J. Stuart Russell*

I. INTRODUCTION

The Critical Legal Studies (CLS) movement has unleashed the most profound challenge to contemporary mainstream Western legal philosophy since Legal Realism swept the United States earlier this century. In the words of Roberto Unger, one of the leading proponents of CLS: "The critical legal studies movement has undermined the central ideas of modern legal thought and put another conception of law in their place. This conception implies a view of society and informs a practice of politics."  

CLS, an essentially American phenomenon, has not remained an arid and unnoticed legal challenge despite its relative youth. With rare exceptions, however, the challenge has largely been ignored by Canadian legal scholars, even though most of the movement's principles would seem to be applicable to the Canadian context. In the United States, the initial ripples CLS created among legal scholars have been transformed into a veritable

* Of the bar of Quebec.


2 Some American scholars of jurisprudence have also attempted to ignore the CLS development. See, e.g., J.E. Bickenbach, Liberal Ideology and Jurisprudence, 22 Osgoode Hall L.J. 773 at 774 (1984). For examples of indigenous Canadian Critical Legal Literature, see A. Hutchinson & P. Monahan, Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought, 36 Stan. L. Rev. 199 (1984); P. Monahan, At Doctrine's Twilight: The Structure of Canadian Federalism, 34 U. Toronto L.J. 47 (1984); T. Pickard, Experience as Teacher: Discovering the Politics of Law Teaching, 33 U. Toronto L.J. 279 (1983). There is no Canadian version of CLS. See also J. de Guise, La science juridique est en crise . . . la profession aussi, Barreau 86 (5 Feb. 1986) who enthusiastically expresses the hope that CLS "gagnera sa bataille et que son influence attendra l'éducation juridique québécoise et ses agents." In the United Kingdom Alan Hunt is the secretary of the recently formed Critical Legal Conference, which held conferences at the University of Kent in 1981 and 1984. See A. Hunt, About the Authors, 19 Law & Soc'y Rev. 3 at 3 (1985). In Europe, the European Conference on Critical Legal Studies coordinates lines between critical scholars in a number of European countries.
tidal wave of controversy, especially at the Harvard Law School. For example, Paul Bator, a member of the faculty at Harvard since 1959, announced recently that he would be leaving Cambridge for the University of Chicago Law School. One report, paraphrasing Bator, explained some of the reasons for his departure:

[Harvard] is increasingly factionalized and dominated by left-leaning faculty members who have allied themselves in a movement known as “Critical Legal Studies”, . . . which views American legal institutions as the captive of elite wealthy interests, [and which has] had a “disastrous effect” on life at Harvard.

It [has] politicized the Harvard faculty, lowered academic standards, blocked faculty appointments and discouraged qualified professors elsewhere from going to Harvard. . . .

Speaking on a panel discussion at the Harvard Club in New York City in May, 1985, Bator reiterated his criticism of CLS: “Starting with the premise that confrontation, trashing and disparagement are legitimate instruments for creating a radical political ambiance . . . they have created a difficult, contentious and inflamed atmosphere in which only the most disciplined is able to focus on serious work.”

In addition to their impact on certain American law schools, CLS scholars have also produced a highly impressive corpus of legal criticism.

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3 According to one report, the Harvard Law School, with three leading CLS scholars on its faculty (Duncan Kennedy, Morton Horwitz and Roberto Unger), is more closely identified with the movement than any other law school in the United States. See D. Margolick, The split at Harvard Law goes down to its foundations, The New York Times, 6 Oct. 1985, at E. 7, col. 1 (Late Edition).


5 D. Margolick, supra note 3. Robert Clark, a leading critic of CLS, is reported as saying that Critical scholars at Harvard have created “prolonged, intense, bitter conflict”, and participated in “a ritual slaying of the elders.” R. Lacayo, Critical Legal Times at Harvard, Time, 18 Nov. 1985, at 97. The Dean of Law at Harvard, James Vorenberg, acknowledges that the debate has created “a tremendous sense of vibrancy and energy”. Id. See also M. Rodriguez, Faculty Divisions Spark Political Debate, Harvard Law Record, 2 Mar. 1984, at 1; M. Rodriguez, ‘Political’ Faculty Affects Tenure, Teaching, Research, Harvard Law Record, 9 Mar. 1984, at 1; A. Eisgrau & M. Rodriguez, Explanation Found For Faculty Split, Harvard Law Record, 1 Apr. 1984, at 1.

This body of writing has been correctly described as "dense and difficult and often inaccessible" and as having produced some of the most provocative and perplexing legal scholarship of the past several years. However, while the CLS movement is essentially "trying to do radical legal scholarship", its goals are much more ambitious. CLS writers not only examine the fundamental assumptions of law and the relationship between legal ideas and social action, they go further, attempting to create a "transformative" legal vision for the future through their ideas of alternative legal practice and theory.

"Due to the movement's diversity and ambiguity, "[i]dentifying precisely what constitutes Critical Legal Studies (CLS) is not easy". Nevertheless, the goal of this article is to attempt to introduce and highlight some of the principal ideas and techniques of the CLS project with respect to legal philosophy. Although CLS has provoked much heated and rich criticism of its ideas, an analysis of such criticism is beyond the scope of the article." It is, however, impossible to grasp the principles of CLS theory without understanding its history and, more particularly, its roots in Legal Realism. Part II of the article, therefore, will examine the historical background to CLS. Part III will discuss the CLS view of law, liberal legalism and legal reasoning. Finally, Part IV will give a detailed analysis of some of the more fundamental notions of this legal philosophy.

II. THE HISTORY OF CRITICAL LEGAL STUDIES: FROM REALISM TO REVOLUTION

CLS was founded at the Conference on Critical Legal Studies at the University of Wisconsin in Madison in 1977. The political perspective of

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8 S. Levinson, supra note 8 at 1466.


10 P. Cassell, id. at i.

11 Reference will be had to such criticism insofar as it helps to illuminate the fundamentals of CLS legal philosophy. See, e.g., L. Schwartz, With Gun and Camera Through Darkest CLS-Land, 36 Stan. L. Rev. 413 (1984) (a critique by a "skeptical" outsider). Some of the more hostile critics of CLS have described it as a "fountain of confusion". Id. at 455. It has also been termed "not a totalitarian party, but a collection of individuals who have little in common except a desire to occupy the most leftward position in the academy." P.E. Johnson, Correspondence, 35 J. Legal Educ. 18 at 19 (1985).
the early CLS movement was molded by the radical movements of the 1960's and 1970's.\textsuperscript{12} CLS was a response to a deepening skepticism regarding the ability of Legal Positivism and "liberal legalism" to provide satisfactory analyses of law in a rapidly changing society.

Although a number of basic ideas can be identified as common threads in the writing of its scholars, CLS is better characterized by its heterogeneity. Duncan Kennedy and Karl Klare correctly explain:

[CLS] has been generally concerned with the relationship of legal scholarship and practice to the struggle to create a more humane, egalitarian, and democratic society. CLS scholarship has been influenced by a variety of currents in contemporary radical social theory, but does not reflect any agreed upon set of political tenets or methodological approaches.\textsuperscript{13}

In fact, three distinct schools of philosophy can be discerned within CLS ranks:

1. \textit{The Frankfurt School of Marxist Criticism}: This school of philosophy, the source of the title of the CLS movement, is currently represented by scholars such as Jurgen Habermas and Theodor Adorno.\textsuperscript{14} A number of CLS scholars have turned to Weberian and "Critical" Marxist theories due to a dislike of "Orthodox" or "Scientific" Marxism. Combining functionalist methods or radicalism, these writers assert that law reflects, confirms and reshapes the social divisions and hierarchies inherent in capitalism.\textsuperscript{15} Another faction in this movement, represented by Kennedy and Mark Kelman, is rooted in legal anti-formalism, viewing doctrine as the manifestation of a particular vision of society and emphasizing the contradictory character of doctrinal argument.\textsuperscript{16} This school is, arguably, the dominant movement within CLS today;

2. "\textit{Orthodox}" or "\textit{Scientific}" Marxism: Mark Tushnet\textsuperscript{17} and some of the

\begin{itemize}
\item \textsuperscript{12} L. Schwartz, \textit{supra} note 11 at 415.
\item \textsuperscript{13} D. Kennedy \& K. Klare, \textit{supra} note 6 at 461.
\end{itemize}
National Lawyers Guild members of CLS are considered "Orthodox" or "Scientific" Marxists; and,

3. The Law and Social Science Perspective: This influential faction, which mixes law and social sciences, was introduced by central representatives of the Law and Society Association.19

These three are not, however, mutually exclusive, conflicting schools of thought, as each has the capacity to borrow from the others. Kennedy and Klare, for instance, readily recognize that CLS properly embraces disciplines other than law, especially the other social sciences.20 The result is not a "Marxist monolith". Due to the dynamic interaction of these three different perspectives, it is a highly heterogenous critical school of thought that is "marked more by a variety of ideas than a single set of doctrinal precepts".21

Although CLS does not yet have a "definitive methodological approach",22 it does have a very pronounced ancestral relationship with Legal Realism. As Tushnet explains, CLS is "the direct descendant of Realism and the law-and-society movement. It too attacks from the left the complacency of the existing centre [mainstream legal thought]; it too denies that law is autonomous; it too insists on the contradictions within the rule system."23

Realism was part of the general twentieth century revolt against formalism and conceptualism. Legal Realism, an American school of jurisprudence that flourished in the 1930's, developed as a reaction against both a highly conceptualized classical legal structure and a reactionary United States Supreme Court.24 The Legal Realists challenged the objec-

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18 See, e.g., Politics, supra note 7.
20 D. Kennedy & K. Klare, supra note 6 at 461. Schlegel argues, however, that the social sciences aspect of CLS is weak and the "rapprochement" with the law and social science group has been a complete failure. J. Schlegel, supra note 15 at 408. Compare 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 Harv. L. Rev. 1669 at 1670, n. 5 (1982) [hereafter cited as Bramble Bush]. By using non-legal disciplines, CLS seeks to characterize the ways in which the law helps to stabilize our society. Critical scholars critically examine legal texts by using interpretive techniques of other disciplines like sociology, phenomenology and structuralism. See, e.g., D. Kennedy, supra note 16 (structuralism adopted).
21 P. Cassell, supra note 9 at i. The importance of CLS is that it "appears to offer a set of viewpoints, descriptions, and prescriptions that vary substantially from those embraced by the mainstream legal culture." Id. One author describes CLS as "Neo-Marxist". D. Polan, Toward a Theory of Law and Patriarchy, in Politics, supra note 7, 294 at 297 (emphasis added).
22 Bramble Bush, supra note 20 at 1669, n. 3.
24 See E. Mensch, The History of Mainstream Legal Thought, in Politics, supra note 7, 18 at 26ff., for a brief overview of the major changes in American legal thought since the beginning of the 20th century. For a discussion of the origins and meaning of
tive existence of "rights" by questioning:

[T]he coherence of the key legal categories that gave content to the notion of bounded public and private spheres. . . . There will be a right if, and only if, the court finds for the plaintiff or declares the statute unconstitutional. What the court cites as the reason for the decision—the existence of a right—is, in fact, only the result.\(^{2}\)

The Realists reasoned that, because in every dispute each party asserts its goals in terms of rights, conflicting rights arise. The court must choose from among these rights. The Realists attempted to expose the fallacy of the idealized judicial decision-making model, maintaining that every decision by a judge is not a mechanical, neutral act, but a moral and political choice.\(^{26}\)

Realism is, as Louis Schwartz explains, "an important earlier model for CLS. It [Realism] arose as a reaction to the prevailing view of the law as static and of judges as bound by historical precedent."\(^{27}\) The problems identified by the Realists arose from, inter alia, the concepts of rules and the characteristics of language.\(^{28}\) More concretely, Realists used social theory to analyze law and employed legal history to question the legitimacy of traditional jurisprudence in a destabilizing and subversive manner.\(^{29}\)

Incoherence in social and political theory, as well as critical


\(^{25}\) E. Mensch, supra note 24 at 27. The attack upon the "logic of rights" theory was closely linked to a critique of stare decisis. See note 72 and accompanying text infra.

\(^{26}\) See, e.g., F. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809 (1935). The Realists' analysis of judicial reasoning was complemented by their belief that all law is policy.


\(^{28}\) See, e.g., L. Wittgenstein, Philosophical Investigations (1953).

\(^{29}\) Critical scholars attempt to demonstrate that fundamental legal principles are the products of historical circumstances and specific modes of legal reasoning. See, e.g., K. Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941, 62 Minn. L. Rev. 265 (1978). They use history to show that the underlying assumptions of legal doctrine lack the necessity claimed for such doctrine (see Bramble Bush, supra note 20 at 1678) and try to demonstrate the existence of historical patterns to legal change. Horwitz argues that mainstream Anglo-American legal scholarship is unhistorical in that it seeks to find universal rationalizing principles, thereby suppressing the real contradictions in society, and to make that society appear to be necessary and to be part of the nature of things. M. Horwitz, The Historical Contingency of
scholarship, were, therefore, linked to a radical political perspective.

CLS not only has many parallels to Legal Realism, it also represents both a continuation and maturation of Legal Realism: its present task is to avoid liberal legal theory and the "mechanical, determinist forms of Marxism-Leninism" found in traditional left legal theory. Like Legal Realism, one of the central goals of CLS is the dejustification of legal rules. Furthermore, CLS advances Legal Realism's "descriptive project" by attempting to disclose the unexpressed assumptions behind judicial decisions. CLS scholars, according to David Trubek, "seek to expose the assumptions that underlie judicial and scholarly [legal] issues, to question the presuppositions about law and society of those whose intellectual product is being analyzed, and to examine the subtle effects those products have in shaping legal and social consciousness".

To employ Roscoe Pound's terms, CLS is concerned with the existence of "received ideals" and "authoritative techniques" in the law. For example, there is the notion that there are settled ways of doing things. CLS tries to understand how these ways became settled. CLS also "carries on the Realist program of redescribing the commonplace in novel ways." For example, Legal Realists recategorized certain areas of law.

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30 D. Kairys, *Introduction*, in Politics, supra note 7 at 6. Kennedy believes that "[w]hat is needed is to think about law in a way that will allow one to enter into it, to criticize it without utterly rejecting it, and to manipulate it without self-abandonment to their system of thinking and doing." D. Kennedy, *Legal Education as Training for Hierarchy*, in Politics, supra note 7, 40 at 50. See also E. White, *The Inevitability of Critical Legal Studies*, 36 Stan. L. Rev. 649 (1984), for a discussion of the relationship of CLS to Legal Realism by an "outsider".

31 In constitutional law, this means "penetrating the surface of decisions and scholarly commentary to discover the unexposed assumptions of which the entire Supreme Court and most commentators are agreed". M. Tushnet, supra note 23 at 627. This article provides an illustration of the descriptive project which is central to the CLS program, by using a case study to uncover the contradictions among values that liberalism takes for granted. *Id.* at 635ff. It also states why such description is necessary. *Id.* at 631-35. One of the questions for a CLS scholar is not *whether* judgments are conservative but *why* they are. Edward White is correct in saying that the main impact of CLS, at least in the short-term, is the exposure of the underlying presuppositions of mainstream legal ideology. E. White, supra note 30 at 660.

32 D. Trubek, supra note 27 at 588-89.

33 M. Tushnet, supra note 23 at 629. CLS does, however, differ from Realism in its epistemology as well as its politics. *Id.* at 627. Schlegel argues that CLS differs from Realism in the following ways:

(1) the social science of choice for CLS is history, not sociology, the domain of Realists;

(2) specific proposals for law reform are absent from much of CLS writing; and

(3) CLS is deeply rooted in a concern for social theory, unlike Realism.

J. Schlegel, supra note 15 at 407.
III. LAW, LIBERAL LEGALISM AND LEGAL REASONING: THE GENERAL CRITIQUE

A. The Nature of Law

A major aspect of the CLS project is its analysis of the nature and function of law in modern Western society. Its critique of the legal order challenges the notion that such an order exists by advancing four main principles:

1. **Indeterminacy**: While there is a body of legal doctrine, it is not a system because it does not provide determinate answers or cover all conceivable situations.\(^{34}\) If law is indeterminate, legal scholarship becomes a form of advocacy, rather than "neutral" or "scientific" analysis;

2. **Anti-formalism**: The Critics reject the notion that, in every case, there is autonomous and neutral legal reasoning through which legal specialists apply doctrine to obtain results that are independent of the specialists' ethical ideals and purposes.\(^{35}\) Scholarly legal analysis, therefore, blends into political and ideological discourse;

3. **Contradiction**: The Critics reject the notion that legal doctrine contains a single, coherent and justifiable view of human relations. For them, such doctrine reflects two or more different and often competing views, none of which is dominant.\(^ {36}\) Consequently, legal argumentation cannot be grounded in the law itself; and,

4. **Marginality**: Even where a consensus can be formed about the norms of the law, the law as such frequently is not a decisive factor in human behaviour.\(^{37}\) As a result, normative arrangements governing social life must be worked out extra-legally, or "in the shadows of the law".\(^ {38}\)

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\(^{35}\) See, e.g., R. Unger, *CLS*, *supra* note 1 at 565. See also notes 58 to 62 and 90 to 91 and accompanying text infra.


\(^{38}\) D. Trubek, *supra* note 27 at 578. The general conclusion from an analysis of these four principles is that law "is not something hard but rather an obscure and vague source of normative guidance. The law, in whose shadow we bargain, is itself a shadow." *Id.* at 579.
CLS scholars argue that ideas "constitute" society in that social order depends on a society's shared "world view" that is comprised of basic notions about human and social relations including ideas about law. Therefore, "the critique of legal thought is the analysis of the world views embedded in modern legal consciousness". 39 Such analysis leads to a "transformative" perspective:

While Critical legal scholars seek to show relationships between the world views embedded in modern legal consciousness and domination in capitalist society, they also want to change that consciousness and those relationships. That is the Critical dimension in Critical legal scholarship. In this scholarly tradition, the analysis of legal consciousness is part of a transformative politics. 40

Assuming that society is constituted by the world views that give meaning to social interactions, a change in consciousness should result in a change in society. Legal scholarship affects consciousness in the following ways:

First, world views are given meaning and constitutive power by a claim to be true. Second, because every world view is hostage to its claim to be true, its constitutive force can be undermined if this claim is refuted. 41

In this view, law is a political product that results from the struggle of conflicting social groups. Consequently, it is not surprising that CLS scholars blur the distinction between law and society because, contrary to the traditional view that law is separate and peripheral to society, it is not practically possible to describe any "basic" social practices without describing the legal relations among the people involved. Law and society are therefore inextricably bound together. 42 Another facet of this "holi-
stic” approach to law is the notion that legal form is intimately connected to legal essence. Therefore, the goal of the Critics is to go beyond the Legal Realists by lifting the “veil of power . . . to expose the legal elements in their composition”.

B. Liberal Legalism

There may be some truth in the statement by Sanford Levinson that CLS is held together not so much by a common analysis, as by a profound disenchantment with “liberal legalism”. The ancestor of this principal antagonist of CLS is liberal political theory, which was based on the view that legal rules have objective content. Liberalism, the dominant contemporary Western ideology, is seen as “viewing the world in terms of a series of contradictory dualities and values such as reason and desire; freedom and necessity; individualism and altruism; autonomy and community; and subjectivity and objectivity. These contradictory values are reflected in virtually all of our common law and statutory concepts and rights.” Liberal theorists attempt to obscure the conflict inherent in such dualities and values, in part through law. Thus, CLS analysis is directed towards the exposure of the contradictions in liberal legal philosophy. This focus is rooted in a negative critique of liberal rights. Such rights do not serve the values of self-realization and true equality; instead they serve the interests of the market and bureaucratic institutions that provide the basis for liberalism.

Liberal legalism represents the status quo and acts as a mask for exploitation and injustice because of its “neutrally benevolent technique”. In addition to exposing the contradictions and incoherence of the underlying assumptions of liberal legalism, including the Rule of Law, CLS mobilizes other disciplines, such as sociology, philosophy

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43 R. Gordon, supra note 42 at 109.
48 R. Gordon, supra note 7 at 283.
49 S. Levinson, supra note 7 at 1467, 1470ff. See also P. Gabel, supra note 45 at 272; E. Mensch, supra note 24 at 23; R. Unger, Modern Society, supra note 1 at 176ff.
and anthropology, to dissect the presuppositions and ideology of that mainstream philosophy.\textsuperscript{50} For CLS, the tensions manifested in particular doctrinal fields pervade the entire legal system; more particularly, the overall framework of liberal ideology is criticized for masking the tensions in liberal theory.\textsuperscript{51}

As one of the goals of the CLS movement is the "transformation of the world", Kennedy writes that liberal legal scholarship is an obstacle to that transformation for two reasons. First, it makes the world look rational, necessary and just, rather than arbitrary and contingent.\textsuperscript{52} It also "diverts energy from the task of figuring out what the world should be like".\textsuperscript{53} Second, the impression that posited results can be easily achieved is a type of narcotic which, if used, will divert one's energy into the wrong avenues, for example, scientism. The attack on liberal legalism is, in Kennedy's view, only a small contribution to a valid strategy for CLS:

(a) The belief in false theories of the evolutionist or cost-oriented kind does not cause people to be conservative, and the critique of such theories cannot all by itself have any substantial impact on anybody's politics. (b) People do not hold to theories of the kinds I have been criticizing simply because they serve conservative ends. At least some people believe in them because they think they're true, even though it seems to them too bad that they are true. (c) For a lot of people, legitimating theories, theories that show the rationality, necessity and (often) efficiency of things as they are, serve as a kind of defense mechanism. These theories are a way of denying, of avoiding, of closing one's eyes to the horribleness of things as they are.\textsuperscript{54}


\textsuperscript{51} See A. Freeman, \textit{Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine}, 62 Minn. L. Rev. 1049 (1978); R. Unger, \textit{supra} note 44. What White calls "process theory" or "process jurisprudence" — the notion that process leads to justice, that advocacy leads to truth and that expertise leads to wisdom — is a central element of liberal legalism. White also believes that liberalism may be on its way to obsolescence and that CLS is an indication of the downturn of liberalism. E. White, \textit{supra} note 30 at 661-62, 671.

\textsuperscript{52} Gordon believes that one way to combat demobilization via conventional beliefs is to use intellectual inquiry to expose belief-structures which claim that, for example, law is the way it is because it must necessarily be that way. Law persuades people that "the world described in its images and categories is the only attainable world in which a sane person would want to live in [sic]." R. Gordon, \textit{supra} note 42 at 109. Thus, the point of CLS is to "unfreeze the world as it appears to common sense as a bunch of more or less objectively determined social relations and to make it appear as (we believe) it really is: people acting, imagining, rationalizing, justifying." R. Gordon, \textit{supra} note 7 at 289. One way to do this is to demonstrate that the belief-structures that rule our lives are not rooted in nature but are "historically contingent" and have not always existed. Another way is to empirically disprove the claim of the necessity of our legal rules to protect our society.

\textsuperscript{53} D. Kennedy, \textit{supra} note 9 at 1281.

\textsuperscript{54} \textit{Id.} at 1282-83. As well, according to Schwartz, some CLS theorists admit that liberalism does occasionally do justice in order to buttress its credibility. L. Schwartz, \textit{supra} note 11 at 425-26. \textit{See also} K. Klare, \textit{supra} note 17 at 134.
Given the leading role played by Legal Positivism in contemporary Western legal philosophy, one might ask whether "liberal legalism" is synonymous with Legal Positivism. The answer is far from clear, especially as Legal Positivism is rarely mentioned in CLS literature. However, it would seem safe to assume that CLS scholars see Legal Positivism as a part of liberal legalism and, like liberal legalism, it is a component of the CLS critique. Trubek, for instance, believes that a major theme of CLS is its hostility to Legal Positivism.

C. Legal Reasoning

As discussed earlier, the CLS view of the function of judges is similar to that of the Legal Realists. CLS scholars reject the idealized model of the legal order created by liberal legalism and the idea that a distinctly legal mode of reasoning or analysis characterizes the legal process. Indeed, they question its very existence. Judgments are based on values and choices of a political nature and are not the product "of distinctly legal reasoning, of a neutral, objective application of legal expertise". This view flows from

56 See R. Gordon, supra note 7 at 287, n. 8. See generally J. Haberman, Knowledge and Human Interests (1972).
57 D. Trubek, supra note 27 at 616-17. Trubek's critique of Positivism consists of two propositions:
   1. Positivism necessarily entails determinism. Most CLS scholars believe that "the world is made by willing subjects and can be remade by willing subjects, they are opposed to determinism in social thought as to determinacy as an adequate description of legal doctrine". Id. at 616.
   2. Positivism is critical for its reductionism: Behaviorism, critical scholars fear, leads necessarily to methods that relate objective indicators of behavior with variables to the actor; a central theme of Critical legal thinking is that the actor's ideas about the meaning of the relations in which he/she is embedded are the most important thing for which a social explanation should account. Id. at 617.
   3. Behaviorism is politically conservative, because all determinist and reductionist thought is conservative and because of the special form which behaviorism in legal studies has taken. It is conservative because it suggests that the mechanism of social change is outside the individual or group, and because it denies the central instrument for social change, the change of consciousness through the criticism of belief systems. See also W. Simon, supra note 6 at 568.
58 See supra note 26 and accompanying text.
59 D. Kairys, Legal Reasoning, in Politics, supra note 7, 11 at 13. See also P. Gabel & J. Feinman, supra note 29 at 181; D. Polan, supra note 21 at 294-95; M. Tushnet, The Dilemmas of Liberal Constitutionalism, 42 Ohio St. L.J. 411 (1981). Compare the following description of judicial decision-making:
   Three distinct elements go into explaining the work of the Court. First is the personal — the likes and dislikes of Justices, their values and prejudices, their relationships with each other. Next, there is the thorny stuff of law — the rules,
the belief that neither judges nor the law they apply are neutral. Accordingly, judges impose the values of their socio-economic group, that of the white, upper-middle-class males, through their decisions. They manipulate legal rules to reflect the ideology of that group. Law is not simply the product of interaction between precedent and interpretive technique, it is intimately affected by external forces. To the individualism of liberal legal reasoning and its unthinking application of precise and rigid rules, Kennedy counterposes “altruism” or collectivism:

[A]ltruism denies the judge the right to apply rules without looking over his shoulder at the results. Altruism also denies that the only alternative to the passive stance is the claim of total discretion as creator of the legal universe. It asserts that we can gain an understanding of the values people have woven into their particular relationships, and of the moral tendency of their acts. These sometimes permit the judge to reach a decision, after the fact, on the basis of all the circumstances, as a person-in-society rather than as an individual.60

Given the inherent subjectivity of judicial reasoning, there is no such thing as objectively determined facts or objectively and rationally applied law. Similarly, most contemporary legal scholars make claims to objectivity that are contradicted by inherent partisanship. In both case analysis and policy prescription, as well as within the school of legal advocacy, the judiciary rely on choices that are subjective and controversial.61 A corollary of this critique is the attack on objectivism, “the belief that the authoritative legal materials [statutes, cases and ideas]... embody and sustain a defensible scheme of human association”.62 The criticism here is based on “the discovery of the indeterminate content of abstract institutional categories like democracy or the market”.63

IV. THE SPECIFIC CRITIQUE

CLS writers have to date generated hundreds of specific critiques of contemporary law that contain a large number of specific recurrent themes. In this section I will examine some of the most prominent of those themes.

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60 D. Kennedy, Form and Substance, supra note 34 at 1773. See also S. Aineri, The Social and Political Thought of Karl Marx 65ff. (1968); K. Marx, Economic and Philosophical Manuscripts (1844), in Early Works at 322-34, 345-58 (1975).
61 M. Tushnet, supra note 27 at 1208-09. See also E. Mensch, supra note 24 at 24.
62 R. Unger, CLS, supra note 1 at 565.
63 Id. at 570.
A. Legitimation and “Trashing”

One of the functions of law, for CLS, is to give the impression that “the system” works according to normative law and that our socio-economic system follows the law. In this sense the function of law is legitimation:

Critical legal scholars believe that the world views embedded in legal consciousness “legitimate” unjust social relations by making these relations seem either necessary or desirable. “Every stabilized social world,” Roberto Unger writes, “depends for its serenity, upon the redefinition of power and preconception as legal right or practical necessity.” Beginning with that insight, Critical studies research seeks to discover the false but legitimating world views hidden in complex bodies of rules and doctrines and in legal consciousness in general.64

Law, therefore, serves an ideological purpose by “masking” exploitation with apparent fairness, thereby legitimating class structures. Of the many important functions of law, David Kairys believes that its legitmation function is central:

The law’s perceived legitimacy confers a broad legitimacy on a social system and ideology that . . . are most fairly characterized by a very small, mainly corporatized elite. This perceived legitimacy of the law is primarily based on notions of technical expertise and objectivity and the idealized model of the legal process . . . . But it is also greatly enhanced by the reality, often ignored in orthodox left thinking, that the law is, on some occasions, just and sometimes serves to restrain the exercise of power.65

In the area of contract law, each major turning point can be explained as follows: “the ideological imagery of contract law served to legitimate an oppressive socio-economic reality by denying its oppressive character and representing it in imaginary terms.”66 The “masking” concept in this area of law is attributable to the notion that contract law denies the nature of the system by creating the illusion that makes oppression and alienation appear to be the consequence of what was desired.67 Similarly, with respect to language, CLS scholars are also concerned with the demolition of legal metaphors that help mask their underlying reality because of their forced and artificial character.68

The theme of legitimation recurs constantly throughout CLS literature. Legal thought directs legal change and legitimates contemporary

64 D. Trubek, supra note 27 at 597. See also R. Unger, CLS, supra note 1 at 582; M. Kelman, supra note 16 at 591; D. Kennedy, Form and Substance, supra note 34 at 1724. Kairys speaks of law as providing “a false legitimacy to existing social and power relations.” D. Kairys, supra note 30 at 4.
65 Id. at 5-6.
66 P. Gabel & J. Feinman, supra note 29 at 179, 181.
67 Id. at 175, 183.
68 M. Tushnet, supra note 29 at 258-60. Quaere: are CLS terms such as “trashing” and “masking” also nothing more than legal metaphors?
The autonomy of legal doctrine, created by the idea that law is separable from the political view of judges, legitimates decisions made under the guise of law. Legal scholarship legitimates the world and \textit{stare decisis} is a "falsely legitimizing justification" for decisions that are essentially social and political.

Considering the central importance of legitimation to liberal legalism, CLS seeks to construct a methodology that delegitimates the concepts and processes being examined, depicts legal phenomena in a way that reveals underlying truths about the legal system and undermines existing legal rules and doctrines. The strategic value of this principle is exemplified by the view of one non-CLS scholar that CLS advocates regard delegitimation of liberal legal scholarship as the major contribution CLS can make to foster change. Delegitimation of law also involves the delegitimation of the precept that social life is created and enforced by imaginary notions.

One particular mode of delegitimation is "trashing", which Kelman defines as follows: "Take specific arguments very seriously in their own terms; discover they are actually foolish ([tragic]-comic); and then look for some (external observer's) order (not the germ of truth) in the internally contradictory, incoherent chaos we've exposed." In the context of the law school, trashing is an anti-hierarchical technique of recognizing and undermining illegitimate power rooted in hierarchies that superficially appear legitimate and inevitable. Kelman, who is most willing to defend trashing or "debunking" at the local level, proposes that the primary focus of CLS should be to examine "the vital general point that status hierarchies are founded, at least, in significant part, on sham distinctions."

More specifically, Kelman describes trashing that occurs in law schools as follows:

\begin{itemize}
  \item S. Levinson, \textit{supra} note 7 at 1467.
  \item D. Kennedy, \textit{supra} note 9 at 1276. Freeman attacks liberal legal scholarship in the following terms:
    \begin{quote}
    \textit{[T]he production of liberal scholarship is really part of the process of fashioning a legitimating ideology that makes the world appear as if it were not the one we live in, that makes it seem legitimate, that holds out utopian promises while ensuring their nonattainment, that cuts off access to genuine possibilities of transformation.}
    \end{quote}
    A. Freeman, \textit{Truth and Mystification in Legal Scholarship}, 90 Yale L.J. 1229 at 1235. \textit{See also id.} at 1233.
  \item D. Kairys, \textit{supra} note 59 at 14.
  \item E. Sparer, \textit{supra} note 46 at 555.
  \item P. Gabel, \textit{supra} note 45 at 277. \textit{See also} J. Schlegel, \textit{supra} note 15 at 401.
  \item M. Kelman, \textit{supra} note 55 at 293. Kelman describes himself as a somewhat reluctant advocate of "trashing", an approach that is also described as "demystification" and "demythologizing". \textit{Id.} at 344.
  \item \textit{Id.} at 325.
\end{itemize}
We are also engaged in an active, transformative anarcho-syndicalist political project. . . . At the workplace level, debunking is one part of an explicit effort to level, to reintegrate the communities we live in along explicitly egalitarian lines rather than along the rationalized hierarchical lines that currently integrate them. We are saying: Here's what your teacher did (at you, to you) in contracts or torts. Here's what it was really about. Stripped of the mumbo-jumbo, here's a set of problems we all face, as equals in dealing with work, politics, and with the world.\(^7\)

Another goal of trashing is to attack a variety of theoretical world views that imply the inevitability of contemporary social life, thereby countering beliefs that the world is running smoothly. Kelman cites the following forms of the trashing technique:

1. Dense description, combined with exemplary anecdotes and empiricism;\(^7\)
2. "Micropractice-oriented highly theoretical analyses of the self-deceiving, mystifying practices of particular actors, assumed to be important enough to study though by no means asserted to be representative of a place, time, or class";\(^7\)
3. Jokes, snippets and costumes.\(^8\)

Alan Freeman, who describes himself as a supporter and practitioner of trashing, regards this technique as "the most valid form of legal scholarship available at the moment",\(^8\) although he criticizes Tushnet for not following through on the implications of his thesis. For Freeman the goal of trashing is:

[T]o expose possibilities more truly expressing reality, possibilities of fashioning a future that might at least partially realize a substantive notion of justice instead of the abstract, rightsy, traditional, bourgeois notions of justice. . . . One must start by knowing what is going on, by freeing oneself from the mystified delusions embedded in our consciousness by the liberal legal worldview. . . . I am advocating negative, critical activity as the only path that might lead to a liberated future.\(^8\)

He therefore defends trashing on three bases: it is fun, it may reveal truth and it is liberating.

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\(^7\) Id. at 326. See id. at 329ff. for a description of the anti-trashing trend within CLS.

\(^8\) Id. at 330. See, e.g., D. Kennedy, Legal Education and the Reproduction of Hierarchy: A Polemic Against the System 66-68 (1983).


\(^8\) M.Kelman, supra note 55 at 330.

\(^8\) A. Freeman, supra note 71 at 1229 (a comment on, inter alia, M. Tushnet, supra note 27).

\(^8\) A. Freeman, supra note 71 at 1230-31.
B. Contradictions, Incoherence and Indeterminacy

As previously discussed, the notions of contradictions, incoherence and indeterminacy are central to the CLS critique of the nature of law and liberal legal doctrine. Unger describes the outcome of the critique of formalism as "deviationist doctrine", the crucial features of which are the recognition and development of the "disharmonies" of law. In other words, the conflicts between the principles and counterprinciples in any body of law are revealed by finding in such disharmonies "broader contests among prescriptive conceptions of society". In using the term "contradictions", CLS is probably referring to conflicting social forces in the Marxist sense.

Louis Schwartz also contends that CLS scholars are especially concerned about the fundamental "contradiction" between procedure and justice of advanced capitalism and the implications of that contradiction. CLS, moreover, sees legal thought as denial in the Freudian sense, as legal thought is "a way to deal with perceived contradictions that are too painful for us to hold in consciousness". It thus becomes apparent that the concept of contradiction is not solely limited to the contradictions discovered in modern legal doctrine, rather it is a recurrent theme throughout CLS literature.

Inasmuch as one of the goals of CLS in the exposure of the internal inadequacies of liberal legal thought is to undermine its power over our minds, the notion of incoherence is closely linked to that of contradiction. A general "proof" of doctrinal incoherence is inadequate, however, as such contradictions must be closely studied in order to conclude that liberal legal doctrine is socially and legally irrational, merely "cloak[ing] power in the garb of right".

Indeterminacy is similarly linked to contradiction in the sense that contrary results are arrived at in the world of liberal legalism "because law is indeterminate at its core, in its inception, not just in its applications. This indeterminacy exists because legal rules derive from structures of thought, the collective constructs of many minds, that are fundamentally contradictory." However, when CLS scholars state that law or legal rights are

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83 See notes 34 and 36 and accompanying text supra.
84 R. Unger, CLS, supra note 1 at 576, 578. Abstract principles such as freedom of contract can provide contradictory arguments. See, e.g., D. Kennedy, Legal Formality, supra note 34.
86 D. Trubek, supra note 27 at 607. See also A. Freeman, supra note 71 at 1231ff. Kelman is of the opinion that CLS is distinctive because of its "focus on ambiguity" and "its refusal to see a synthesis in every set of contradictions." M. Kelman, supra note 55 at 296.
87 D. Trubek, supra note 27 at 595. The idea of incoherence is far from being well articulated in CLS literature.
88 R. Gordon, supra note 42 at 114.
indeterminate, they do not mean that “law fails to constrain social or official action at all, for it obviously does, but rather that because it is founded upon contradictory norms, its principles cannot constrain a single set of outcomes even if intelligently, honestly and conscientiously applied.”

C. Formalism and Legalism

Another aspect of CLS critique is its attack on the formalism and legalism of legal rules and the liberal legal system. “Legalism”, for CLS scholars, means an excessive literalism in applying legal rules, while “formalism” is:

[T]he CLS caricature of the notion that law is a deductive and autonomous science that is self-contained in the sense that particular decisions follow from the application of legal principles, precedents, and rules of procedure without regard to values, social goals, or political or economic context.

Both of these notions were initially developed by the Legal Realists. Unger more accurately defines formalism as “... a commitment to... a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary.” In any event, CLS rejects formalism and legalism in favour of both broad, flexible standards that are viewed as superior guides to justice and looser standards of equity and fairness.

D. Reification

The process of allowing structures built by humans to mediate relations that make us see ourselves as performing abstract roles in a play that is not produced by a human agency is called “reification”. According to Peter Gabel, legal thought is characterized by reification — a degree of distortion of meaning that occurs within communieation when an abstraction is drawn from a concrete situation, which abstraction is then mistaken for the concrete. This is not a merely private act but the act of an “unconscious conspiracy”, whereby we know of the fallacy, yet deny that


91 R. Unger, supra note 1 at 564. Like incoherence, formalism and legalism are not well developed in CLS writing. See also note 35 and accompanying text supra.

92 P. Gabel, supra note 43 at 263.
such fallacy exists. However, legal reification is more than just distortion: it is also a form of coercion in the guise of passive acceptance of the existing world within the framework of capitalism. Schwartz may therefore fall prey to oversimplification again when he writes that reification is the mere "substitution of an abstract word or idea in place of the complexity of the underlying data".  

As an example of this notion, Gabel suggests that by printing "fuck this bullshit" in a law review article, the entire legal system is put in question by the dereification of law review language, especially as lawyers are partially constituted by their language in such articles. Consequently, "[i]f law reviews don't have to seem like law reviews, perhaps nothing has to seem like anything." In this sense the concept of dereification would seem to be closely related to that of trashing: the goal of both is the delegitimation of a central pillar of liberal legal philosophy.

E. Illegitimate Hierarchies

Once presuppositions are discarded by way of trashing, a world is revealed that is characterized by conflict and illegitimate hierarchy. The latter characteristic has been described as "recurring illegitimate power relationships that seek to rationalize themselves through presuppositions". Embracing the view that knowledge and power are inseparable, Freeman eagerly subscribes:

To a critical method that is concerned with appearance as opposed to essence, that reduces abstract universals to concrete social settings, and that emphasizes how patterns of domination, exploitation, and oppression within those settings relate to the abstract universals used to rationalize what is and hence to promote complacency about or acceptance of those patterns and those settings [e.g. illegitimate hierarchies]. For me, the task of a [Critical] 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 fact or ethical norm.

Examples of such hierarchies abound including the Bar, the court system, law schools, corporations and government. Undoubtedly speaking for a majority of Critical scholars, Unger believes that the most immediate effect of CLS "transformative activity" is upon law schools. However, unlike the attack on other enemies of CLS, the task is not merely to criticize illegitimate hierarchies but to abolish them.

93 L. Schwartz, supra note 11 at 441-42.
94 P. Gabel, supra note 45 at 269.
95 A. Freeman, supra note 71 at 1236.
96 Id.
97 R. Unger, CLS, supra note 1 at 668.
98 See P. Gabel & J. Feinman, supra note 29 at 172-73.
F. The State, Base and Superstructure

By adopting the following highly condensed description of the Marxist theory of law, it might appear as though many in the CLS movement could be labelled as Orthodox Marxists:

Marxists examine the real nature of law in order to reveal its functions in the organizations of power and to undermine the pervasive legitimizing ideology in modern industrial societies known as the Rule of Law.\(^99\)

As discussed earlier,\(^100\) however, CLS is essentially divided along Critical Marxist and Orthodox Marxist lines. The former stresses indeterminacy in social circumstances, while the latter attempts to elaborate intelligible laws of social change. Kennedy writes that one of the difficulties with the Orthodox Marxist position on judicial action is:

[T]here is no “logic” to monopoly capitalism, and law cannot be usefully understood ... as “superstructural”. Legal rules the state enforces and legal concepts that permeate all aspects of social thought constitute capitalism as well as responding to the interests that operate within it. Law is an aspect of the social totality, not just the tail of the dog.\(^101\)

It may help to understand Critical Marxism by briefly referring to the views of the Italian political theorist Antonio Gramsci, who rejected “mechanistic” or Orthodox Marxism. For Gramsci, the capitalist class rules by a combination of force and consent, the latter of which flows from the capitalists' hegemony over the State and civil society.\(^102\) Boggs describes Gramsci’s concept of “hegemony” as “the permeation throughout civil society ... of an entire system of values, attitudes, beliefs, morality, etc. that is in one way or another supportive of the established order and the class interests that dominate it.”\(^103\)

The “legitimation theorists”, thrown up in the wake of Gramsci’s “conceptual revolution”, are quite far from V.I. Lenin’s political orienta-

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\(^100\) See notes 12ff. and accompanying text supra.


\(^102\) E. Greer, Antonio Gramsci and “Legal Hegemony”, in Politics, supra note 7 at 304, 305. According to Gordon, some critical legal scholars in the United States have adopted Gramsci’s notion of hegemony. R. Gordon, supra note 7 at 286-87.

tion as they tend to eliminate coercion as part of capitalism by making consciousness the focus of their politics.\textsuperscript{104} The consequence of Gramsci's theories is that law is not an autonomous system of rules and concepts, rather, in major part, it is "constitutive" of capitalist state power, for without law capitalist society could not exist. The similarity between Gramsci and the Frankfurter School thus becomes evident.\textsuperscript{105} The distinguishing features of the Critical interpretation of law in capitalist society are to a certain extent rooted in Gramsci's theories:

Critical scholars see social order as maintained by a system of beliefs. The beliefs system that structure action and maintain order in capitalist societies present as eternal and necessary what is only the transitory and arbitrary interests of a dominant elite. This commonly accepted body of ideas justifies the unequal and unjust power of the dominant group. These systems of ideas are reifications, presenting as essential, necessary, and objective what is contingent, arbitrary, and subjective. Furthermore, they are hegemonic, that is, they serve legitimate interests of the dominant class alone.\textsuperscript{106}

In the doctrinal Marxist notion of a base and superstructure where ideas, including legal ideas, are determined by the economic base, social relations are reality, while ideas are the mere reflection of reality. Ralph Miliband, a representative of this Orthodox view, believes in the vital significance of the material base and the corresponding triviality of cultural manifestations, including law.\textsuperscript{107} The Critical Marxists in CLS reject this reduction of law to the status of an instrument of class domination and believe in the "totalization of base and superstructure".\textsuperscript{108} For while law does contain doctrines that facilitate domination, it also "contains rules that restrain, and utopian norms and possibilities for argument and action that can help liberate people from domination...."\textsuperscript{109} In place of the base/superstructure polarization, CLS Critical Marxists advance a more sophisticated holistic view that rejects the notion that the law and the State are "neutral, value-free arbiters, independent of and unaffected by social and economic relationships, power forces, and cultural phenomena."\textsuperscript{110}

\textsuperscript{104} E. Greer, supra note 102 at 307-08. But see H. Hart, \emph{The Concept of Law} (1961).

\textsuperscript{105} See note 14 and accompanying text supra.

\textsuperscript{106} D. Trubek, \emph{supra} note 27 at 606. See also A. Freeman, \emph{supra} note 51; P. Gabel, \emph{supra} note 45; R. Gordon, \emph{supra} note 7; D. Kennedy, \emph{supra} note 16; L. Schwartz, \emph{supra} note 11 at 424. On the other hand, any discussion concerning private property is noticeably absent. See, e.g., \emph{id.} at 426.

\textsuperscript{107} R. Miliband, \emph{The State in Capitalist Society} (1969). See also H. Collins, \emph{supra} note 16 at 77ff.; M. Kelman, \emph{supra} note 55 at 296, n. 11; D. Kennedy, \emph{supra} note 9 at 1281; K. Marx, \emph{Preface to a Contribution to the Critique of Political Economy}, in K. Marx & F. Engels, \emph{Selected Works in Two Volumes} 361 at 362-63 (5th ed. 1962). The statement that the principles in contract law decisions reflect the modern economy echoes the Orthodox Marxist view. See P. Gabel & J. Feinman, \emph{supra} note 29 at 180.

\textsuperscript{108} J. Schlegel, \emph{supra} note 15 at 398.

\textsuperscript{109} R. Gordon, \emph{supra} note 89 at 4. E.g., 19th century American law established slavery but also contained egalitarian principles that facilitated the abolition of slavery.

\textsuperscript{110} D. Kairys, \emph{supra} note 30 at 4.
Law is thus a complex social totality in which it constitutes and is constituted.

CLS Critical Marxists take particular aim at the Instrumental Marxists, who argue that legal rules directly serve the interests of the ruling class:

Legal outcomes have only the most marginal effect on the movement of socioeconomic processes and social actors who have been conditioned to accept the apparent necessity of these processes do not require anything so abstract as "legal rules" to shape and direct their daily conduct. It is closer to the truth to say that it is action which has an "instrumental" effect on legal thought, as social actors of every class seek to legitimate to themselves the experiential world within which they come to know themselves and their relations with others, under definite historical conditions.\(^{111}\)

As Gordon explains, some writers, borrowing from European neo-Marxists to criticize crude Instrumental theory, spoke of law as a means of legitimizing class society, seeing the "legitimacy" of capitalist society as inherent in the system’s uncertain promises to protect rights and freedoms for all.\(^{112}\) As the need for legitimacy makes it possible for other classes to use the system against itself, to force it to respect its utopian promises, such promises could become rallying points for organization, such that the law and the State become "arenas of class struggle".\(^{112}\)

V. Conclusion

The strength and attractiveness of the CLS project lie in its ability to make a very critical and complex examination of conventional legal theory in such a way that it provides a real alternative to the contending schools of jurisprudence. The CLS approach thus exposes the illegitimacy of our legal system and allows us to consider a different legal philosophy. The critique is, however, much more fully developed than the formulation of a coherent alternative theory to liberal legalism.\(^{113}\) CLS attempts to fill the void left by liberal legalism in three ways:

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\(^{111}\) P. Gabel, *supra* note 45 at 262-63. Gabel draws heavily from Jean-Paul Sartre’s *Critique of Dialectical Reason* (J. Ree ed. A. Sheridan-Smith transl. 1982) and uses a number of its terms. See also P. Beirne & R. Quinney, *Editors' Introduction, supra* note 45 at 16ff.

\(^{112}\) R. Gordon, *supra* note 7 at 285-86, 292, n. 4. Gordon believes that CLS has gone beyond liberal/activist reformist legal philosophy, as well as Instrumental theories of law and society (liberal-pluralist and Orthodox Marxist versions). *Id.* at 284.

\(^{113}\) See R. Unger, *CLS,* *supra* note 1 at 667 where he states that the goal of CLS practice, closely aligned with the basic tenets of its theory, include revelation, agitation and new perspectives. As Samek correctly declares, "[n]o theory of justice will cure a single injustice in the world. Practice without theory is blind, but theory without practice is lame. Justice, like truth, must be part of praxis, not merely subjects of speculation for philosophers." R. Samek, *supra* note 99 at 811.
1. [A]ctions in the here-and-now: short-term, relatively opportunistic, acting-out kinds of actions. For example, there ought to be more women and blacks on the Yale faculty. . . .

2. [I]nformation about how things are the way they are that isn’t oriented to showing that the real explanation is that they have to be that way. . . .

3. [U]topian speculation . . . dreaming up ways we think things might be better than they are.\(^\text{114}\)

Paul Brest suggests that one long-term alternative strategy to traditional jurisprudence is a form of genuinely radical participatory democracy: “a genuine reconstitution of society — perhaps one in which the concept of freedom includes citizen participation in the community’s public discourse and responsibility to shape its values and structure.”\(^\text{115}\)

Another long-term goal, according to Gordon, is to contribute to the debate over whether legal change can ever effect social and economic change or whether law is wholly dependent upon the “hard” world of production.\(^\text{116}\) In the short-term, the movement has also made some headway in providing alternative visions in particular areas of law such as legal advocacy.\(^\text{117}\) Nevertheless, at this early stage at least, CLS is less a coherent legal philosophical school of thought with a parallel program of practice, than a powerful methodological approach for criticizing and analyzing contemporary Western legal philosophy.\(^\text{118}\)

Despite its intensely acidic attack on virtually all aspects of law and the contemporary legal system, CLS is optimistic about the possibility of change and urges lawyers to promote change in order to bring about a better society. Yet what is clear from this brief exploration of CLS is that the movement’s most controversial and useful contribution is its profound and intellectually challenging critique of our legal order. As Gordon argues, the brightest promise of CLS is “thickly described accounts of how law has been imbricated in and has helped to structure the most routine

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\(^{114}\) D. Kennedy, *supra* note 9 at 1283.


\(^{116}\) R. Gordon, *supra* note 7 at 290.

\(^{117}\) See, e.g., W. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, [1978] Wis. L.R. 29 at 130ff.; R. Abel, *Lawyers and the Power to Change*, 7 Law & Policy 5 (1985). According to Kelman, CLS does in fact offer proposals for institutional change. M. Kelman, *supra* note 55 at 321. Schwartz is incorrect, therefore, in stating that CLS is utopian and theoretical, declining to provide particular programs and to address current issues. He does concede, however, that the movement is interested in results. For example, he states that by exposing neutral justice, CLS claims to reveal the danger of allowing legal process to take precedence over legal results and he cites D. Kennedy, *Form and Substance*, *supra* note 34, as an example. L. Schwartz, *supra* note 11 at 426-27.

practices of social life."  CLS is far from replacing liberal legalism as the mainstream legal philosophy but it has unquestionably presented a most profound critique.

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