights was being challenged. Thus not only was their resistance founded on economic interest but it was grounded in legitimations which allowed them, as Thompson demonstrates, to win and mobilize significant allies from amongst the better-off yeomen farmers who became involved in defence of the prevailing customary and legal relations which formed the communities in and around the forest.

A clearly defined theoretical difference can be identified between Thompson's position and that argued by Jerry Cohen who insists that a central tenet of Marx's theory of history is the necessary separability of economic and legal relations. The issue posed involves what has become known as 'the legal problem in historical materialism' and centres on the question of whether it is possible to specify 'property relations' as economic relations in such a way as to make no reliance upon legal concepts, and thus produce a 'rechtsfrei' concept of property. Exponents of constitutive theory have not as yet addressed Cohen's argument as fully as it deserves. A test case for the emergent constitutive theory of law will need to engage with Cohen's analysis before it can proceed to grapple with the interpenetration of legal and economic relations.

Karl Klare's initial presentation of constitutive theory involves a conception of the legal process 'as, at least in part, a manner in which class relations are created and articulated, that is, to view law-making as a form of praxis'. It is immediately apparent that constitutive theory is closely connected to the concept of the relative autonomy of law; it embodies the aspiration towards an analysis in which law is viewed as both determining (constitutive) and determined (constituted). As a version of relative autonomy theory it encounters the same
range of criticisms that have been considered above in Section VIII. In its role as an attempt to breathe substance into the relative autonomy thesis constitutive theory seeks to identify the effectivity of law. One important feature of constitutive theory which may allow it to overcome weaknesses in presently available formulations of the relative autonomy thesis is its concern with the effectivity of law. Edward Thompson is concerned to insist that the fact that customary practices were embedded in legal form had implications both for the way in which claims were mobilized by the forest dwellers and for how such claims were responded to by both judiciary and the state. Klare illustrates this concern with effectivity (without employing the concept) in his own research on the National Labor Relations Act of 1935. His general conclusion was that the legislation 'contributed to defining what the character of capitalism would become and creating the institutional and social relations of the late capitalist workplace'.

This formulation involves a 'strong' assertion of the causal role of the NLRA in shaping workplace relations. But just as the relative autonomy thesis provides no means for specifying the 'limits' of the autonomy of law neither does constitutive theory provide any account of the causal weight of the legislation's constitutive effects.

One possible response to this objection is to insist that the question of specific causal weight can only be resolved in the context of the study of particular concrete historical situations. The risk inherent in such a response is that of lapsing back into a naive empiricism in which every situation is uniquely the result of the specific causal factors. In its present state of development the constitutive theory of law is an aspiration towards a theory which does not, as yet, exist.

A step forward towards this objective can be taken by employing the concept 'conditions of existence' which directs attention to the necessary requirements for the existence of a social institution or practice, and the means by which these conditions are secured or provided. The identification of the conditions of

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107 In defence of the ugly neologism 'effectivity' it is intended to make clear that the concern is not with the 'effects' of law conceived as one independent variable acting upon another social element. 'Effectivity' is intended to demarcate the consequences for the development of some complex social element of its legal dimension or manifestation.

108 K. Klare, supra n 25, 131. In the same article he employs the formulation which identifies the role of the legal process as 'one of the primary forms, if not the primary form, of social practice through which the actual relationships embodying class power were created and articulated'; ibid, 130.

109 Marx employed the concept of conditions of existence in a distinctive manner. 'Like all its predecessors, the capitalist process of production proceeds under definite material conditions, which are, however, simultaneously the bearers of definite social relations entered into by individuals in the process of reproducing their life. These conditions, like those relations, are on the one hand prerequisites, on the other hand results and creations of the capitalist process of production; they are produced and reproduced by it.' K. Marx, Capital (1960), Vol 3, 798. The distinctive feature of Marx's formulation is that whilst certain 'conditions' are a prerequisite of
existence makes possible the study of both the processes through which these conditions are provided and the interaction between the conditions in constituting the social phenomenon under consideration. It we return to Klare's own example of the processes involved in creating the social relations of the workplace, we can identify the part played by labour law in creating specific mechanisms of collective bargaining and arbitration procedures. But we are also enabled to focus on its interaction with the given structure of management and the forms of trade union practice. Within this analytic model we can identify the specific legal regulation of the NLRA not as a single constitutive element but in its interactive relationship with the economic practices within which it is located and upon which it has identifiable effects; in this way it is possible to avoid applying constitutive theory as a disguised form of legal monism.

The important question that this suggested theoretical model must confront is whether this is not, dressed up in fancy language, just a simple old-fashioned empiricism in which factors are isolated and assigned some causal weight. This charge can be rejected, not because its object is an empirical enquiry, this indeed is a positive merit, but because it does not employ an empiricist epistemology which insists that an object of knowledge can only be provided by experience. Rather the conditions of existence stand in a logical or necessary relation to the object of inquiry; experimental data is pertinent in requiring the checking of the content or formulation of these concepts. The method allows and facilitates a complex theoretical elaboration which is capable of application to concrete particulars.

This procedure involves the pre-empirical stage of the analytical identification of necessary preconditions without which the relationship under analysis could not exist. The empirical stage of enquiry concerns the manner and form in which these elements are provided. This stage of analysis will be concerned with the different ways in which, in historically particular circumstances, the conditions of existence are differentially met in comparable circumstances. This can be illustrated by offering a brief re-interpretation of Robert Brenner's analysis of the different trajectories of the peasantry in preindustrial England, France and eastern Europe. Brenner seeks to explain how it came about that the response to the population decline from the fourteenth century resulted in the intensification of feudalism in the East, the institutionalization of a strong peasantry in France and the eradication of capitalism, their existence is the creation of the capitalist process of production. In other words, capitalism provides its own prerequisites.

110 R. Brenner, 'Agrarian Class Structure & Economic Development in Pre-Industrial Europe' 70 Past and Present 30–75 (1976). Brenner, it should be stressed, does not make use of the conceptual apparatus through which I represent his thesis. I take Brenner's analysis to illustrate the methodology being proposed because I hope to supplement the way in which Bob Gordon invokes Brenner in illustrating constitutive theory.
of a peasant class in England. The conditions of existence of a class will involve *inter alia*:

(a) the capacity to formulate interests as claims,
(b) the means of articulating claims in legitimated form (e.g. claims of right, of custom, etc.),
(c) the capacity to mobilize (and to win allies) in advancing and protecting claims.

Brenner's conclusion was that it is not possible to make sense of the course of European feudalism without invoking an analysis of the structure of class relations. In the terms of the methodology here proposed the variant outcomes can be understood in terms of both the degree and the form in which the three conditions of existence identified were secured. In general the capacity of the peasantry to mobilize and thus to secure, protect and reinforce both customary and legal rights provides the explanatory framework for the divergent fates of the peasantry in Europe.

A methodology of this type has the additional merit of being able to take advantage of some of the insights of structuralist theory. I assume that it is essential to avoid any circularity in the application of structural theory in which the structure is defined in such a way that it provides its own supports or conditions of existence. The most important step is to insist on a dual relationship between the general (structure) and the particular (elements of a structure) by a process that Foucault calls 'double conditioning'. Neither a structure nor its elements are understandable on their own. No particular elements of legal regulation or legal practice is to be studied without taking account of its location within the structure of 'the Law', whilst 'the Law' has no purchase except through the specific regulations or practices. This interactive relationship is such that neither is reducible to or explainable in terms of the other. This framework is not restricted in its application to the most obvious example employed above of particular legal doctrines situated within a given legal system; it may be employed in such a way as to break free from this common-sense positivist conception of 'laws' within a 'legal system'. Our attention should be directed to its relevance to the analysis of the relationship between different forms of law, thus allowing us to go beyond the general assumption which underlies much critical scholarship of a single form of law as constituting the structure of a legal system. Similarly it helps focus attention on the concern with legal pluralism which is currently playing an important part in a theorization of law which breaks with many of the assumptions of legal positivism.

The reformulation of a constitutive theory of law which I have proposed is capable of elaboration within a range of different theoretical emphases; it is

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compatible with, for example, some of the recent advances in Marxist theory, structuralist analysis or Foucault's institutionalism. Further, it is formulated in such a way as to avoid some of the more important problems encountered in the analysis of critical legal theory presented in this essay. It is compatible with a strong commitment to an emphasis upon the connectedness of law and the external social totality without relinquishing a concern with the specific effectivity of legal doctrine. Similarly it seeks to breathe substance into the concept of the relative autonomy of law without falling foul of the indeterminacy inherent in its general formulation. Finally, this theorization seeks explicitly to fulfil the critical theorist's promise of being able to draw upon different theoretical traditions. The claim that can be made for it is that it does so by avoiding the 'melange' of different traditions, but rather combines them in a form which makes explicit their interconnections and is sensitive to problems involved in establishing such integration.

XI. CONCLUSION

The emergence of critical legal studies is the most important intellectual development in the field of legal studies since the rise of Realism. It is, of course, significant that it shares many common characteristics with that earlier movement and is conscious of those connections. But to conceive of critical legal studies as little more than a 'new Realism' is to underestimate both the distinguishing characteristics of the new movement and its potential.

Critical legal studies takes up a significantly different stance in relationship to the prevailing orthodoxy of legal scholarship from that of the Realists. The Realist disenchantment with legal formalism was pragmatic; orthodoxy did not provide satisfactory answers for the constituency which the Realists sought to represent. Formalism provided no satisfactory guidance for legal practitioners concerned with improving the efficiency of their concern to predict the outcomes of litigation nor an adequate framework for the policy concerns of legislators. Critical legal scholars are not preoccupied by such pragmatic considerations; they do not seek to articulate the concerns of legal practitioners or legislators or, in general, of 'insiders' within the legal process. Critical scholars are motivated by a much broader political objective within which it is 'the law' itself that is 'the problem'; law is not conceived as being capable of resolving the problems that it apparently addresses. Rather law is seen as a significant constituent in the complex set of processes which reproduces the experience and reality of human subordination and domination; thus the wider concern with the conditions and possibility of human emancipation forms the extended political perspective of the movement.

The organizing concerns of the critical legal studies movement are very different and much broader than those of their Realist forebears. Yet it is crucial to an understanding of the potential of the critical movement to take cognisance of their focus upon the detailed interrogation of legal doctrine. Other significant
precursors of critical legal theory, in particular that embodied in the sociology of law, were concerned with a predominantly 'external' perspective on law focusing upon the results and impact of legal institutions and processes. Within these concerns legal doctrine hardly figured. Indeed, insofar as the 'sociological movement in law' took up the Realist problematic of 'the gap' between legal ideal and legal reality, their focus was, and remains, predominantly with the result or output of legal processes, 'the law in action'. The critical legal movement runs the risk of omitting the potential of this tradition of research. But this risk of omission stems not from neglect but rather from a preoccupation with the internal processes of legal consciousness, which results in a predominant emphasis upon the ideological or legitimatory role at the expense of its regulatory role. Or, to put the same point in the language that has much influenced the sociology of law, to stress the symbolic function of law over its instrumental function.

I detect no impediment, stemming from either a theoretical or a political cause, that will not allow critical legal studies to readjust this balance. The fault, insofar as there is one, has been to overcompensate in their rejection of instrumentalism with an overemphasis upon the ideological dimension of law. In this one detects a heavy reliance on a pessimistic view of reification and mystification as the all-embracing reality of modern society. There is less evidence of a more measured attempt to grasp the interaction between instrumental and symbolic, or coercive and consensual dimensions of legal phenomena. Although this thrust does emerge in a number of individual papers, it has not yet received substantive attention and development.

Critical legal theorists must also be differentiated from the Realists in their more explicit concern with the role of theory. It is in the projection of substantive analysis that is at one and the same time consciously rooted in theoretical, historical and political concerns that marks out the greatest strength and potential of the critical project. Yet it is in the area of the theoretical content of critical legal studies that this essay has been centrally concerned. There is a paradox about critical legal writing which I am not certain that this essay has fully grasped. Critical authors exhibit the concern with theory that characterizes modern radical and neo-Marxist scholarship and yet, at the same time, much of that concern is, either literally or metaphorically, footnoted. Whilst more critical legal scholarship operates at a theoretically sophisticated level there is an absence of an explicit on-going discussion of theoretical issues. I identify some part of what appears as reticence to enter into theoretical debate within the movement as stemming from an understandable concern to maintain the valuable pluralism of the movement. There is a quite proper concern not to seek to lay down a single orthodoxy for fear of its ossification. Yet there is such potential within the published work of what by any measure is still a very young movement that it can only be assisted by a healthy and self-critical theoretical debate which takes place both in the course of and alongside the substantive fields of research undertaken by critical scholars. Indeed I am much encouraged by the very valuable contributions of CCLS
'insiders' to the development of this theoretical debate. This essay seeks to contribute to the development of this theoretical enterprise which forms such a central part of the critical project. It is now possible to lay the fear of instrumentalism and determinism to rest. It is in reaction against these that a pronounced trend within the movement has veered towards a functionalist account of legal consciousness and legitimation. The current theoretical problems confronting critical legal studies revolve around the articulation of a theoretical vehicle which can grasp the contradictory reality of law. This project has to escape the ever-present difficulty of avoiding the pendulum moving between consent and coercion. The outlines of constitutive theory provide the theoretical framework through which this project can be further advanced.

113 Of particular importance are the contributions to the *Stanford L Rev* symposium from Bob Gordon, *supra* n 29, and Dave Trubek, *supra* n 3.