

# RECONSTRUCTING CRITICAL LEGAL STUDIES

Samuel Moyn<sup>\*</sup>

## Table of Contents

I. Introduction .....	2
II. A Brief Social Theory of Law .....	5
A. Law in Social Theory .....	5
B. Culture, Ideology, and Freedom .....	6
C. Radicalizing Social Theory .....	8
III. Between False and True Necessity .....	9
A. Functional Determinacy and Underdeterminacy .....	10
1. From Crude Reductionism to “Relative Autonomy” .....	10
2. Leaving Functionalism Far Behind .....	13
3. Searching for Balance .....	16
B. Interpretive Determinacy and Underdeterminacy .....	18
1. Of “Indeterminacy” and Ideology .....	19
2. Searching for Balance .....	21
IV. Political Economy and Intersectional Subordination .....	23
A. Law and Political Economy .....	24
B. Feminist Legal Theory .....	26
C. Critical Race Theory .....	28
V. Marxism Evolves ... into Critical Legal Studies .....	29
VI. Conclusion: Free to Change .....	34

*It is an increasingly propitious moment to build another radical theory of the law, after decades of relative quiescence in the law schools since the last such opportunity. This essay offers a reinterpretation of the legacy of critical theories of the law, arguing that they afford useful starting points for any radical approach, and not merely cautionary tales of how not to proceed. The essay revisits the critical legal studies movement in particular and imagines its reconstruction. Critical legal studies extended the social theory of the law pioneered by legal realism, and framed law as a forceful instrument of domination, though one that is compatible with both functional and interpretative underdetermination. Legal order*

---

<sup>\*</sup> Chancellor Kent Professor of Law and Legal History, Yale Law School. Thanks to Justin Desautels-Stein, Ioannis Kampourakis, Amy Kapczynski, Caroline Parker, Noah Rosenblum, Arun Sharma, Ntina Tzouvala, and John Witt for help.

*oppresses, and the way it does so is never accidental or random, while regularly accommodating alternative pathways of control and contestation. Analogously, law is often determinate, which is how it can so routinely serve oppression, even though it does so in and through processes of interpretation of elusive or vague legal meaning by courts and other institutions. The essay concludes by showing that the parameters of a radical social theory of the law—parameters we should reclaim critical legal studies for helping establish—apply to current or future attempts to build any successor, taking account of critical race theory, feminist legal thought, and most especially the emergent “law and political economy” movement. Had critical legal studies never existed, it would have to be invented today.*

## I. Introduction

Almost as much as ever, the law is bound up with domination and oppression. As usual, mainstream legal thought remains “one more variant of the perennial effort to restate power and preconception as right.”<sup>1</sup> Indeed, neoformalist theory in both public and private law has been in the ascendant in recent decades, though it would make legal realists—let alone those legal radicals who claimed their mantle—blanch. At the same time, it is an increasingly propitious moment to build another radical theory of the law, after decades of relative quiescence in the law schools in between the last such opportunity and now. This essay assesses the moment and argues for exploiting an option that risks being lost amid early contention about what kind of radical legal theory to construct.

It argues for a radical *social theory* of how law works. Law is not autonomous, and therefore always needs to be situated within the social orders that give it form, meaning, and purpose. Law is involved in the making and maintenance—and, occasionally, remaking and renovation—of social order, but never on its own. Nonetheless, a radical theory of the law in particular is essential in its own right, and institutionally so because law has been segregated within universities for separate study and teaching.

A radical theory would emphasize that legal orders and rules matter because they institute, legitimate, and reproduce domination and oppression. In doing so have comparatively determinate content and effects. A radical legal theory would also emphasize the possibility of altering the terms of domination that the law affords and that sometimes are exploited. But even if it is never an accident that law serves subordination, or freedom for that matter, a radical theory cannot forsake that functional determination is compatible with an emphasis on flexibility and plurality. It is simply not necessary to choose between a vision of law emphasizing prevalent determination and determinacy, on the one hand, and one making room for residual flexibility and plurality, on the other. Today, radical legal theory is being misled from the need to strike the right balance between such options in understanding

---

<sup>1</sup> Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 674 (1983).

specific regimes of domination and oppression. The mistake haunting legal theory now is not “false necessity.” It is *false dichotomy*.

Striking the balance is crucial for two urgent reasons. One is to assess just how the domination characteristic of modern political economy—by which is meant the institutionalization, legitimation, and reproduction of regimes of production, exchange, and distribution—works.<sup>2</sup> In particular, scholars and students today are newly interested in how those regimes reflect and shape social and state power, and in intersecting subordination based on gender, race, sexual orientation, disability, or indigeneity. And inspiring and rightly so. But such legal orders have to be theorized persuasively. The other reason to strike the balance, even more important, is to allow recovery of what pathways for change there are and have been in legally institutionalized and legitimated domination—and what sort of agency there is for pursuing those pathways. No credible theory of law could omit the situated freedom of agents to alter the terms of their domination—even, in rare instances, to lift it.

Intellectually, the world of legal theory is changing very quickly. In a just a few years, a space has opened for constructing a radical challenge, a space that didn’t seem available before.<sup>3</sup> If that is true, it is also a space for reconstructing critical legal studies, which died as a movement some decades ago but offers adequate and so far unsurpassed starting points for our moment—or so this essay suggests as its central argument.<sup>4</sup> Even emergent currents of Marxism in legal scholarship, once one looks at them, actually offer a call to reconstruct the basic project of critical legal studies, not to reject it.

In advancing these perspectives, this essay urges the Law and Political Economy movement, which has exploded today, to become much less non-committal theoretically than it has been so far.<sup>5</sup> It also responds to recent impulses from that larger movement<sup>6</sup> and even more from a narrower but overlapping set of Marxist theorists of law<sup>7</sup> to junk critical legal studies. For certain, any reclamation of that movement has to be discriminating. Nothing turns, either, on what radicals label their framework, nor on the historical propriety of their claims about the intellectual past; what matters is the credibility of their theory. But had critical legal studies never existed, it would have to be invented along the lines sketched here. And if I emphasize historic contributions to legal theory and what to take and leave from our heritage, it is not

---

<sup>2</sup> See Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020).

<sup>3</sup> Compare, a few short years ago, Samuel Moyn, *Legal Theory Among the Ruins*, in *SEARCHING FOR CONTEMPORARY LEGAL THOUGHT* (Justin Desautels-Stein & Christopher Tomlins eds. 2017).

<sup>4</sup> This essay tries to combine, generalize, and reformulate more recent pieces that are part of this larger whole: Samuel Moyn, *From Situated Freedom to Plausible Worlds*, in *CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES* (Ingo Ventzke & Kevin Jon Heller eds. 2021); Justin Desautels-Stein & Samuel Moyn, *On the Domestication of Critical Legal History*, 60 HISTORY & THEORY 296 (2021); and Samuel Moyn, *History, Law, and the Rediscovery of Social Theory* in *HISTORY IN THE HUMANITIES AND SOCIAL SCIENCES* (Richard Bourke & Quentin Skinner eds. 2023).

<sup>5</sup> See Britton-Purdy et al., *Building*, *supra* n. 2, and *infra*, Part IV.A.

<sup>6</sup> See, e.g., Talha Syed, *CLS from an LPE Perspective* (forthcoming).

<sup>7</sup> See *infra*, Part V.

because there is something perfect to revive but because there is no reason to reinvent the wheel, spurning resources useful for our purposes now.

Finally, as the contemporary discomfort with critical legal studies shows, legal theory has some degree of historical self-consciousness, demanding some sense of the relation of any current venture to what has come before. Not least, critical legal studies was the first radical legal theory that placed the conceptualization of domination and the imperative of its unmaking centerstage—where both ought to remain today. The essential starting point critical legal studies affords has to be separated from the irrelevant trivia of its articulation and reception, including its own collapse and fissuring as a movement anathematized by conventional legal academics in its time (not to mention some of its own potential friends), and banished by them.<sup>8</sup> A review of its contributions, far from being an antiquarian indulgence, is as current as anything else in legal scholarship, at least for scholars hoping to build a radical theory today.

This essay begins in Part II by sketching some basic features of a social theory of law, as the indispensable framework for any radical theory now or later. High-altitude and synthetic, this Part suggests that the central premises of the tradition of social theory can do a great deal of work in setting out a vision for legal theory, one that critical legal studies radicalized.

The essay then turns in Part III rebut suggestions that critical legal studies did or must unjustifiably privilege the aleatory, contingent, and indeterminate as if they defined law exclusively. These suggestions have been made in order to recenter the necessitarian character of past and present legal orders, and usefully so—but, as I hope to show, mainly to restore critical legal studies, and not to transcend its aspirations.

The essay then argues, in Part IV, that the Law and Political Economy movement in current scholarship cannot avoid the search for balance that critical legal studies is reconstructed here as achieving, or at least seeking. This true—perhaps even more true—when the Law and Political Economy corrects insists on gendered, racialized, and otherwise intersectional accounts of production, distribution, or exchange. No applicable form of domination, like capitalism or white supremacy, is identically self-repeating no matter what, nor instituted through constant legal reinterpretation of underdeterminate norms.

Comparably, in Part V, my goal is to show how contemporary Marxists have learned to concur, to the point that Marxism itself now overlaps substantially with a reconstructed critical legal studies. Though never an explicit presence in legal theory in the United States—not even in critical legal studies—Marxism has returned to global legal theory, but often in an evolved new form. Its theorization of capitalism is intended to be consistent with functional and Interpretive under determination, and thus with critical legal studies rightly understood.

---

<sup>8</sup> See, e.g., Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991).

Part VI concludes.

## II. A Brief Social Theory of Law

Whether we can imagine social orders without law,<sup>9</sup> we cannot imagine law without social orders. Law is made by them, and law is a social phenomenon in reflecting society's meanings and purposes, even as it is a tool for making and unmaking them. Whatever they may say, no one is interested in law for its own sake. Alongside biological life and broader natural processes, social order and reproduction is what everyone is ultimately involved in, and anything they might do or not do traces back to it. It was so important that critical legal studies resumed the more general project of a social theory of law, that it is worth beginning with the basic premises of any such project. This Part is a primer on those premises.

### A. Law in Social Theory

A general social theory is the indispensable setting for any credible legal theory.<sup>10</sup> It is also why functionalist and instrumentalist frameworks—explaining pragmatically or “realistically” how laws have served and should serve ends, notwithstanding doctrinal obfuscation to the contrary—remain the single most revolutionary development in modern legal thought.<sup>11</sup> Critical legal studies, and allied movements singling out the gendering and racialization of law, added little more to this view than the insight into just how profoundly legal orders institute and promote domination.

But governance of some humans by others can take a wide variety of guises, both legal and non-legal. Recently, law as an instrument of partial self-rule became possible. There is a wide variety of arrangements in which law has played this instrumental role, and the changing forms and not merely the evolving substance of law reflect this fact. But whatever the value of an inventory of the guises of law, there is no doubting that law is a creature of social relations, serving their institutionalization, legitimation, and reproduction. All such relations are open to revision. But the whole point of social theory is that, while made up, the relations define the lives of those involved in them powerfully, usually with the consequence of rendering emancipation from them elusive, and always setting the terms of available innovation or transformation.

---

<sup>9</sup> H.L.A. HART, *THE CONCEPT OF LAW* 91-99 (1961); ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1994).

<sup>10</sup> On the tradition of social theory, see, e.g., LOUIS ALTHUSSER, *POLITICS AND HISTORY: MONTESQUIEU, ROUSSEAU, MARX* (Ben Brewster trans. 1972). Given insights into the pervasive gendering and racialization of domination, it is not surprising that social theory (including Marxism) is itself haunted by such legacies, though by no means in ways that require abandoning this tradition altogether. See, e.g., GURMINDER K. BHAMBRA & JOHN HOLMWOOD, *COLONIALISM AND MODERN SOCIAL THEORY* (2021) or DURBA MITRA, *INDIAN SEX LIFE: SEXUALITY AND THE COLONIAL ORIGINS OF MODERN SOCIAL THOUGHT* (2020).

<sup>11</sup> RUDOLPH VON JHERING, *DER ZWECK IM RECHT* (1877); for a representative American aftereffect, see Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

Law has been an essential topic in social theory from its invention in early modernity. Less often acknowledged, however, is that the entire purpose of social theory was to demote law to an exemplary feature or instrumental tool of the establishment of social order. Order and value (what is today called normativity) necessarily tracked not formal law but with the preeminence of an informal order of relations that law rarely enacted and usually reflected. By focusing on less formal determinants of order—such as who ruled or what law said—the point was to reveal the “shared practices and values, which secured the individual as social being and furnished the society surrounding him with an indefinitely complex and flexible texture.”<sup>12</sup> The study of customs or manners, what would now be called norms, demoted law to its actual place. “Manners are of more importance than laws,” wrote Edmund Burke, in this vein. “Manners are what vex or soothe, corrupt or purify, exalt or debase, barbarize or refine us, by a constant, steady, uniform, insensible operation, like that of the air we breathe in.”<sup>13</sup>

Social theory therefore treated law in one of two ways. First, theorists turned to law as exemplary of forms of society—as a good example to illuminate deeper features of its distinctive shape. Thus, Émile Durkheim offered up a comparison of the criminal sanction to modern contract law as an aperture on the shift from “mechanical” to “organic” solidarity.<sup>14</sup> Second, theorists ascertained how law related to the institutionalization and reproduction of society in the making of the modern world. It was an open question when formal law ought to be separated and singled out for study, especially as beneficiary of any causal preeminence in the makings of stability or transformation. And generally, social theorists discovered that law served functional purposes or did ideological work, mostly as a lag rather than lead variable. Alexis de Tocqueville agreed that “[t]oo much importance is attributed to laws, too little to manners.”<sup>15</sup> But he also cited the counterexample of the abolition of primogeniture as a legal change that fomented massive social change.<sup>16</sup> Comparably, Karl Marx and Max Weber debated the function of law in “capitalism,” the latter dissenting slightly from the former about how far to assign an independent significance to bureaucratization in making sense of the form and substance of modern law.<sup>17</sup>

## B. Culture, Ideology, and Freedom

Social theory accorded great importance to culture, though never an exclusive monopoly in describing or explaining the coming or passing of order. Indeed, modern thought has been profoundly marked by the discovery of the social conditions of significance, born of

---

<sup>12</sup> J.G.A. Pocock, 2 *BARBARISM AND RELIGION* 20 (6 vols. 1999-2015).

<sup>13</sup> Edmund Burke, *Letters on a Regicidal Peace* in 4 *THE WORKS OF EDMUND BURKE* 392 (9 vols. 1839).

<sup>14</sup> Émile Durkheim, *De la Division du Travail Social* chs. 2-3 (1893).

<sup>15</sup> Alexis de Tocqueville, 2 *De la Démocratie en Amérique* 248 (1835) (“On attribue trop d’importance aux lois, trop peu aux mœurs”).

<sup>16</sup> *Id.* at 1: 74-80.

<sup>17</sup> Karl Löwith, *Karl Marx and Max Weber* (Hans Fantel trans. 1982).

reflection on how customary, habitual, and meaning-laden routines are generally far more consequential than political or legal ordering in establishing control. Plato and Aristotle classified regimes by the criteria of *who rules* and *to what ends*; social theory defines types of regimes according to their meaningful social practices that establish whole modes of collective life (feudal or capitalist, *gemeinschaftlich* or *gesellschaftlich*, cold or hot, and so forth). Within social theory, therefore, culture was of momentous significance. Some social theory spotlighted the occasional role of cultural developments in fomenting practical change, Weber's theory of the Protestant origins of capitalism being the classic example.<sup>18</sup>

But law's meaningfulness itself is not autonomous from social relations in the broadest sense. Law does not simply arrange and rearrange, creating and sustaining institutions or dictating legal outcomes; it is also a meaningful phenomenon that works in and through the self-conception of the agents who produce and reproduce society. Most explorations of legal culture in the last generation, while sometimes insisting that legal meaning is collective by definition, insist on severing any connection between that meaning and the practices it animates, obfuscates, and sustains. Social theorists never made this mistake. Their prize was explaining social order and its reproduction. Treating culture as free-standing abandons its pursuit altogether.

Decades after Weber, for a brief period in the 1980s and 1990s, legal theorists influenced by the cultural turn in the humanities argued for the centrality of meaning, narrative, or ritual to legal order.<sup>19</sup> But this school made two characteristic errors. One came with the cultural turn legal theorists imported: to sever culture from its wider setting of social relations. The other was all their own: to overstate the autonomy of legal culture or meaning, much as legal scholars are routinely tempted to treat law itself separately from social relations. The indispensability of "the cultural study of law" therefore has to be reaffirmed as part of the social theory of which it is non-negotiably a part.<sup>20</sup>

The distracting legitimization that law provides social orders as one of its functions—leading to acceptance of hierarchy and inequality—is sometimes called "ideology." Marxist social theory understandably elevated the importance of investigating and theorizing this function. A theory of law as ideology or meaning can come in different versions. But all of the credible versions of a theory of ideology are part of and subordinate to the larger task of building a social theory of law. That is, they explore the relations between social representations and social practices, explicating how law is implicated in oppression, never presupposing the

---

<sup>18</sup> MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM AND OTHER WRITINGS* 122 (Peter Baehr ed. 2002) (noting that "it cannot, of course, be our purpose to replace a one-sided 'materialist' causal explanation of culture and history with an equally one-sided spiritual one").

<sup>19</sup> Clifford Geertz, a cultural anthropologist, was formative in this regard. See the essays collected in CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1986). The most cited if idiosyncratic culturalist in legal theory was Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

<sup>20</sup> PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1997). Out of critical legal studies, we will see below, Jack Balkin built a culturalist theory of ideology. J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* (1999).

independence of the representations from the practices. Ideology is therefore not individuated: it is never merely the reasons and rationalizations of individuals. More important, it is not “free-floating,” as a cultural system to be understood on its own.<sup>21</sup>

People are embodied and practical in their relations, never just language-users, or even meaning-makers, alone. They have to have something to interpret and reinterpret, and it is never merely their language, stories, or texts, but their social reality as a whole, around which their webs of significance are spun. Meaning, including linguistic meaning, is therefore inextricable from the practical realities that law can help constitute as well as occult and rationalize, practices that no interpretive fiat can simply wish away. Interpretive flexibility, it follows, is operative strictly within the limits set up by practical relations. It is true that meaningfulness is a condition of having any practices, which are always sapient and never “mindless.” But there is no freestanding interpretive power that can demiurgically transform the practices with which meaning is always bound up.

Social theory changes the terms of theories of practical freedom (including interpretive freedom) from a relatively more metaphysical perspective to a relatively more institutional one. Philosophers will continue to ponder how freedom is conceivable in a determined world—which is determined naturally before it is determined socially. But social theorists have posed the problem in light of the fact that different social orders set up radically different potentials for agents under them to transform the terms of their personal lives or of their collective institutional settings.

There is always freedom under domination. Notwithstanding the fact that they bear down on individuals and groups with immense force, social orders also construct a modicum of free agency; and to the extent these orders are neither fixed or unified, they present their agents with specific options to pursue between relatively continuous reproduction and relatively discontinuous transformation. Interpretive freedom is best understood as a dimension of social freedom, though it may be easier to achieve than some other forms. This situated freedom is an essential complement to the accounts of order social theorists have striven to outline.<sup>22</sup> But what is distinctive about it is that, because (like culture) it is conceived as part of social theory, situated freedom presupposes that social institutions and practices are both the source of the practical freedom that agents enjoy and set the terms of the agency available to them.

### C. Radicalizing Social Theory

---

<sup>21</sup> Clifford Geertz, *Ideology as a Cultural System*, in *IDEOLOGY AND DISCONTENT* (David E. Apter ed. 1964).

<sup>22</sup> The phrase situated freedom is from MAURICE MERLEAU-PONTY, *PHÉNOMÉNOLOGIE DE LA PERCEPTION* (1945).



It was essential that the founders of critical legal studies—the first radical theory of law—drank deep at the well of social theory.<sup>23</sup> They aspired to radicalize its project. Whatever their other innovations, their foremost contribution was to discern a far greater depth of domination in legal order than anyone in liberal societies ever had—paradoxically, in part because the extent of partial emancipation in those societies allowed them to do so.

Such founders also inherited a great deal from “legal realism.” It had been the first theory of law made in the image of modern social theory, albeit a generally non-radical one. Like critical legal studies after it, and the law and society movement in between, much legal realism insisted on restoring law analytically and prescriptively to its social life.<sup>24</sup> But the founders of critical legal studies did not believe, as most realists did, in simply appropriating power to redefine the purposes of law, denaturalizing private law baselines so as to legitimate a public reset to entitlements, or transferring public authority over formerly “private” arrangements to administrators from judges. The radicals saw that realists had erased any limits to socially reconstructive law. Critical legal studies merely wondered why, armed with this newfound power, legal realists had demystified any natural and necessary basis to class hierarchy but then only proceeded to tweak it, before attempting to stabilize the apparent end of ideological strife they observed through the notorious theory of “legal process.”<sup>25</sup>

In this sense, especially when joined by antiracist and feminist theorists, the founders of critical legal studies were realists who refused to underplay the extent of domination instituted, legitimated, and reproduced through law, and who therefore imagined the much greater transformation required to undo that domination. This appraisal is what made them radical. It also makes any current or future radicals their heirs. If critical legal studies did more than this, it was to reckon with the *underdeterminacy* of law’s social functions and of law’s interpretive stability in accounting for oppression—and drawing the consequences for seeking a way out.

### III. Between False and True Necessity

Precisely because law is situated in larger social orders, it has to be accounted for in functional terms much of the time.<sup>26</sup> For example, it is not—and has never been—just an accident that law serves economic hierarchy and inequality. The same, *a fortiori*, applies to the gendering or racialization of subordination. But functionalism isn’t everything, and a radical theory would also need to make room for the pervasive underdeterminacy of law as it performs its

---

<sup>23</sup> One could qualify the priority claim here by looking before World War II and/or outside Anglophone theory. The best examples of the genetic relationship of critical legal studies to social theory are David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WISC. LAW REV. 720 (1972) and ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY (1976).

<sup>24</sup> See, e.g., Roscoe Pound, *The Need of a Sociological Jurisprudence*, GREEN BAG (1907).

<sup>25</sup> HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994).

<sup>26</sup> On functionalism in social explanation, see *infra*, Part III.A.

services. Similarly, the frustrating malleability of the law has been one of the core features of how it has been theorized far back in intellectual history.<sup>27</sup> A radical theory would illustrate the determinate necessity with which legal orders and rules shape individual and collective life, whether economic, patriarchal, racialized, or other versions of necessity. But if the workings of law leave some latitude for alternative pathways that might have been taken, the law's achievement of functional requirements also has to be squared with its interpretive underdeterminacy. A radical social theory of law simply does not allow for concluding either that law is exclusively determinate and necessitarian or that it is generally indeterminate and plastic.

This Part offers a reading and reconstruction of some classic texts of critical legal studies, to show how to reach a position in between these two poles. Goldilocks is a good guide. One strand of critical legal studies did emphasize—but, arguably, overemphasized—the functional service the law plays to advance non-legal ends. Another strand of critical legal studies did emphasize—but, arguably, overemphasized—the interpretive malleability of law and the functional underdeterminacy of legal regimes in performing their social functions. A final one sought the equipoise that remains the agenda of any credible radical theory of law, even if it did not always get things “just right.”

For that reason, while this Part is not an intellectual history,<sup>28</sup> it treats the founders of critical legal studies and some of their immediate disciples as having repeated options still live today. Those interested in centering political economy today (or gender or race today for that matter) have come close to reinstating Morton Horwitz's crude functionalism, in part to repudiate Duncan Kennedy's emphasis on its limits and on the “indeterminacy” of law, neglecting altogether Roberto Unger's refusal to choose between such positions, seeking balance instead. Kennedy and his followers have often been mistakenly treated, especially retrospectively, as a synecdoche for critical legal studies. But any reconstruction for our time has to recognize that there were—and are—other options.

## A. Functional Determinacy and Underdeterminacy

### *1. From Crude Reductionism to “Relative Autonomy”*

Morton Horwitz's epochmaking reconstruction of the trajectory of private law between the late eighteenth and late nineteenth centuries offered an attractive and debatable functionalist approach to law and legal change.<sup>29</sup> “Economic interests” dictated a conscious and self-aware use by jurists of legal rule change to abet economic development; and once the economic transformation and the rule change had been achieved, legitimating and stabilizing the results

---

<sup>27</sup> See, e.g., THOMAS HOBBS, LEVIATHAN ch. 26 (1651).

<sup>28</sup> I emphasize this because of my exclusion of a massive primary and secondary period literature that some intellectual historian should revisit someday, assuming I don't; for the purposes of this essay, the goal is to enumerate basic living options to allow informed choices now.

<sup>29</sup> MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977).

dictated a switch from instrumentalist legal thought to formalist legal thought that presented the law as comprehensive and harmonious and called on judges to deduce outcomes from norms “mechanically.”<sup>30</sup> *Transformation* was a brilliant presentation of a powerful functionalist interpretation of law and legal evolution; indeed, part of its power was that, in Horwitz’s account, jurists were themselves functionalists, until they masked this fact having provided the goods, stabilizing their victory through theory change.

Much could be said about the controversies Horwitz inspired; but what is of greatest interest are the controversies *within* nascent critical legal studies about making such a model work. In his own, rival, unpublished account of late nineteenth century doctrine (written in 1975 as Horwitz finalized his book), Duncan Kennedy responded that law “had a measure of autonomy” and “exercises an influence on results distinguishable from those of political power and economic interest.”<sup>31</sup> Horwitz was neither self-consciously nor unwittingly a Marxist, but he did receive what was in effect a “vulgar” Marxist scheme about the economic base and the legal superstructure from the American progressives such as Charles Beard whose public law historiography Horwitz enterprisingly adapted to private law developments. Kennedy was even less self-consciously or unwittingly a Marxist; indeed, those who have referred to critical legal studies as Marxist have missed the drama of how its intramural disputes threatened Marxism more than any other theoretical movement on the left, even courting the withdrawal from social theory as a whole.<sup>32</sup>

It was revealing that Kennedy’s target was not the interrelation of legal case, doctrine or theory with social order, as Horwitz had tried to explain it. Rather, Kennedy hoped to understand “consciousness,” and in particular the integrating structuring elements of legal consciousness that defined one age of legal thought compared to another.<sup>33</sup> True, he acknowledged, the “autonomy” of legal consciousness was “no more than relative. Not only the particular concepts and operations characteristics of a period, but also the entity they together constitute, are intelligible only in terms of the larger structure of social thought and action.”<sup>34</sup> So a more complex social theory could not deny the relevance and perhaps ultimacy of functional imperatives. But Kennedy’s new approach would recover the subtlety of how consciousness “mediated” to reach them.<sup>35</sup> Doing so would help “learn things about our present situation which were obscured by the simpler version of an unmediated interplay of purposes and outcomes.”<sup>36</sup>

---

<sup>30</sup> *Id.* at chs. 6, 8.

<sup>31</sup> DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* 34 (1975/2006).

<sup>32</sup> Jane Mayer, *Ted Cruz Responds—and Still Sees Red at Harvard Law*, *NEW YORKER*, Feb. 23, 2013.

<sup>33</sup> See the glossary in KENNEDY, *RISE*, *supra* n. 31, at 33-34.

<sup>34</sup> *Id.* at 8.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

In fact, Kennedy's intervention was characteristically structuralist, with its own peculiarities.<sup>37</sup> Notwithstanding the acknowledgment that concepts, discourse, language, and mind exist in a broader social world, Kennedy's interest was in structures of consciousness. In effect, Kennedy's intervention was a direct repudiation of Horwitz's reductive functionalism.<sup>38</sup> The next year, in a classic article, Kennedy edged close to poststructuralism, calling for a "method of contradiction" in the study of legal consciousness. It identified not how cognitive or discursive structures managed contradiction (as in *Rise and Fall* before),<sup>39</sup> but rather how they forced on the minds or speech of those caught up in those structures a kind of unavoidable discord or diremption.

The study of legal consciousness, Kennedy now added, demonstrates that there is an "experience of unresolvable conflict among our *own* values and ways of understanding the world" that is "here to stay."<sup>40</sup> In another idiom, Kennedy's study of legal consciousness was of the unhappy consciousness as a permanent fate. Whether there was a connection between avowed "defeatism" and Kennedy's rupture with social theory in favor of a structuralist account of consciousness is hard to say.<sup>41</sup> It does look, however, like the antifunctionalist theory that Kennedy proposed reflected a certain compensatory reaction to political failure characteristic of an entire generational cohort.<sup>42</sup> Having seen extraordinary hopes for the countercultural revolutionizing of everyday life in the 1960s crash into the gray reality of the 1970s incited Kennedy and others to consent to imprisonment in contradiction at the level of consciousness, language, and thought—rather than to build a credible emancipatory social theory.

Kennedy was always too creatively disorganized and erratic to stay in one place, and he wrote many other things; but his early riposte matured in the hands of his disciples in fateful ways that essentially reversed the "reductive" functionalism of Horwitz's version of critical legal studies. The results were an equally extreme position that, had it defined the legacy of the school as a whole, would entitle it to rejection root and branch today to start again in another

---

<sup>37</sup> I am using the term "structuralism" in this essay to refer, as Kennedy did, to accounts of conceptual, cognitive, discursive, linguistic, or mythic order, in the tradition of Ferdinand de Saussure, and in the mid-twentieth century the early Michel Foucault, Jean Piaget, or Claude Lévi-Strauss. To avoid confusion I have referred throughout (except in quotations I can't alter) to social theory as an attempt to account for social *orders* rather than cognitive or other *structures*. On structuralism, see, e.g., from the same year as Kennedy's manuscript, JONATHAN CULLER, *STRUCTURALIST POETICS* (1975). On its publication decades later, Kennedy commented that "the point" was "to add structuralist ... techniques to the repertoire available for understanding law as a phenomenon." Duncan Kennedy, *Thirty Years Later*, in KENNEDY, RISE, *supra* n. 31, at xiv. For his other classic effort, see Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979). See also JUSTIN DESAUTELS-STEIN, *THE JURISPRUDENCE OF STYLE* ch. 1 (2019).

<sup>38</sup> He underplays this in his later preface in merely saying that *Rise and Fall* "was written in dialogue with" *Transformation*, "but it was quite different." Kennedy, *Thirty*, *supra* n. 37, at xxvii.

<sup>39</sup> See, e.g., KENNEDY, RISE, at 14.

<sup>40</sup> Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1689, 1712 (1976).

<sup>41</sup> *Id.* (the method of contradiction as "pessimistic, even defeatist").

<sup>42</sup> PHILIPP FELSCH, *THE SUMMER OF THEORY: HISTORY OF A REBELLION* (Tony Crawford trans. 2021).

place. After all, at least reductive functionalism is at least a rudimentary attempt to relate law and society; Kennedy's disciples abandoned that project altogether.

## *2. Leaving Functionalism Far Behind*

Robert W. Gordon's sophisticated and urbane "Critical Legal Histories," which always repays another look, is the most graphic example of how this occurred.<sup>43</sup> Its net effect was to detonate the entire project of social theory in the name of taking Kennedy's interventions to their logical conclusion (or so far as to reduce them to absurdity).

Gordon's own classic essay is organized as a catalog of reasons that law is often functionally underdetermined: one could imagine different regimes that failed to be achieved for what he called "contingent" reasons. Gordon started very persuasively: showing how, even before critical legal studies came, historians were undermining crude functionalism.<sup>44</sup> One response was to retreat to supposedly more sophisticated positions, but the results were "discouragingly ad hoc."<sup>45</sup> And critical legal studies had gone furthest, showing that how hard it was to believe that "[t]he conditions of social life and the course of historical development are radically underdetermined," especially compared to just-so stories of a "uniform evolutionary path."<sup>46</sup> These points were and are incredibly well-taken. For historians, what is supposed to follow is charting how the underdetermination of social processes led to one or another outcome that could have been different.

But does that conclusion really follow? Gordon conceded that what he called "disengagement," severing the description of law from social theory, threw out the baby with the bathwater.<sup>47</sup> But he did insist on calling law "relatively autonomous," which meant that law "can't be explained completely by reference to external political/social/economic factors. To some extent they are independent variables in social experience."<sup>48</sup> The allusions to the aspirations to "complete" explanation and the independence of law "to some extent," like Kennedy's original repurposing of the notion of its "relative autonomy," are tells. Yes, social theory has to be complex. All things excellent—like sophisticated functionalism—are as difficult as they are rare. Nowhere, however, was Gordon's fealty to Kennedy's branch of critical legal studies more graphic than in Gordon's abandonment of any attempt at a social theory of law on the excuse that this is so.

I don't mean just that Gordon made so much concession to critiques of functionalism, and took their critical radicalization as far as he could, as to make functionalism itself seem incredible. Rather, Gordon systematically obfuscated how much necessity there in fact is in

---

<sup>43</sup> Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

<sup>44</sup> *Id.*, Part II.

<sup>45</sup> *Id.* at 87, and Part III generally.

<sup>46</sup> *Id.* at 100.

<sup>47</sup> *Id.*, Part III.E.1.

<sup>48</sup> *Id.* at 101.

social life, past and present, and therefore in the life of the law. Domination consists in not getting to exploit underdetermination all that much or often, especially if you are a victim.

And then Gordon concluded with a flourish. The reason for pervasive functional underdetermination, he explained, was that it was the possibility that “law is indeterminate at its core, in its inception, not just in its applications.”<sup>49</sup> He added, in an unmistakable allusion to Kennedy, that “legal rules derive from structures of thought ... that are fundamentally contradictory.”<sup>50</sup> Echoing Kennedy’s fatalism, too, Gordon wondered if “because the fundamental contradiction ... has never been (perhaps can never be?) overcome, legal structures represent unsuccessful and thus inherently unstable mediations of that contradiction.”<sup>51</sup> He was sure of one thing: “Anyone who has come to adopt this approach has left functionalism far behind. For if it turns out to be true that law is founded upon contradictions, it cannot also be true that any particular legal form is required by, or a condition of, any particular set of social practices.”<sup>52</sup> Left for an unintegrated afterthought was the otherwise arresting suggestion that Kennedy’s disciples didn’t “mean—though they sometimes sound as if they do—that there are never any predictable causal relations between legal forms and anything else.”<sup>53</sup>

Routinizing Kennedy’s version of critical legal studies, Gordon’s claims were themselves routinized—by a generation of less radical historians who tended to be apolitical or liberal or moderate—as the twin commitments that law is “constitutive” and “contingent.”<sup>54</sup> Partial truths were elevated into research programs that did a great deal to postpone for a still pending future any hope for a radical legal theory of how the past led to the present.

The idea that law is constitutive is one half-truth. Ignoring Tocqueville’s sober position that law is occasionally a lead variable but usually a lag one, Gordon stressed that law constitutes the social world and should be studied as such.<sup>55</sup> “[L]egal relations,” Gordon observed, “to an important extent define the constitutive terms of ... any set of ‘basic’ social practices.”<sup>56</sup> It is, of course, almost trivial to say so, once one adds “to an important extent.” Yet Gordon’s reclamation of the “constitutive” significance of law had the effect of exaggerating the important but episodic and occasional and (often) superficial place of law in overall social

---

<sup>49</sup> *Id.* at 114.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 115-16.

<sup>53</sup> *Id.* at 125.

<sup>54</sup> See, e.g., Ariela G. Gross & Susanna L. Blumenthal, *Celebrating Bob Gordon’s “Taming the Past,”* 70 STAN. L. REV. 1623 (2018) (“it is not too much of an exaggeration to say that [‘Critical Legal Histories’] redefined the field of legal history and set the agenda for two generations of legal historians”).

<sup>55</sup> Gordon, *Critical*, *supra* n. 43, at Part IV.A.

<sup>56</sup> *Id.* at 102-103.

relations.<sup>57</sup> Anyway, law cannot constitute society if, as Gordon also held, the distinction between “law” and “society” is eroded in the first place.<sup>58</sup>

The other half-truth — far more important for these purposes — is that law is “contingent.” Gordon launched a thousand ships that all discovered the continent where law, because it is functionally underdetermined, could have been different. And then the analysis stopped. Alternatives that held more promise had been “lost” as worse ones fortuitously gained the upper hand.<sup>59</sup> This or that legal order or outcome was “accidental” in its origins.<sup>60</sup>

Actually, most of the time, it wasn’t. Even when it is not determined in some simple way, law is more complexly so. Indeed, the entire notion of “contingency” was something of a misnomer. It does not follow from functional underdetermination that results are aleatory or random. Underdetermination—Gordon’s term, and rightly so—is not indeterminacy. In fact, some might worry that functional underdetermination itself is incoherent. Isn’t everything caused? Doesn’t everything happen for some reason?<sup>61</sup> A radical theory of the law needs to make room for freedom—always constituted freedom among old or newly constituted options—to alter the terms of social life, or to leave those terms the same for that matter. But even if this turns out to be true, the point is not to save space for something like an *acte gratuit* that emerges unpredictably and leads to inexplicably random outcomes.<sup>62</sup> Stressing functional underdetermination in reaching some order or outcome generally just means that a more specific explanation of why it came about is needed—including why agents constituted by the social order with a range of likewise constituted options moved in one way rather than other. The insight into functional underdeterminacy is useful because it denaturalizes, proving that some legal result or other might have been determined much later and with much less necessity than previously thought. What does not follow—like, at all—is

---

<sup>57</sup> Indeed, it is especially tragic that Gordon overstated the importance of law, for the exploration of norms was left as the preserve of neoliberals in the legal academy such as ELLICKSON, ORDER, *supra* n. 9, or ERIC A. POSNER, LAW AND SOCIAL NORMS (2000).

<sup>58</sup> Gordon, *Critical*, *supra* n. 43, at 102, 107-8.

<sup>59</sup> RISA GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007).

<sup>60</sup> JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2004). I am just trolling his book title, but for his own attempt to balance “contingency” and “inevitability,” see, e.g., John Fabian Witt, *Contingency, Immanence, and Inevitability in the Law of Accidents*, 1 J. TORT L. ii (2006). Compare NATE HOLDREN, INJURY IMPOVERISHED: WORKPLACE ACCIDENTS, CAPITALISM, AND LAW IN THE PROGRESSIVE ERA (2020) and John Fabian Witt, *Radical Histories versus Liberal Histories in Work Injury Law*, 60 AM. J. OF LEGAL HIST. 564 (2020).

<sup>61</sup> Unlike in other domains, and for better or worse, the critique of functionalism in law wasn’t really about whether there are *other explanations than functional ones*. Analytic Marxists had one famous version of the discussion to this effect, evolutionary theorists another. See, e.g., G.A. Cohen, *Functional Explanation: A Reply to Elster*, 28 POL. STUDIES 129 (1980) or S.J. Gould & R.C. Lewontin, *The Spandrels of San Marco and the Panglossian Paradigm: A Critique of the Adaptationist Programme*, 205 PROC. ROYAL SOC. B 581 (1979).

<sup>62</sup> Gordon wrote that “the path actually chosen [is] chosen ... because the people pushing for alternatives were weaker and lost out in their struggle or because both winners and losers shared a common consciousness that set the agenda for all of them, highlighting some possibilities and suppressing others completely.” Gordon, *Critical*, *supra* n. 43, at 112. Both sound like excellent functional explanations to me, not “underdetermined” ones.

that those results could have been anything, or were “accidental” or “contingent,” as if social life were a series of rolls of the dice.<sup>63</sup>

In short, as crucial as the discovery of functional underdeterminacy in law is, it is a call for more sophistication in a social theory of law, either because it points to the need for more specific explanation or because it suggests how agents exploit the freedom constructed for them in a world of prevalent social determination. And this was, essentially, the position that Unger actually reached, coming not from outside critical legal studies but rather from within it.

### *3. Searching for Balance*

Ironically, in his earliest writing, Unger had helped make possible the structuralist version of critical legal studies Kennedy’s branch of the movement propagated as its brand. In *Knowledge and Politics*, Unger portrayed “liberalism” as a form of consciousness irremediably riven by various antinomies.<sup>64</sup> Even then, there was an optimism about an alternative that would supposedly transcend liberal dilemmas, rather than an acceptance of ineliminable self-division of the kind Kennedy enthroned. And even as he always framed a radical legal theory in the midst of a larger social theory, Unger soon gave up his critique of liberal thought as a set of deep contradictions.<sup>65</sup>

What replaced it was, with Unger’s own peculiarities of expression, a satisfactory starting point for a radical legal theory even today. For its point was to give both necessity and “contingency” their due. Given the prevalence of simplistic functionalism both in mainstream explanation and in Marxist explanation, Unger’s theory was advertised as “anti-necessitarian.” But it was an anti-necessitarian *social theory*, conforming to the requirements of all imaginable social theories.<sup>66</sup> The details don’t matter much for this essay, so I will restrict myself to providing evidence of Unger’s aspiration to avoid the equal and opposite poles of reductive functionalism that treated law as an aftereffect of capitalism and a cult of underdetermination that abjured explanation (not to mention radicalism itself).

In the opening and the only footnote to his landmark “The Critical Legal Studies Movement,” Unger distinguished “[t]wo main tendencies” in the body of thought. One was functionalism, “the thesis that law and legal doctrine reflect, confirm, and reshape the social

---

<sup>63</sup> I am reliably informed that I once wrote that “human rights” arose contingently, but I didn’t mean it in this sense, or take it back if I did. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010). If the best critic of functionalism was Michel Foucault, genealogy remains to be integrated in an adequate social theory, and otherwise risks devolving into accounts of serial imaginative leaps that harden into mistakenly naturalized domination. Compare Amia Srinivasan, *Genealogy, Epistemology, and Worldmaking*, 119 *PROC. ARISTOTELIAN SOC.* 127 (2019).

<sup>64</sup> ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* (1975).

<sup>65</sup> Roberto Mangabeira Unger, *Postscript*, in *KNOWLEDGE AND POLITICS* (new ed. 1983).

<sup>66</sup> ROBERTO MANGABEIRA UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* (1987).



divisions inherent in a type or stage of social organization.”<sup>67</sup> But, in a nod to the kind of thing Gordon would shortly canonize, this approach “has been increasingly modified by the awareness that institutional types or stages lack ... cohesive and foreordained character.”<sup>68</sup> Then there was Kennedy’s view, which emphasized the “contradictory” character of law and especially doctrine, a perspective with “antecedents” in “antiformalist legal theories and structuralist approaches to legal history.”<sup>69</sup> At this point he was making nice, proposing to save what was worth saving in these approaches, rejecting their extremism and irreconcilability.<sup>70</sup>

There may have been a gap between Unger’s intention and his rhetoric or at least his reception. He certainly helped develop the theory of functional underdetermination. And he was certainly taken to stress the resulting plasticity of institutions, even as he did express hopes for maximally plastic institutions (both in the organization of political economy and all other sectors of social life). When Marxist theorists of law express frustration with critical legal studies across the board, it is because it is alleged to have discarded necessity altogether, and enthroned “false contingency” out of a horror of what Unger called false necessity.<sup>71</sup> For Unger, the accent did fall on freedom: a radical account must also make sense of the situated freedom of the individuals and groups constituted by those orders to exploit functional underdetermination in a powerfully determined world. But there is no missing that *the entire point* of Unger’s approach was to purge from social theory any concessions to necessity without sacrificing its essential goal of accounting for the inception and reproduction of order—while angling to force its undoing.

“We have placed at the top of the agenda the following problem,” Unger wrote in closing “The Critical Legal Studies Movement.” “On the one hand, there are practical and imaginative structures that help shape ordinary political and economic activity while remaining stable in the midst of the normal disturbances that this activity causes. On the other hand, however, no higher-level order governs the history of these structures or determines their possible identities and limits.”<sup>72</sup> In short, the domination and oppression of social orders are real; its forms and paths are underdetermined. Unger repeated this mantra over and over.<sup>73</sup> If it is the only credible framework for a radical legal theory, we should, too.

---

<sup>67</sup> Unger, *Critical*, *supra* n. 1, at 563n.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> We know this because he caustically presents his approach as an alternative to those of Horwitz and Kennedy in his own retrospective, ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME*, A GREATER TASK 26-30 (new ed. 2015).

<sup>71</sup> Susan Marks, *False Contingency*, 62 CURRENT LEGAL PROBS. 1 (2009); UNGER, *FALSE NECESSITY*, *supra* n. 66. Even Marks acknowledges that “Unger is certainly aware of the problem of false contingency,” since the whole point of his theory is “limits and pressures.” But she worries that “we are never invited or encouraged to scrutinize these, at least not in any sustained fashion.” I see what she means, but at worst it would be a failure of exemplification and specificity.

<sup>72</sup> Unger, *Critical*, *supra* n. 67, at 665.

<sup>73</sup> I have privileged this as the first version. But the main exploration of it was in ROBERTO MANGABEIRA UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASK* (1987).

## B. Interpretive Determinacy and Underdeterminacy

While functional underdetermination dominated the internal disagreements in critical legal studies, interpretive “indeterminacy” dogged its external reputation. And it was partly the movement’s fault. Indeed, whether there were any constraints in legal interpretation was probably the true “question that killed critical legal studies.”<sup>74</sup> This does not mean that the question is of burning theoretical importance in current debate. But it does allow for repeating my procedure above of sketching how critical legal studies left behind both less plausible and more plausible options useful for constructing a radical legal theory now.

Everyone agrees law is sometimes interpretively indeterminate and routinely underdeterminate. This underdeterminacy cannot have been the main contribution of critical legal studies because the consequences of ambiguities, conflicts, and gaps in the law have been known to legal theory for so long. Legal realists did the pioneering work in demystifying legal reasoning beyond formalist accounts. And from Thomas Hobbes to Hans Kelsen and H.L.A. Hart, thinkers in the positivist tradition have been open about the large amounts of interpretive legerdemain decisionmakers have within frames of higher norms (in Kelsen’s case) or in penumbral spaces (in Hart’s). The thesis of the radical *indeterminacy* of law, that a judge “can justify any result she desires in any particular case,” would have been novel.<sup>75</sup> But it was not widely shared in the critical legal studies movement, to the extent it was enunciated at all.

There is something hilarious about how central “indeterminacy” was to how that movement was attacked in its time, and unfortunate about how central it is to how it has been remembered since.<sup>76</sup> A few affiliates did indeed suggest that the law is radically indeterminate all the time. It is also true that critical legal studies was preoccupied with purging formalist remnants from accounts of judicial decisionmaking—but the truth is that this preoccupation led Kennedy and his disciples to a radical theory not merely with a strikingly doctrinalist focus but also with its own neoformalist schemes characteristic of high structuralism.<sup>77</sup>

---

<sup>74</sup> This phrase is an allusion to Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 1779 (1992). Fischl himself blames the end of the movement on its failure to offer alternatives. It is true that this was on the minds of some scholars who failed to do all of the reading—e.g., Owen Fiss in his exasperated *The Death of the Law*, 72 CORNELL L. REV. 1, 9-10 (1986)—but is neither a plausible description of the sectors of critical legal studies that imagined alternatives (and even a society built around their constant production) nor captures the devastation wrought by the charge that critical legal studies stood for interpretive indeterminacy.

<sup>75</sup> Lawrence Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 462 (1987). Solum acknowledged the difficulty of assigning the thesis to critical legal studies but concluded that it was fair to do so in light of such then-visible publications as Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984). For various broader comments from the time, see Jules Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. OF PENN. L. REV. 549 (1993), Kenneth J. Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283 (1989), Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QLR 339 (1997).

<sup>76</sup> See, e.g., Syed, *CLS*, *supra* n. 6.

<sup>77</sup> Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 NYU L. REV. 429 (1987).

If the debate critical legal studies inadvertently sparked around legal interpretation and “indeterminacy” remains useful, for all its logorrhea, it is because any radical theory of the law must have *something* to say about interpretive flexibility. I will argue, mirroring the last section, that critical legal studies saw attempts both to minimize and maximize the interpretive underdeterminacy of law. In doing so, the school placed novel and unprecedented focus on the need for a theory of law and ideology, and how law does not merely institute and reproduce but also legitimates and stabilizes social order, notwithstanding the self-evident flexibility of rule and doctrine. Here too, rejecting Horwitz’s assumption of determinate law, and having helped Kennedy towards a strategy that invited charges of indeterminacy, Unger beat a retreat to the view that *underdeterminacy is enough* both as a general proposition about legal interpretation and as an element of some future theory of law and ideology no one has yet built.

### 1. Of “Indeterminacy” and Ideology

Once again, it is useful to begin with Horwitz, whose crude functionalism almost necessarily required downplaying the malleability of the law. Of the trio, Horwitz was the most theoretically avoidant, so speculation is required; but the simpler one’s view of law as a tool serving extra-legal ends, the less one will tolerate tools that do not fulfill their social functions straightforwardly.

Horwitz supposed that early nineteenth-century judges adapted doctrine instrumentally to serve economic interests. In doing so, the judges did not so much exploit the malleability of doctrine as self-consciously change its content. To remove equitable constraints on contracts, for example, judges didn’t need prior norms to be underdeterminate enough to allow their work, let alone indeterminate; they just changed the norms.<sup>78</sup> As for how formalist theories of the law arose to rationalize the results in the later nineteenth century, Horwitz did harbor some kind of theory of ideology. But whatever his account, it would seem that Horwitz also assumed that *formalism worked*—not merely to disguise past rule change but also so that present judges would “mechanically” follow the new rules, not necessarily intending to abet elite economic interests. (Possibly they did, but they wouldn’t need to, and it would be more convenient if they didn’t.) For these purposes, most of the rules had to be more or less determinate most of the time.

If Horwitz was part of critical legal studies, it is just ignorance—or slander—to reduce that movement as a whole to “indeterminacy.” And contrary to reputation, Kennedy did not really push a theory of the radical indeterminacy of legal interpretation either. The whole point of cognitive or discursive structuralism is constraint: people are hostage to the structures

---

<sup>78</sup> HORWITZ, TRANSFORMATION, *supra* n. 29, 161-73.

of consciousness or language they use, even the point of effacing them as agents. Language speaks humanity, not the other way around.<sup>79</sup>

This “antihumanist” evacuation of the easy possibility of manipulating underdeterminacy applied even to Kennedy’s diremptive theory of the structure of legal consciousness and legal domains riven by specific contradictions between principles and counterprinciples like altruism and individualism. It also applies when such alternatives are seen to be mutually implicated or even to undo themselves, as Kennedy came close to philosophical deconstruction. Even so, Kennedy’s school of legal thought got so associated with the belief in radical indeterminacy that it was not so clear after a certain point that it was not his view.

There was a lot, of course, to Kennedy’s long obsession with judicial decisionmaking, especially in the common law tradition. It led to a theory of freedom and constraint in adjudication that remains useful insofar as judicial behavior *in situ* is a persistent obsession in legal academia, far beyond Kennedy’s case.<sup>80</sup> No one would want to abandon the debunking of the false determinacy of much legal reasoning that critical legal studies built on legal realism in revealing. It remains true today that, when it comes to interpreting law, the curriculum in schools just is critical legal studies—that doctrine is manipulable, and outcomes are rarely foreordained, if you have the votes, so long as you engage willingly in the charade that the law decided the case rather than you and your friends.

But Kennedy did distract from the need to build a social theory of law with a focus on how, notwithstanding law’s interpretive underdeterminacy, any radical theory requires an account of how social functions (including ideological legitimation) are fulfilled in and through this fact. Worst, Kennedy’s contribution badly overstated the importance of a theory of judicial decisionmaking, including judicial ideology, to a radical legal theory. It was one thing to see that legal doctrine characteristically works by means of principles and counterprinciples that introduce unacknowledged lability in casuistry, quite another to see that fact reflecting “fundamental contradiction” and ending the analysis there—without making it the prime agenda to account for what Horwitz and others called the “tilt” by means of which domination is indeed instituted, legitimated, and reproduced in and through the legal order.<sup>81</sup> It was a cop-out for defeatist structuralists to isolate the determinate contradictions of legal reasoning, as we have already seen Gordon follow Kennedy in doing, in order to trace those

---

<sup>79</sup> As Akbar Rasulov argues, critical legal studies sometimes centered underdeterminacy in consciousness, rather than in the legal materials first and foremost. Akbar Rasulov, *What CLS Meant by the Indeterminacy Thesis*, LPE BLOG, <https://lpeproject.org/blog/what-cls-meant-by-the-indeterminacy-thesis/> (March 27, 2023). In retrospect, Kennedy himself sometimes remarked that he aimed to show that the legal materials are far more indeterminate than the legal consciousness that resolves their ambiguities, conflicts, and gaps in one direction rather than another. See, e.g., Tor Krever et al., *Law on the Left: A Conversation with Duncan Kennedy*, 10 UNBOUND: A JOURNAL OF THE LEGAL LEFT 1, 27 (2015).

<sup>80</sup> See, e.g., Duncan Kennedy, *Freedom and Constraint in Interpretation: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986) and DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN-DE-SIÈCLE)* (1997).

<sup>81</sup> Wythe Holt, *Tilt*, 52 GEO. WASH. L. REV. 280 (1984) and Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 175-76 (1986).

conflicts to irremediable existential diremption, or even just to domain-level contradictions. And it could lead to a strikingly culturalist if not fully discursive theory of ideology.

In his intrepid early writings, Jack Balkin took this syndrome in his own original direction. Balkin, another onetime follower and former student of Kennedy's, carefully and lucidly formalized his teacher's structuralist account of legal reasoning. He showed that it is based on hierarchically arranged "nested oppositions" of principles and counterprinciples in different legal domains.<sup>82</sup> And, building on Kennedy's insistence that at least "phenomenologically" adjudication involves felt constraint, Balkin suggested that one purpose of a theory of ideology has to be to show how legal actors do *not* exploit available underdetermination.<sup>83</sup> In Balkin's later terminology, rooted in this early critical work, it is a comparatively rare event for legal possibility inherent in the materials to move from "off the wall" to "on the wall."<sup>84</sup> Not merely as a reading of Kennedy's thought, but in building his own, Balkin was peremptory in rejection of any association with "radical indeterminacy" in interpretation.<sup>85</sup> But it was quite another step to follow Kennedy into an account of ideology that forsakes any attempt to trace law back to its place in social relations generally, in order to help explain outcomes.<sup>86</sup> If a theory of ideology is not about the occultation and rationalization of powerful social practices, it is not a theory of ideology.

## 2. *Searching for Balance*

In another irony, Unger has his share of blame in the rise of the indeterminacy meme. As Kennedy himself later stressed, his colleague endorsed the view that there was no way to validate interpretation in the (very) few pages about law that occur in the midst of his juvenilia.<sup>87</sup> But his evolved theory of doctrinal flexibility went together with the strongest possible repudiation of legal indeterminacy.

Nowhere was Unger closer to his fellow founders of critical legal studies than in his consent to dally with their obsession with judicially evolved private law doctrine. But his theory of it in "The Critical Legal Studies Movement" was altogether different. Doctrine is mostly a

---

<sup>82</sup> See J.M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1, 2n (1986) (crediting Kennedy for "open[ing] my eyes to a new way of thinking about law") and, especially impressively, J.M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669 (1990). Another student turned colleague, David Kennedy, formalized structuralism in international law debates. See, e.g., David Kennedy, INTERNATIONAL LEGAL STRUCTURES (1987); Samuel Moyn, *Knowledge and Politics in International Law*, 129 HARV. L. REV. 2164 (2016).

<sup>83</sup> J.M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133 (1991).

<sup>84</sup> See, e.g., Jack M. Balkin, *Deconstruction's Legal Career*, 27 CARDOZO L. REV. 719, 735 (2005) or later JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 179-83 (2011).

<sup>85</sup> On Kennedy, see, e.g., Balkin, *Ideology*, *supra* n. 83, at 1991n.88 (noting that "it would be difficult to square a position of radical indeterminacy with Kennedy's elaborate descriptions of the legal doctrines and legal consciousness of the 19<sup>th</sup> and 20<sup>th</sup> centuries"); see also Richard Michael Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505 (1987). In his own voice, see, e.g., Balkin, *Nested*, *supra* n. 82, at 3 (reporting that "the form of deconstructive analysis that I advocate does not involve any ... claims of radical incoherence or indeterminacy").

<sup>86</sup> See BALKIN, CULTURAL, *supra* n. 19, at 1 (describing his book about ideology as "about culture").

<sup>87</sup> UNGER, KNOWLEDGE, *supra* n. 64, at 88-100; KENNEDY, CRITIQUE, *supra* n. 80, at 276.

patchwork because it has always been one site of endemic social conflict. If so, it was not just the tool (first evolutionary then rationalizing) of the ruling class, as Horwitz had presented it. In this regard, Kennedy was right that “there are principles and counterprinciples [to] be found in any body of law.”<sup>88</sup> Yet where Kennedy’s method of contradiction discovered this configuration and stopped there, Unger refused to do so. He never flirted with the linguistic or poststructuralist turns popular in the humanities at the time.<sup>89</sup> What Unger called “deviationist” doctrine proposed to coax future social alternatives from interpretive instability, taking advantage of “disputes of legal doctrine [that] repeatedly threaten to escalate into struggles over the basic imaginative structure of social existence.”<sup>90</sup>

Unger’s examples of deviationist doctrine in anti-discrimination and contract law were once well-known. The details don’t matter much now; what does is that, in the course of developing the examples, Unger never appealed to radical interpretive indeterminacy. On the contrary, deviationist doctrine presupposes that, while you can activate recessive tendencies in contradictory bodies of law, an essential reason for doctrine in the first place is ideological stability. “Every stabilized social world,” Unger wrote, “depends, for its serenity, upon the redefinition of power and preconception as legal right.”<sup>91</sup>

This doesn’t mean, however, that the rationalizing functions of law create a perfect system of control, which forbids locating alternatives within the very carapace of legally rationalized domination. Nor was Unger’s suggestion, as in familiar improving doctrinal work — pretending the law is already on your side in hopes of seeing judicial decisions implement your views — that judges themselves would break that carapace. They couldn’t, not only wouldn’t.<sup>92</sup> Rather, the point was that there is no source of dominant alternatives in social life except radicalization of recessive alternatives, including though by no means exclusively within the existing legal materials.<sup>93</sup> At the same time, exploring doctrinal flexibility, and envisioning steps judges might not ever want to take, could never serve as “a substitute for more tangible and widely based achievements” or “a replacement for other kinds of practical or imaginative conflict.”<sup>94</sup>

Later, after the collapse of the critical legal studies movement, Unger was much more censorious about any commitment to the indeterminacy of law. After (perhaps unfairly)

---

<sup>88</sup> Unger, *Critical*, *supra* n. 67, at 578.

<sup>89</sup> Balkin mistakenly assimilated Unger’s theory of deviationist doctrine to his own rendition of deconstruction in legal theory. But Jacques Derrida never worked with the idea that contradictions allow the escalation of recessive options in one regime into a more dominant position in an alternative regime. If anything, that idea is more Marxist, except that Marxists believe(d) that escalating contradiction was inevitable, and would cause the wholesale substitution of one entire system in crisis by a new one. More generally, Derrida’s pantextualist theory epitomized the generational rupture with the basic principles of social theory. There is a very great deal outside the text. See J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 761n.60 (1987).

<sup>90</sup> Unger, *Critical*, *supra* n. 67, at 579.

<sup>91</sup> *Id.* at 582.

<sup>92</sup> *Id.* at 615-16 (“the results for which I have argued could never be made to triumph through a doctrinal putsch”).

<sup>93</sup> *Id.* (“We have no stake in finding a preestablished harmony between moral compulsions and institutional constraints”).

<sup>94</sup> *Id.*

blaming Kennedy for propagating it, Unger rejected it in withering terms. It wasn't so much that there was no value to exploring how far the phenomenon of pervasively underdeterminate (and often indeterminate) law went. But doing so for its own sake was a "dead end."<sup>95</sup> Precisely because law can achieve some modicum of determinacy, "law can be something, and it matters what it is."<sup>96</sup> To avoid this truth was doubly catastrophic. It was a compensatory move obscuring the actual significance of how routinely and successfully the powerful make the law for their purposes and find both servants to interpret it to do their bidding, and theorists to rationalize the outcomes. And it lent credence to the sober moderation of those who purport to reject "naïve" accounts of determinacy while also steering clear of irresponsible suggestions of utter indeterminacy.

Law is no more interpretively determinate than anything else, partly because it is embodied in language or crosses openly into morality or policy, all of which have been understood to be fissiparous and unstable since Plato. Law can be made more determinate, at least locally, and on simple matters; it would be absurd to claim there are not easy cases in which determinate law applies. But awareness of the prevalent underdeterminacy of law does and should undergird a continuing radical practice of demystifying claims of excessive determinacy in legal interpretation. And unlike with functional underdeterminacy, legal scholars are specially positioned to contribute something to theorizing how ideological work in interpretation shapes and stabilizes social order.

The great pity of the charge that law is radically indeterminate all the time, or that anyone ever believed it is, has been that no one has built the full-scale account of legal interpretation we need. Prevalent underdeterminacy allows diverse legal interpreters and institutions of interpretation such as courts to participate in domination in and through legal order—including through ideological and rationalizing work. Any radical theory of law would need some such account. But at least critical legal studies provided not just false options but also the true path toward it.

#### IV. Political Economy and Intersectional Subordination

Legal theory looks very different now in progressive circles than it did at the high tide of critical legal studies. And most developments since—most especially in recent years—begin with the fateful character of political economy, often theorized intersectionally in relation to regimes of ableist, heteronormative, patriarchal, racist, or settler domination. Understandably so. It was long overdue, and surprising it took so long for a consensus that production, exchange, distribution, and consumption set oppressive terms for social life to crystallize. It is nonetheless an extraordinary achievement of the Law and Political Economy movement to organize a new space for that consensus, to take on board the gendering and

---

<sup>95</sup> ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 121 (1996).

<sup>96</sup> *Id.*, 122. Compare UNGER, CRITICAL, 26-28.

racialization of domination in and through markets, and to investigate how law helps entrench and perpetuate (intersectional) subordination.<sup>97</sup>

This Part assesses what in a reconstructed critical legal studies, if anything, has to be abandoned or modified in response. It argues that if there is no choosing between the priority of functional determination and interpretive determinacy, on the one hand, and elements of flexibility and freedom, on the other, this is also true when radical legal theory moves to organize itself analytically or mobilizationally around “political economy” in general or “neoliberalism” in particular, or when that political economy is conceived intersectionally as “social reproduction”<sup>98</sup> or “racial capitalism.”<sup>99</sup> For this reason, as a social theory of the relevance of law to ongoing domination, critical legal studies provides a basic framework to specify in new and ongoing ways.

This Part begins with the emergence of Law and Political Economy before looking to earlier and ongoing schools of legal thought that the current movement integrates so compellingly, even while leaving its relationship to critical legal studies unclear.

### A. Law and Political Economy

The manifesto of the emergent Law and Political Economy movement bracingly and correctly contests the hegemony of the law and economics movement in legal academia.<sup>100</sup> And it proposes a shift of optics so that legal scholarship can face presupposed realities that law and economics obfuscates, as well as values such as “equality” and “democracy” that those realities betray.<sup>101</sup> But the manifesto does not aspire to explain law and political economy, or even the rise of neoliberalism, except intellectually within law schools in the form of the law and economics movement.<sup>102</sup>

As of today, to judge from its manifesto, Law and Political Economy does not rest on a general social theory, or even on more than the beginnings of a legal theory. The manifesto gestures towards a relatively simple functionalism. The point to make about law is that it “is perennially involved in creating and enforcing the terms of economic ordering.”<sup>103</sup> But nothing is said about functional underdeterminacy. The incipient legal theory of the manifesto, which asserts a relationship between contemporary legal ordering and neoliberal

---

<sup>97</sup> See, canonically, Britton-Purdy et al., *Building*, *supra* n. 2.

<sup>98</sup> See, e.g., SILVIA FEDERICI, *REVOLUTION AT POINT ZERO: HOUSEWORK, REPRODUCTION, AND FEMINIST STRUGGLE* (2012).

<sup>99</sup> See CEDRIC ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* (1983).

<sup>100</sup> Britton-Purdy et al., *Building*, *supra* n. 2, Part I.

<sup>101</sup> *Id.*, Part II.

<sup>102</sup> Note in passing that it may be no more fair to extrapolate from the manifesto about the whole movement, in spite of its prominence, than it was for all those years to treat Unger’s manifesto as an authoritative summary, which no one inside the movement could ever have thought, and which Unger’s text explicitly said it wasn’t. Unger, *Critical*, *supra* n. 1, at 564 (“[m]y version ... is more proposal than description”).

<sup>103</sup> Britton-Purdy et al., *Building*, *supra* n. 2, at 1833.



political economy, come closest to an implicit vulgar Marxism or (therefore) to Horwitz's branch of critical legal studies.

Sometimes, the Law and Political Economy manifesto is even more tentative than this: the movement's main goal is principally the legal realist one of denaturalizing the economy as an apolitical site.<sup>104</sup> Indeed, the manifesto most clearly situates itself in relation to legal realism—but minus the explanatory ambition in general and sociological aspiration in particular.<sup>105</sup> At the same time, the manifesto also calls for not just denaturalization but also demystification, since “precisely because economic ordering is a political and legal artifact, the idea of an ‘autonomous’ economic domain has always been obscurantist and ideological, even when accepted in good faith.”<sup>106</sup> But nothing is said about interpretive underdeterminacy: how neoliberalism wins out in and through the resolution of legal controversy on diverse scales.

These aren't criticisms; it is merely to suggest that there is no avoiding theory forever. At some point, it is not enough to sidestep critical legal studies (or, to anticipate the next Part, Marxism too) as explanatory projects that strove to understand outcomes, and social theories that placed a premium on making sense of ideology.<sup>107</sup> Part of the setting for Law and Political Economy, it is worth noting, is autumnal quietism after the “summer of theory,” an aversion to abstract and systematic intellectualism that has set in for a host of reasons, some of them good. Law and Political Economy arises in the midst of exciting and multifarious progressive mobilization, not an era (yet) of the defeat and failure of radical politics. Ultimately, however, law schools are for schooling and scholarship, the main purpose of which has to be to teach and theorize why the world is the way it is and what the grounds are for changing it.

To date, in any case, the Law and Political Economy movement appears to postpone theory not because it is irrelevant, but out of indecision and above all out of strategy.<sup>108</sup> There are hard theoretical choices to make. And fledgling movements have to be kept together, since those theoretical choices can divide rather than unite. Prior decades seemed to lead to competitive and often individualized grand projects of explanation, and the intolerable (male) egos associated with those projects, rather than the big tent and team spirit that may have a better chance at institutional or political change or both.<sup>109</sup> And remarkably, the strategy is paying off: though it has achieved nothing like the impact or notice critical legal studies once

---

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*, 1819 (citing Robert Hale among other references to legal realism sprinkled through the manifesto).

<sup>106</sup> *Id.*, 1833.

<sup>107</sup> Corinne Blalock provocatively suggests that critical legal studies missed neoliberalism at the very moment of its 1970s inception—and in Kennedy's version was perhaps even an instantiation or reflection of it. Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 LAW & CONT. PROBS. 71 (2014). The contention is worth pondering, like the fact that, to the best of my limited knowledge, Unger was the first and for a long time only legal academic in the United States to reframe his theory after 1989 around the problem of neoliberalism. ROBERTO MANGABEIRA UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE* 52-132 (1998).

<sup>108</sup> Britton-Purdy et al., *Building*, *supra* n. 2, at 1791 (“We ... offer some preliminary ideas about how we might best reconstruct legal scholarship”).

<sup>109</sup> Of course, to the extent law schools are also sites of political work, no more than the critical legal studies movement could avoid the paradoxes of launching a political initiative out of trade schools can Law and Political Economy do so.

did, it is certainly true that Law and Political Economy has built a relatively more unified movement to date, compared to the famous splintering of critical schools.<sup>110</sup>

From the start, the Law and Political Economy manifesto and other sources show it refuses to conceptualize “political economy” non-intersectionally, and this helps ward off the possibility of movement schism.<sup>111</sup> It is one of the most irresistible features of the Law and Political economy movement, and anything but one adopted on strategic grounds alone. But it is not as if centering patriarchy or racialization on their own, or intersectionally with each other or in relation to political economy, could save any radical legal approach the trouble of generating a social theory of law and how underdeterminacy works within it.

## B. Feminist Legal Theory

In the rest of this Part, to make this point, my exposition reconsiders foundational texts of feminist legal theory and critical race theory. Their great virtue was to resist any abandonment of functionalism wholesale; and they were especially incensed by the pressure critical legal studies put on the determinacy of law (and rights).<sup>112</sup> Very obviously to these theorists, law is a functional instrument of oppression, and it is interpretively determinate in its workings. But these very commitments led them to call off the search for balance for which I have reconstructed critical legal studies as standing. I don’t have the space to prove that the subsequent history of these movements failed to remedy the defects of their origins. But what if they didn’t?

Start with the case of the pivotal legal feminist Catharine MacKinnon, who prioritized social and legal theory almost from the first. What was bold about MacKinnon’s version of feminist legal analysis was that it both took Marxism as a model theory of social order and replaced it with a theory of sexual domination.<sup>113</sup> Her goal was not to develop a Marxist or even broader socialist feminism centered on social reproduction through the gendering of labor.<sup>114</sup> One of the reasons that MacKinnon insisted on the sexual foundations of gender domination is that she thought Marxism’s attention to the gendering of political economy downplayed or missed the original rationale for gendering and why it persisted.<sup>115</sup> In turn, gender reductionism was predicated on sex reductionism.<sup>116</sup> MacKinnon’s account explicitly mimicked Marxist

---

<sup>110</sup> See, e.g., Harlon L. Dalton, *The Clouded Prism*, 22 HARV C.R.-C.L. L. REV. 435 (1987). For some narratives of critical race theory as a partial or total revolt from critical legal studies, see, e.g., Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC’Y REV. 697 (1992) or Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741 (1994).

<sup>111</sup> Indeed, some founders of critical race theory are deeply involved in the Law and Political Economy movement. See, e.g., Angela P. Harris & James P. Varellas, *Introduction: Law and Political Economy in Times of Accelerating Crisis*, 1 J. OF L. & POL. ECON. (2020).

<sup>112</sup> On rights, see PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* ch. 8 (1991).

<sup>113</sup> Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1983).

<sup>114</sup> See, e.g., *id.* at 523-24 (“Attempts to create a synthesis between marxism and feminism, termed socialist-feminism, have not recognized the depth of the antagonism or the separate integrity of each theory”).

<sup>115</sup> See, e.g., *id.* at 526.

<sup>116</sup> See, e.g., *id.* at 533 (“sexuality is the linchpin of gender inequality”).

accounts of class domination, with the mode of production replaced by sexuality as the driving force. The sexual exploitation of woman by man replaced the exploitation of man by man. The very binary of woman and man was artifactually constructed for the sake of domination, much like classes under capitalism were.

It was lastingly illuminating to build a social theory around the centrality of gender relations to social order. And MacKinnon was surely right that a theory of gender that displaces the centrality of sexual control simply doesn't fit the facts of patriarchy past and present. Indeed, her overall theory had firmer grounds than placing either class struggle or racial division at the base of social order. If capitalism is modern, and if most societies have lacked race as an organizing principle, no known society has lacked gendered hierarchy, across the world and all the way back in time.

True, this very eternity of sexual domination meant that MacKinnon, for all her miming of Marxism, had nothing to say about the historical development of social relations.<sup>117</sup> But the arresting fact for these purposes is that the price of her powerful theory was a straightforward functionalism, as the rest of social relations serve male dominance in a straightforwardly instrumentalist mode, and as if the law served those relations. MacKinnon's crude functionalism was glaring from the start—social explanation centering on the sexual interests of men as ruling class—though there was more truth to it than to any comparable functionalism.

When she mimicked Marxist functionalism, however, MacKinnon adopted a theory of law as an instrument and ideology of sexual domination.<sup>118</sup> It was superstructural and obeyed the functional imperative that brought it about. She also gestured toward a new feminist jurisprudence that would not accept that “all law does or can do is reflect existing social relations” as a piece of “objectivist epistemology.”<sup>119</sup> But this was not because she affiliated with critical legal studies, with its emphasis on functional and interpretive underdetermination. Its perspectives were “less useful for those for whom law is all too determinate.”<sup>120</sup> MacKinnon has been criticized and indeed vilified—often unfairly—on a surfeit of grounds. Notwithstanding her awe-inspiring legal innovations, the most devastating problem with her legal theory may have been that she actually embraced one tendency within critical legal studies, while ignoring a more plausible version.

---

<sup>117</sup> “[T]he actual practices of sex may look relative flat [over time]. ... For such suggestions, feminists have been called ahistorical. Oh dear. We have disrespected the profundity and fascination of all the different ways in which men fuck us in order to emphasize that however they do it, they do it. And they do it to us.” Catharine A. MacKinnon, *Does Sexuality Have a History?*, 30 MICH. Q. REV. 5-6 (1991). (Can one imagine Marx saying the same of work—that it was monotonously the same subordination across history, primarily interesting for helping imagine a different world?)

<sup>118</sup> Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983).

<sup>119</sup> *Id.* at 658.

<sup>120</sup> CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 290n.18 (1989).

### C. Critical Race Theory

The founder of critical race theory, Derrick Bell, refused to sugarcoat the truth: “As every civil rights lawyer has reason to know—despite law school indoctrination and belief in the ‘rule of law’—abstract principles lead to legal results that harm blacks and perpetuate their inferior status.”<sup>121</sup> Even to make such a basic—and plausible—claim required him to commit to some sort of theory of the racializing tilt of law in the direction of constantly reinvented subordination. But while he provided examples of how such an account might work, he came to rely generally on a racial pessimist vision of repetitious white supremacy, and on a theory of ideology with unnerving stories of the cooptation of self-serving Black elites by white elites who themselves only engaged in self-serving “progress.” These suggestions were both edgy and momentous, and remain so even now; but they encounter serious limits too. And beyond his mechanisms, there was no general theory of how underdeterminate law works to achieve or rationalize or stabilize functional subordination.

Obviously, Bell had come to these positions through harsh personal and national experience. In his article on the divergence of interests of lawyers and clients that anticipated or even inaugurated critical race scholarship, Bell responded to the patent limitations of the civil rights litigation on which he had spent his earlier life.<sup>122</sup> That litigation, Bell now argued, had been premised on too optimistic a set of assumptions about the constant self-reproduction of white supremacy.<sup>123</sup> No wonder, then, that attempts to integrate schools inevitably caused backlash and sometimes worsened the situation of Black children. Equally important, the divergence of interests between litigators and Black clients in Bell’s depiction fit with a convergence of interests between Black elites who often led the litigation and white liberals who often funded it.<sup>124</sup>

With many of their roots in Black nationalism, Bell’s contentions were, of course, not new.<sup>125</sup> But his application of them was potent because his intervention matched clear emerging limits in school desegregation in the aftermath of the noxious Supreme Court case *Milliken v. Bradley*,<sup>126</sup> in which the justices ratified white flight and in effect abandoned integrationist ideals themselves. Bell’s radicalism was to notice right away that the Supreme Court itself was returning to form in the entrenchment of racialized oppression, notwithstanding

---

<sup>121</sup> Derrick A. Bell, Jr., *Racial Realism*, 24 CONN. L. REV. 363 (1992).

<sup>122</sup> Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976). The piece is the first, e.g., in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds. 1995).

<sup>123</sup> Bell, *Serving*, *supra* n. 122, at 478-79.

<sup>124</sup> *Id.* at 490n.59, citing and depending more than is commonly understood on former NAACP colleague Leroy Clark’s earlier but less conclusive writing on coopted litigating elites and self-serving whites. See Leroy Clark, *The Lawyer in the Civil Rights Movement—Catalytic Agent or Counter-Revolutionary?* 19 KAN. L. REV. 459 (1971). Bell’s account of interest convergence associated with his best-known intervention is already on full display in his earlier piece. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

<sup>125</sup> See, e.g., Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (1990).

<sup>126</sup> 418 U.S. 717 (1974).

enduring beliefs in the beneficence, not just of the higher judiciary, but of the “rule of law” itself.<sup>127</sup>

Yet Bell’s disquieting suggestions, which seem mostly vindicated, do depend on general theoretical premises. They would require more than a fideistic belief in the endurance of white supremacy no matter what, a belief characteristic of Afro- or racial pessimism.<sup>128</sup> They would require a showing of how law could and does function in the midst of alternative pathways to perpetuate or reinvent oppression. And the Equal Protection Clause is a great example of a legally indeterminate (or at least endemically vague) provision that nonetheless ended and ends up being interpreted compatibly with oppression, as indeed it generally has been in American history since its enactment.<sup>129</sup> Comparably, Bell’s claims would demand a sophisticated enough explanation of how integrationist legal ideals can and do function ideologically, mystifying and rationalizing the choices of Black and white elites, not to mention saving the Supreme Court from emergent liberal skepticism for another several decades (and counting).<sup>130</sup>

Even today Bell is exemplary to this extent: critics of all stripes are intellectually in the new place critical legal studies helped take legal thought. Critical race theory, like feminist legal theory, is in the identical situation as Law and Political Economy, which in turn relies on them to ensure that its account of political economy does not neglect gendered, racialized, and intersectional harm.<sup>131</sup> All radicals are in the same boat. The will to center or restore fateful necessity in accounts of social life, and therefore in law, could risk oversimplifying the very functionalism in explanation and stability in interpretation that critical legal studies struggled to put in its proper place. And appeals to ideological reinforcement of order likewise presuppose some theory of how legal underdeterminacy can nonetheless lead to the predictable reinvention of hierarchy over and over again.

## V. Marxism Evolves ... into Critical Legal Studies

---

<sup>127</sup> DERRICK A. BELL, JR., *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1989).

<sup>128</sup> *See, e.g.*, FRANK B. WILDERSON III, *AFROPESSIMISM* (2020).

<sup>129</sup> It is a crucial fact that Bell’s article appeared at exactly the same moment, and in response to exactly the same events, as Owen Fiss’s “racial optimist” attempt to refound Equal Protection Clause jurisprudence around anti-subordination rather than anti-classification. Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976). It now seems that it was too early or late, if not outright wrong, to retain optimism.

<sup>130</sup> For one account of the fecundity of debate within critical race theory on (economic) determinism and how ideology works, *see, e.g.*, RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* ch. 1 (3rd ed. 2017) (on “structural determinism” and its limits). Comparably, in international law there is an interesting new venture to fuse critical race theory and the “Third World Approaches to International Law” movement: *see, e.g.*, James Thuo Gatthi, *Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn from Each Other*, 67 UCLA L. REV. 1610 (2021).

<sup>131</sup> For the famous point that intersectional domination is not just additive, see Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

Critical legal studies, one Marxist recently wrote, “did much to destabilise the hold of facile legalism in the minds of students, scholars, and activists, but its tendency to dispense with class analysis and fetishise doctrinal and adjudicative indeterminacy often had the effect of displacing specifically Marxist modes of examining law and legal reasoning under capitalism.”<sup>132</sup> “The inattention to capital” in critical legal studies, another remarks, “renders it inadequate for the purposes of guiding critical legal inquiry.”<sup>133</sup>

This Part turns briefly to Marxism in contemporary legal thought. It argues that, once reconstructed, critical legal studies demands in turn the reconstruction of Marxist legal approaches—something that, along with a host of other factors, critical legal studies has already helped bring about in recent decades. Indeed, the line between critical legal studies and Marxism has blurred through a process of adjustment and concession, mostly on terms that critical legal studies has set.

In United States legal theory, Marxism proper was never more than a brief and evanescent option, at least as an explicit matter. Mark Tushnet experimented with an open and self-conscious Marxism within critical legal studies but was quickly converted into his law school classmate Kennedy’s camp of the movement.<sup>134</sup> It is an amazing fact that the most prominent explicit Marxism in the United States legal academy to date has been MacKinnon’s mimed version of it in her feminist account of sexual domination.<sup>135</sup> Obviously, Marxism has deeply informed the evolution of legal theory, even in the United States, where its vulgarization in covert and informal versions (including Horwitz’s rendition of critical legal studies) remained as ubiquitous as it was unspoken.

Today, if still much more explicitly outside the United States than in the country’s law schools, Marxism has returned with full force to legal theory. And understandably so, since it also never gave up its fundamental commitment to how “capitalism” shapes modern lives with determining forcefulness. Like critical race theory, legal feminism, and especially law and political economy, then, Marxism reflects an imperative that always defined social theory: to grasp the determinate reasons that law takes one form rather than others and sponsors some outcomes rather than others. At the same time, Marxism today is being thoroughly revised to accommodate once dissident perspectives within and outside the

---

<sup>132</sup> Umut Özsü, *The Necessity of Contingency: Method and Marxism in International Law*, in CONTINGENCY, *supra* n. 4, at 62.

<sup>133</sup> Rob Hunter, *Critical Legal Studies and Marx’s Critique: A Reappraisal*, 31 YALE J. L. & HUMAN. 389, 392 (2021).

<sup>134</sup> Mark Tushnet, *A Marxist Analysis of American Law*, 1 MARXIST PERSPECTIVES 96 (1978); Mark Tushnet, *Duncan Kennedy as, Yes, Mentor*, 10 UNBOUND: A JOURNAL OF THE LEGAL LEFT 75, 76 (2015) (reporting that he was “led to agree, more or less, with [Kennedy’s] post-modernist views about law and social theory”). See also Mark Tushnet, *Marxism as Metaphor*, 68 CORNELL L. REV. 281 (1983) or Mark Tushnet, *Is There a Marxist Theory of Law?*, 26 NOMOS 171 (1983). For the best reflection on this material, see Akbar Rasulov, *CLS and Marxism: A History of an Affair*, 5 TRANSNAT’L LEGAL THEORY 622 (2014), which doubles as one of the best things ever written on critical legal studies in general.

<sup>135</sup> See *supra*, Part IV.B.

tradition that targeted intersectional and multiform oppression for analysis and critique.<sup>136</sup> But the question remains how to fulfill its explanatory imperatives in light of functional and interpretive underdetermination.

One of the more interesting features of the contemporary revival of Marxist legal thought is that it almost always defines itself in contradistinction to critical legal studies, while treating Kennedy's strand of that movement synecdochically as *pars pro toto*—much as other commentators have done. This is a pity. For developing Marxist legal theory is hampered more than it is helped by avoiding the truths of underdetermination, as if scapegoating critical legal studies could ever complete its account.

Like Law and Political Economy, neo-Marxist legal theories can return Horwitz's position if they want. There is ample precedent for "vulgar Marxism" in Marxist traditions. But for decades Marxists themselves have been in the lead in qualifying or even rejecting overly simplistic functionalism. And it would seem that current Marxists in legal theory are alive to both functional and interpretive underdetermination. But if they sternly reject the abandonment of the explanation of the making, rationalization, stabilization, or transformation of social order, while framing Marxism as up to the challenge of underdetermination, then Marxists are working within the best schemes of critical legal studies.<sup>137</sup>

It doesn't matter much for these purposes whether the evolution of Marxism is attributed to the original insights of Marx himself (a regular pattern in historic and recent Marxism, as it is in all traditions) or treated as heretical departures or wholesale revisions. Marx's legal theory was functionalist to the core and helped frame the problem of ideology. A generation ago, G.A. Cohen volunteered to attempt to salvage the Marxism of the Second International, including its reduction of law "uncontroversially" to superstructure.<sup>138</sup> Today's Marxism looks very different. It is not just the now commonplace rejection of any distinction between base and superstructure.<sup>139</sup> There is also an embrace of functional and interpretive underdetermination of law, as two brief examples show.

---

<sup>136</sup> See, e.g., FEDERICI, *REVOLUTION*, *supra* n. 98, and ROBINSON, *BLACK MARXISM*, *supra* n. 99.

<sup>137</sup> A counterexample is the current revival (especially in the United Kingdom) of the commodity form theory of the law associated with Soviet legal theorist Evgeny Pashukanis, which grants large amounts of autonomy to the state and the legal order. Anything but crude, and anxious about the entire project of functionalist reduction, the school shows how abstractions of legal subjecthood formally mirror the value commensuration of a specific social order of commodity exchange. If this school does not focus on the law's performance of functional tasks, it is questionable whether it has seriously reckoned with interpretive underdeterminacy of law. For one recent rendition, ZOE ADAMS, *LABOUR AND THE WAGE: A CRITICAL ACCOUNT* ch. 3 (2020).

<sup>138</sup> G.A. Cohen, *Reply to Elster*, 11 *THEORY & SOCIETY* 483, 485 (1982). See also G.A. COHEN, *KARL MARX'S THEORY OF HISTORY: A DEFENCE* ch. 8 (1978).

<sup>139</sup> The most popular cite here would be ELLEN MEIKSINS WOOD, *DEMOCRACY AGAINST CAPITALISM: RETHINKING HISTORICAL MATERIALISM* ch. 2 (1995) ("Rethinking Base and Superstructure"). See also, e.g., Nate Holdren & Rob Hunter, "No Bases, No Superstructures: Against Legal Economism," *LEGAL FORM*, January 15, 2020, <https://legalform.blog/2020/01/15/no-bases-no-superstructures-against-legal-economism-nate-holdren-and-rob-hunter>.

Marx himself believed in contingent outcomes, leading Marxist lawyer Umut Özsu contends. A “sensitivity to contingency is not limited to Marx,” he adds, “but is rather a distinctive feature of the Marxist tradition.”<sup>140</sup> Far from rejecting what I have been calling functional underdetermination, Özsu contends, the tradition “provides an explanatory framework within which contingencies may be comprehended. Rather than encouraging enthrallment with the unpredictability of a given event, Marxism lays the groundwork for a systemic account of its conditions and implications.”<sup>141</sup> But then it is (now) a theory that pushes back at the extremes to commit to some middle-ground approach to the forcefulness of pressures to institute, perpetuate, or transform social order, along with the multiple and underdetermined possibilities by which these processes may unfold. Marxism clamps down on contingency as aleatory or random outcomes, but not to deny alternative legal pathways or reassert monocausality.

In a notable recent book, meanwhile, Ntina Tzouvala incorporates interpretive indeterminacy within a Marxist analytic.<sup>142</sup> She argues that “material” forces impose broad constraints on what law can mean, but only up to a point, after which what she calls indeterminacy reigns. Much like Hans Kelsen’s account of norm generation and law application as framed “indeterminacy,” Tzouvala is then giving that concept far more of a role than most critical legal studies proponents ever did.<sup>143</sup> It is just that legal indeterminacy, far from being the alpha and omega of analysis, is itself the situated effect of order, and bounded by it.<sup>144</sup> More generally, she is seeking to reconcile constraint and possibility in interpretation, exploring how “capitalism” (indeed, in her account, imperialist and racialized capitalism) wins, and does so in and through doctrinal instability.<sup>145</sup>

Finally, Marxists and post-Marxists inside and outside legal theory continue to struggle with a theory of ideology, demanding complex accounts that can register how mystifying rationalization and stabilization of order work.<sup>146</sup> In these traditions, avoiding culturalism and idealism remains crucial, in order to explain how ideology renders the totality of social practices seem more justifiable, or less transparent, or both. But Marxists and post-Marxists should also agree that their theory of how law helps rationalize and obfuscate outcomes could not shy away from the underdeterminacy of legal interpretation across the board.

---

<sup>140</sup> Özsu, *Necessity*, *supra* n. 132, at 61.

<sup>141</sup> *Id.* at 63.

<sup>142</sup> NTINA TZOUVALA, *CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW* 16 (2020) (proposing to rehabilitate precisely the early Duncan Kennedy who broke so radically from social theory in order to make Marxism more credible today). *See also* Ntina Tzouvala, *International Law and (the Critique of) Political Economy*, 121 S. ATL. Q. 297 (2022).

<sup>143</sup> HANS KELSEN, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY* ch. 6 (Bonnie Litschewski Paulson and Stanley L. Paulson trans. 1992).

<sup>144</sup> TZOUVALA, *CAPITALISM*, *supra* n. 142, at 16.

<sup>145</sup> Compare Ionannis Kampourakis, *The Standard of Civilisation: Between Political Economy and Legal Indeterminacy*, *TRANSNAT’L LEGAL THEORY* (forthcoming 2023).

<sup>146</sup> For my favorite example, see Claude Lefort, *Outline of the Genesis of Ideology in Modern Societies*, in *THE POLITICAL FORMS OF MODERN SOCIETY: BUREAUCRACY, DEMOCRACY, TOTALITARIANISM* (John B. Thompson ed. 1986).



To a remarkable extent, in short, Marxism has *become* critical legal studies. The contention does not simply end in virtue of this fact, for Marxists legitimately demand understanding what precisely covertly or non-Marxist accounts of legal orders and outcomes do explain and how they propose to explain it. But conversely, this is a Marxism that, in different versions, has engaged in a self-conscious debate about what to ditch from Marx himself, not merely from Second International breviaries. There is a lot to say about such Marxist themes as the extraction of surplus value, the pauperization of the working class, the intensification of crisis, and the viability of revolutionary politics. If there is something to junk from critical legal studies, there is also a lot to consider junking in Marxism itself.

Perhaps the most extraordinary dilemmas Marxists face today concern whether to continue believing that there are fundamental systemic imperatives of capitalism, and whether there is a systemic identity to “capitalism” itself. Critical legal studies questioned both of these assumptions—notably in Unger’s impressive if long-winded considerations of the limits of closed list and compulsive sequence social theories.<sup>147</sup> But even here, there is common ground.

Not that Unger wanted to abandon social explanation, or calling out domination in and through markets or neoliberalism. Far from it.<sup>148</sup> He did believe that challenging the notions that social life is a matter of occupying one of a finite set of categorical options (feudalism, capitalism, socialism) or entering an evolutionary track that inevitably leads from one stage to the next (feudalism turns into capitalism, which is creating the conditions for socialism) meant leaving Marxism behind. It would seem like there is more disagreement around that conclusion than about the impulses that led Unger to it.<sup>149</sup>

Even for Marxists today, it follows, “capitalism” is not a take-it-or-leave-it system to be kept or replaced, but an already ramshackle construction characterized by meaningfully different forms of institutionalization and reproduction, both legal and non-legal. This variation could even lead one to conclude that there is “no such thing as capitalism.”<sup>150</sup> But this conclusion couldn’t mean that there is no such thing as the institution of social order with all of its domination and oppression in ways legal theory is called upon to help analyze and reimagine. If we agree we are dealing with something forceful—not to mention unjust—even if functionally and interpretively underdeterminate, perhaps it doesn’t matter much what we call “capitalism,” or what we call the social theory of oppression that engages it.

---

<sup>147</sup> See UNGER, FALSE NECESSITY, *supra* n. 66.

<sup>148</sup> See ROBERTO MANGABEIRA UNGER, PLASTICITY INTO POWER: COMPARATIVE-HISTORICAL STUDIES ON THE INSTITUTIONAL CONDITIONS OF ECONOMIC AND MILITARY SUCCESS (1987).

<sup>149</sup> See UNGER, FALSE NECESSITY, *supra* n. 66.

<sup>150</sup> I made this claim, unpopular in some circles, in Samuel Moyn, *Thomas Piketty and the Future of Legal Scholarship*, 128 HARV. L. REV. F. 49, 55 (2014).

The main point is that reconstructing Marxism requires joining critical legal studies, as it has been reconstructed in these pages. Or, more generously put, critical legal studies and Marxism have to converge, perhaps in a different guise than either has assumed so far on its own. That new theory would intensify the latter's fervent and righteous insistence on the fateful social determination under modern and neoliberal regimes of production, exchange, and distribution. It would also refuse to depart from the former's insights into the difficulty, intricacy, and responsibility that make such an account believable—not to mention the situated freedom that alone allows for critique and transformation.

## VI. Conclusion: Free to Change

A social theory that balances necessity with underdeterminacy of the functional and interpretive varieties spotlights situated freedom. Legal theory is just one domain in which to do so. But it is a crucial one.

Legal orders can produce agency sufficient to change them—since freedom, like meaning, has to be theorized socially—though they differ radically in the extent to which they do so. An adequate framework for thinking about law thus accounts, from one time and place to another, for its combination of social necessity and situated freedom. That framework does so in order to lay the groundwork for challenging the first and with aspirations to unshackle the second.

Call it critical legal studies, or call it something else: either way, it is the point of departure for radical legal theory now.