

CRITICAL LEGAL STUDIES

Critical legal studies (C.L.S.) burst on the scene in the United States in the late 1970s with a series of conferences.¹ It grew out of a dissatisfaction with current legal scholarship. It is more a ferment than a movement with those who identify as "crits" a diverse group perhaps united only by their commitment to a more egalitarian society. Off-shoots are critical race theory, the Lat-Crit movement and other examples of outsider jurisprudence, such as "queer jurisprudence".²

Like realism, with which it is often compared, it is sceptical of orthodoxy.³ It builds upon insights from social and critical philosophy, literary theory and elsewhere. It draws on the radical political culture of the 1960s generation. It "asserts the inescapability of commitment and rejects the aspirations of the preceding intellectual climate's search for value neutrality."⁴ There is a shared concern with the "politics of law."⁵ In one sense it is a continuation of the Realists' project,⁶ but its objectives are much wider. The Realists were firmly within the camp of liberalism: the C.L.S. movement is more radical an attempt to escape the "crippling choice"⁷ between liberalism and Marxism. Like the Realists C.L.S. rejects formalism,⁸ but the Realists saw legal reasoning as autonomous or distinct and C.L.S. scholars certainly reject the enterprise of presenting a value-free model of law. A major difference between critical and ortho-

¹ These began in 1977. The initiative came from a group of jurists including Abel, Horwitz, Kennedy, Trubek, Tushnet and Unger dissatisfied with the Law and Society Association, which they thought had become too closely identified with empiricism and behaviourism. In Britain, the Critical Legal Conference was formed in 1984.

² On which see F. Valdes (1995) 83 California Law Rev. 3. For some comparisons see F. Valdes (1999) 53 Univ. of Miami L. Rev. 1265. See *post*, ch. 16.

³ And see J.A. Standen (1986) 79 Virginia L.Rev. 983, and J.S. Russell (1986) 18 Ottawa L.Rev. 1.

⁴ *Per* J. Boyle (1985) 133 Univ. of Penn. Law Rev. 685.

⁵ See D. Kairys (ed.), *The Politics of Law* (1982; 3rd ed., 19).

⁶ On the relationship between Realism and C.L.S. see Note (1982) 95 Harv. L.Rev. 1669, 1670-1686. On the historical background more generally see J. Schlegel (1984) 36 Stanford L.Rev. 391.

⁷ *Op.cit.*, n. 5, p. 16 (1982 ed.). But are C.L.S.'s criticisms of Marxism well-founded? For a view that they are not see S. Sciaraffa (1999) 5 *Legal Theory* 281.

⁸ See G. Fletcher (1982) 90 Yale L.J. 970; O. Fiss (1982) 34 Stanford L.Rev. 739. See also M. Tushnet (1981) 90 Yale L.J. 1205 who argues that most legal scholars would privately accept the view that legal rules have no objective content, but are unprepared to make a public acknowledgement for fear of undermining the whole enterprise of liberal legal theory (p. 1206). But is this a view that would command support in Britain?

dox (including for these purposes Realist) legal thought is then that, though the latter rejects formalism, it maintains the existence of a viable distinction between legal reasoning and political debate. Critical legal thought does not countenance this distinction. Crits believe there is no distinctive mode of legal reasoning. Law is politics. It does not have an existence outside of ideological battles within society.⁹

CRITICAL LEGAL STUDIES AND LIBERALISM'S CONTRADICTIONS

A central thrust of C.L.S.'s attack is against legal liberalism, a tradition they associate not just with the positivism of Hart, Kelsen and Raz but also with the writings of Dworkin, Rawls, Nozick, Finnis, Fuller and much else besides. What do the Crits object to in legal liberalism?

According to Mark Kelman (whose *A Guide to Critical Legal Studies*¹⁰ is probably the best introduction to the subject), liberalism in the eyes of Crits is "a system of thought that is simultaneously beset by internal contradiction ... and by systematic repression of the presence of these contradictions."¹¹ There are, he claims, three central contradictions: (i) that between "a commitment to mechanically applicable rules as the appropriate form for resolving disputes ... and a commitment to situation-sensitive, ad hoc standards,"¹²; (ii) "the contradiction between a commitment to the traditional liberal notion that values or desires are arbitrary, subjective, individual and individuating while facts or reason are objective and universal and a commitment to the ideal that we can know social and ethical truths objectively ... or to the hope that one can transcend the usual distinction between subjective and objective in seeking moral truth"¹³; (iii) "the contradiction between a commitment to an intentionalistic discourse, in which all human action is seen as the product of a self-determining individual will, and determinist discourse, in which the activity of nominal subjects merits neither respect nor condemnation because it is simply deemed the expected outcome of existing structures."¹⁴

The implications of each of these contradictions may be examined further by concentrating on some leading C.L.S. essays. The first contradiction regarding rules and standards may be illustrated by reference to the leading C.L.S. thinker, Duncan Kennedy. His "Form and Substance in Private Law Adjudication" is unquestionably one of the seminal pieces of C.L.S. literature.¹⁵ Central to this article is the question: what

⁹ See R. Gordon (1981) 90 Yale L.J. 1017; D. Kennedy (1976) 89 Harvard L.R. 1685; R. Unger (1983) 96 Harvard L.R. 561.

¹⁰ Published by Harvard University Press in 1987.

¹¹ *Ibid.*, p. 3.

¹² *Ibid.*, and Chap. 1.

¹³ *Ibid.*, and Chap. 2.

¹⁴ *Ibid.*, and Chap. 3.

¹⁵ (1976) 89 Harvard L.R. 1685.

degree of formal realizability should legal norms have? He explains it thus:

"The extreme of formal realizability is a directive to an official that requires him to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way. Ihering used the determination of legal capacity by sole reference to age as a prime example of a formally realizable definition of liability.¹⁶ ... At the opposite pole from a formally realizable rule is a standard. ... A standard refers directly to one of the substantive objectives of the legal order. Some examples are good faith, due care, unconscionability, unjust enrichment, and reasonableness."¹⁷

The problem of form derives from the belief that there are good reasons for thinking that it is better for legal norms to have a higher degree of formal realizability (that is, to be cast as rules). There are, however, good counter-reasons for believing that they are better cast as standards. The virtues of the rule form are that it confines official discretion¹⁸ and that it provides citizens with a clear advance warning of the circumstances in which public power may be deployed, thus giving them both choice and security.¹⁹ But the rule form also has its vices. If the age example is used, then that protecting minors from improvident contracts can be seen to protect those who are as mature as adults and therefore do not need protection and to fail to protect those chronologically of age who lack the maturity to make rational decisions. The rule is there to implement a substantive purpose, but it does not always succeed. The virtues and vices of standards are a mirror image of those of rules. The choice could therefore be said to come down to a question of which form most effectively carries out the substantive purpose. This would ask an empirical question.²⁰ No doubt this is the conventional approach to the dilemma. But it is not Kennedy's.

For Kennedy the two positions (pro-rules and pro-standards) are "an invitation to choose between sets of values and visions of the universe."²¹ The formal arguments about the use of rules or standards is thus related to substantive ideals about the proper ordering of society. The jurisprudential position that favours rules is linked with one substantive ethical view (individualism); the jurisprudential view that favours standards with another (altruism). Individualism is bracketed with liberalism and the belief that all values are subjective; altruism with collectivism and the belief that justice consists of order directed to the achievement of shared ends. The pre-Civil War period was characterised, Kennedy argues, by altruism, to be succeeded in the classical period by in-

¹⁶ See also J. Boyle, *Critical Legal Studies* (1992), p.XIX. (The U.S. Constitution says the President must be 35, but does this refer to calendar age or the level of maturity expected of a person in the eighteenth century at 35?).

¹⁷ *Op.cit.*, n. 15, pp. 1687-1688.

¹⁸ See K.C. Davis, *Discretionary Justice* (1969).

¹⁹ See H.L.A. Hart, *Punishment and Responsibility* (1968).

²⁰ What Kennedy calls (*op. cit.*, n. 15) "a positivist investigation of reality" (p. 1712).

²¹ *ibid.*

dividualism.²² The modern era is an age of contradiction; though it is dominated by considerations of morality and policy, the conflict between individualism and altruism remains. The judge is thus constantly presented with a political choice. The modern jurist has contradictory pulls:

"The explanation of the sticking points of the modern individualist and altruist is that both believe quite firmly in both of these sets of premises, in spite of the fact that they are radically contradictory. The altruist critique of liberalism rings true for the individualist who no longer believes in the possibility of generating concepts that will in turn generate rules defining a just social order. The liberal critique of anarchy or collectivism rings true for the altruist, who acknowledges after all we have not overcome the fundamental dichotomy of subject and object. So long as others are, to some degree, independent and unknowable beings, the slogan of shared values carries a real thrust of a tyranny more oppressive than alienation in an at least somewhat altruistic liberal state."²³

Kennedy's dichotomy can be over-emphasised and, as a result, misinterpreted. As Kelman points out,²⁴ he is not saying that individualists will inevitably favour the rule form for any legal norm and altruists the standard form. He would not, and should not, subscribe to a claim about human social life that asserts something to be inevitable. And, secondly, Kennedy himself gives examples of rule-like norms that have been consistently promoted by those holding altruistic principles, for example progressive income tax laws and standards that can promote individualist values, such as, the negligence standard. Kelman suggests that Kennedy be interpreted as positing an "aesthetic" connection between form and substance.²⁵ He states "the rule *form* may always tend to appeal to the *substantive* individualist because its formal virtues match up aesthetically with the virtues he is inclined to admire."²⁶ But, as Altman argues,²⁷ this will not do. What is the aesthetic connection, if any, between the rule form with its doctrine of fair opportunity and the individualist virtue, as Kennedy conceives it, of self-reliance? The connection may be logical: it is difficult to see any aesthetic link. Altman believes that the best interpretation of "Form and Substance" construes Kennedy "as postulating the relatively modest logical connections between form and substance. Individualism provides general but feasible reasons for choosing rules over standards, while altruism provides general but defeasible reasons for choosing the opposite."²⁸

But, it may well be asked, whether at root the Kennedy critique of the

²² He discusses this more fully in "Toward an Historical Understanding of Legal Consciousness: the Case of Classical Legal Thought in America, 1850-1940 in *Research in Law and Sociology* (ed. S. Spitzer, 1980), vol. 3, p. 3.

²³ *Op.cit.*, n. 15, p. 1774.

²⁴ *Op.cit.*, n. 10, p. 17. See also A. Altman, *Critical Legal Studies: A Liberal Critique* (1990), p. 111.

²⁵ *Op.cit.*, n. 10, pp. 59-61.

²⁶ *ibid.*, p. 59.

²⁷ *Op.cit.*, n. 24, p. 112.

²⁸ *ibid.*, p. 114.

first contradiction of liberalism stands up to critical examination. The model of liberalism attacked has a straw-man feel about it. It is significant, for example, that the work of Neil MacCormick is ignored by Kennedy, Kelman and Altman. But a reading of this opens up a more sophisticated picture of liberal legalism than the over-rigid dichotomy and their supposedly ethical associations depicted here.²⁹ Are rules and standards really in polar opposition? Or is MacCormick not right to indicate that "it takes a rule to make a standard legal," and "may take a standard to make a rule satisfactorily workable?"³⁰ Can rules be interpreted without standards? Are all rules alike and "mechanically applicable?" The "two" in the "two witnesses for a will" rule³¹ requires nothing more than the ability to count, but what is a witness depends on a valuation of the importance to be attached to considerations like sight and hearing and these require judgement and interpretation. Indeterminacy becomes more apparent when one takes a rule like that which lays down that in matters relating to a child's upbringing the child's welfare is paramount.³² This "rule" has to be seen as a concretisation of standards (the residential status quo is good³³ and should be favoured), presumptions and assumptions (babies need mothers,³⁴ older boys fathers) and all sorts of values (discipline is good for children,³⁵ the tenets of Scientology bad).³⁶ It is difficult to imagine any rule requiring judicial interpretation which is so determinate that its proper application is decidable without regard to background standards or values. Of course, the premise underlying the critique of liberalism is that legalism itself is necessarily bad, but MacCormick for one is unhappy with its designation as a vice, rather than a virtue.³⁷

The second of liberalism's contradictions—the facts-values distinction, the reason-desire separation, Kelman illustrates by reference to Unger's *Knowledge and Politics*,³⁸ perhaps the seminal early C.L.S. work, and to the writing of Heller.³⁹ In a nutshell the problem is identified as liberalism's positivist method failing to meet its normative needs, the difficulties it confronts when applying empirical methodology to human desire.⁴⁰ "Since there is no objective good, only preference satisfaction has any claim; thus good social systems simply accurately aggregate private

²⁹ See his *Legal Reasoning and Legal Theory* (1978), many of the essays in *Legal Rights and Social Democracy* and "The Ethics of Legalism" in (1989) 2 *Ratio Juris*. 184. See also "Reconstruction after Deconstruction: Closing In On Critique" in *Closure or Critique: New Directions in Legal Theory* (A. Norrie ed., 1993), p. 142.

³⁰ "Reconstruction After Deconstruction", *op. cit.*, n. 29, p. 145.

³¹ Wills Act 1837, s.9.

³² Children Act 1989, s.1.

³³ *Re W* (1983) F.L.R. 492.

³⁴ *Cf. Re A* [1991] 2 F.L.R. 394.

³⁵ *May v. May* [1986] 1 F.L.R. 325.

³⁶ *Re B and G* [1985] F.L.R. 134.

³⁷ See "The Ethics of Legalism", *op. cit.*, n. 29.

³⁸ (1974). This is discussed by Kelman, *op. cit.*, n. 10, Chap. 2.

³⁹ See, in particular, (1984) 36 *Stanford L. Rev.* 127, particularly pp. 172–181.

⁴⁰ And see Kelman, *op. cit.*, n. 10, p. 73.

preferences (for example through markets and voting systems)."⁴¹ In earlier chapters we have seen how utilitarians and economists tackle this: utilitarians⁴² by claiming that we are morally bound to seek the maximisation of utility—we don't simply desire to do so; the economists⁴³ by avoiding the problem. Yet, as Kelman says, most liberals would find the Coasean⁴⁴ description of our practices quite inadequate. Do women have the right not to be raped only because it is "society's *factual* judgment"⁴⁵ that they would probably purchase the right from would-be rapists were it assigned to them in the first place?⁴⁶ But, exponents of C.L.S. would contend, values are not merely matters of taste. Rather, they can be considered as universal maxims to govern human relationships, practices and laws.

The third contradiction invokes the long-standing conflict between free will and determinism. Liberal discourse is said to privilege intentionalist discourse (which pictures human action in phenomenological, forward-looking, free-will-oriented terms), just as it privileges a commitment to the Rule of Law, individualism and value subjectivity.⁴⁷ Determinist discourse, by contrast, pictures conduct in backward-looking, amoral terms, with conduct simply a last event in a chain of connected events so pre-determined as to merit neither respect nor condemnation. Kelman illustrates this by reference (but not exclusively so) to the criminal law.⁴⁸ He shows through a series of examples the ways in which orthodox criminal law, premised on liberalism and therefore on free will, often uses determinist discourse.

In Kelman's *Stanford* article, he examines the importance to criminal law of the stage that precedes legal analysis. He argues that "legal argument has two phases: interpretive construction and rational rhetoricism, and that the former, a vital step which undercuts the authority of the latter, goes virtually unexamined."⁴⁹ An example is that the result of a case may depend on whether the defendant's act is set in a broad or narrow time-frame. The issue has come to a head with a series of cases where battered women have murdered their husbands and the scope of the provocation defence has been tested.⁵⁰ If a broad time-frame is used, she may have defences of provocation, even self-defence: in a narrow

⁴¹ *ibid.*

⁴² *Ante*, 200.

⁴³ *Ante*, 557.

⁴⁴ Some empirical evidence of this is R. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991). And see *ante*, 563–564.

⁴⁵ *Op. cit.*, n. 10, p. 68.

⁴⁶ See, further, G. Schwartz (1979) *Wisconsin L.Rev.* 799, 804–808.

⁴⁷ *Op. cit.*, n. 10, p. 86 and Chap. III.

⁴⁸ And see also his "Interpretive Construction in the Substantive Criminal Law" (1981) 33 *Stanford L.Rev.* 591, and *post*, 1081.

⁴⁹ 33 *Stanford L.Rev.* 591 at 591–592.

⁵⁰ See *R. v. Thornton* [1992] 1 All E.R. 306, *R. v. Ahluwalia* [1992] 4 All E.R. 889 (and *Nicolson and Sanghvi* (1993) *Crim. L.R.* 728). On abuse excuses see the Symposium in (1996) 57 *Univ. of Pittsburgh L. Rev.* and also M. Stoker (1999) 16 *Soc. Phil. and Pol.* 175.

time-frame she has committed murder. There is no meta-theory to tell us which is the appropriate time-frame; the decision accordingly is "arational".⁵¹ Kelman argues that this interpretive construction hides the fact that the criminal law is taking a political, and perhaps also a moral, decision—to take an intentionalist (free will) or determinist view of the defendant. He writes:

"Often, conduct is deemed involuntary (or determined) rather than freely willed (or intentional) because we do not consider the defendant's earlier decisions that may have put him in the position of apparent choicelessness. Conversely, conduct that could have been viewed as freely willed or voluntary if we looked only at the precise moment of the criminal incident is sometimes deemed involuntary because we open up the time frame to look at prior events that seem to compel or determine the defendant's conduct at the time of the incident. The use of "time-framing" as interpretive *method* blocks the perception that intentionalist or determinist issues could be substantively at stake. If one has somehow convinced oneself that the narrow time-framed focus is the appropriate *technique* for interpreting criminal law material, there is simply no background data one can use, either to provide the grist for a determinist account or to locate a prior sphere of choice in a seemingly constricted world."⁵²

Nor, he points out, is this limited to "hard cases", because narrow time-framing "fends out" the possibility of undertaking determinist analyses.⁵³

RULES AND REASONING

As noted already, one characteristic of C.L.S. is its rejection of formalism. Formalism has tended to be the fall back position of liberal legal thinking when forced to confront the question: how can a legal system give the kinds of neutral decisions expected of it. Formalists, as C.L.S. characterise them,⁵⁴ circumvent this problem by insisting that the judge is not imposing his values (or anyone else's) but merely interpreting the words of the law. Hart, by separating "core" and "penumbra"⁵⁵ could be taken to admit the problem by his concession that the judge had to have recourse to discretion in interpreting the "penumbra" of legal rules. Fuller's response⁵⁶—that judges were to seek out the purpose behind the rule—does not satisfy Critics any more because, they argue, that "purpose" is equally indeterminate. Who knows what Parliament (or Con-

gress) intends?⁵⁷ Nor, they would argue, does Dworkin satisfactorily answer this question.⁵⁸

In the C.L.S. view, formalism relies on a new kind of essentialism—the belief that there are essential meanings to words. But one theme in C.L.S. writing is to connect adjudication to legislation and to ask the same questions about the legitimacy of the exercise of state power in relation to judicial activity as has been asked for millennia about the operation of power by other state institutions. Legal decisions, on this view, are no more neutral than the decisions of a legislature or an executive. Political choices are equally involved. The public/private law distinction is exposed as chimerical. The Realists said as much,⁵⁹ and Kelsen saw this too,⁶⁰ but the theme is more fully developed within C.L.S. writing. If the view that there is a line between private and public law is a myth,⁶¹ the rules of private law cannot be deduced from the interplay of free market forces. Contract law⁶² as much as administrative law, property law as much as environmental law, has to be chosen. There is nothing natural or neutral about it. Arguments about deregulation and privatisation are exposed for the shams that they are. Those who wish to deregulate the free market or privatise the family are only expressing a preference for one set of regulation, usually one less susceptible to scrutiny and control, over another.⁶³ A free market could be one in which workers had decision-making power, a deregulated family could be one which developed power and choices on children, but these are not usually the models envisaged by their advocates. Extracts from Kennedy on Blackstone's *Commentaries* (an "attempt to naturalize purely social phenomena," according to Kennedy⁶⁴) and from Clare Dalton's deconstruction of contract doctrine illustrate the themes presented here.

The next extract from Peter Gabel is both a development of this work and a step-up from it. The analysis goes beyond legal doctrine to examine legal processes within the dynamics of social theory.⁶⁵ For Gabel, legal thought is part of a larger practice of turning concepts or social roles into things, the practice of "reifying."⁶⁶ Each person experiences himself as a thing-like function of "the system."⁶⁷ "Thus, a 'small businessman' experiences himself as a 'small businessman' 'a secretary' as a 'secretary,' a

⁵⁷ Nor is this problem alleviated by the courts' greater willingness to consult extrinsic material. See *Pepper v. Hart* [1993] 1 All E.R. 42.

⁵⁸ See *Law's Empire* (1986). See also D. Kennedy, *A Critique of Adjudication* (1997), pp. 119–130.

⁵⁹ L. Jaffe (1937) 51 *Harvard L.Rev.* 201, Hale (1943) 43 *Columbia L.Rev.* 603.

⁶⁰ *The Pure Theory of Law* (1967), p. 280–284.

⁶¹ D. Kennedy (1982) 130 *Univ. of Pennsylvania L.Rev.* 1349.

⁶² See C. Dalton (1985) 94 *Yale L.J.* 997.

⁶³ See F. Olsen (1985) 18 *U. Mich. J.L. Rev.* 835; M. Freeman (1985) 38 *C.L.P.* 153.

⁶⁴ (1979) 28 *Buffalo L.Rev.* 209, 211.

⁶⁵ The influences of Marxism and of Sartre (in particular *The Critique of Dialectical Reason* (1976)) are clear.

⁶⁶ On which see P. Berger and T. Luckmann, *The Social Construction of Reality* (1967); R.D. Laing, *The Politics of Experience* (1967).

⁶⁷ *Research in Law and Sociology* (1980), vol. III, p. 28.

⁵¹ *Per J. Boyle, op.cit.*, n. 16, p. XXVII.

⁵² *Op. cit.*, n. 49, p. 594.

⁵³ The analysis pursued here may be equally applicable in other areas of legal doctrine (tort and divorce being the most obvious examples).

⁵⁴ See, e.g. R. Unger, *Knowledge and Politics* (1975), pp. 83–103.

⁵⁵ See *The Concept of Law* (1994), pp. 124–136; 71 *Harvard L.Rev.* 593 and *ante*, 367. And see F. Cohen (1935) 35 *Columbia L.Rev.* 809 for an early (Realist) critique of this view.

⁵⁶ 71 *Harvard L.Rev.* 630 (1958) and *ante*, 370.

'child' as a child."⁶⁸ "One is never, or almost never, a person; instead one is successively a 'husband,' 'bus passenger,' 'small businessman,' 'consumer' and so on."⁶⁹ Social roles appear to have an objective character. In Gabel's view, legal reasoning is a system in which "one manipulates concepts that share exactly this reified and apparently thing-like quality."⁷⁰ So long as we know and remember this, it may not matter overmuch. But once this knowledge is forgotten or glossed over the abstractions are taken on as beliefs about an objective reality. And at this point we can believe ourselves "actually to be living in a world of rights-holders, legal subjects and formal equality."⁷¹ The reification of legal concepts becomes a way of legitimating the status quo.

Gabel's views are not subscribed to by many within the C.L.S. movement. To many his emphasis on repression and alienation, on the lack of "connectedness" in society is misplaced (is there an unalienated existence outside, beyond or underneath social role and reified concept?). Gabel "tries to capture both the objective structures of apparent necessity and the subjective moments shaped by those structures."⁷² He presents legal doctrine "as though it is both infinitely manipulable and firmly constrained by the reified metaphors of common sense and legal consciousness."⁷³ There may be important implications in this in trying to understand the judicial role: how real, for example, is judicial choice even within areas of "weak discretion."⁷⁴ But there is no doubt that the chief merit in Gabel's writing is in showing the power of reification in legal (as well as social) thought.

CRITICAL LEGAL STUDIES AND LEGAL PRACTICE

One of the reasons why C.L.S. could not fail to have had an impact is that its protagonists have concerned themselves with the problems of legal practice. Practitioners who felt able to ignore debates about the rule of recognition or the morality of law—"these did not concern *them*"—had to grapple with the issues confirmed by the "Crits." Perhaps only the Realists of earlier schools and now Dworkin can have locked theory so much into practice.

Critical legal theorists believe that the lessons of critique can radicalise law practice. Thus, Gabel and Harris argue that "the very public and political character of the legal arena gives lawyers, acting together with clients and fellow legal workers, an important opportunity to reshape the way that people understand the existing social order and their place

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ Per J. Boyle, *op.*, n. 16, p. xvii.

⁷¹ *ibid.*, pp. XVII-XVIII.

⁷² Per J. Boyle (1985) 133 Univ. of Pennsylvania L.Rev. 685, 719-720.

⁷³ *ibid.*, p. 735.

⁷⁴ Cf. R. Dworkin *post*.

within it".⁷⁵ Their objective is "to show the way that the legal system works at many different levels to shape popular consciousness towards accepting the legitimacy of the status quo, and to outline the ways that lawyers can effectively resist these efforts in building a movement for fundamental social change."⁷⁶ They use several examples, most graphically the notorious trial of a rape victim who shot and killed her assailant.

Inez Garcia had two trials.⁷⁷ The first succeeded in that she was not convicted of first-degree, but only of second-degree, murder. But to achieve this required psychiatric testimony that she was unconscious of what she was doing. "Politically" this defence degraded Garcia. Her true feelings come out in the following "I took my gun, I loaded it, and I went after them . . . I am not sorry that I did it. The only thing that I am sorry about is that I missed [the second assailant]."⁷⁸ And earlier in the trial, she had reacted angrily to the judge's decision to disallow testimony about the emotional trauma of rape, screaming at the judge: "Why don't you just find me guilty? Just send me to jail . . . I killed the fucking guy because he raped me!"⁷⁹

There was a retrial⁸⁰ at which she was represented by a radical-feminist attorney, Susan Jordan.⁸¹ The task Jordan faced was "to translate the male-oriented rule of self-defence into a form that would capture the real experience of a woman facing possible attack by a man."⁸² Jordan was able to confront the cultural myths about rape (that women invite, encourage, like rape, that it is their fault) by creative use of *voir dire*. The jury, so constructed, "was able to view the rape not as a sexual act caused by male-female flirting, but rather as a violent assault."⁸³ The authors comment⁸⁴:

"The two trials of Inez Garcia demonstrate that in the right circumstances it is possible to win a case with a political approach when a more conventional approach would fail . . . With a male attorney in her first trial in effect apologizing for her action and the anger that produced it, Garcia was separated from the movement supporting her, and indeed from her own self. In pleading "impaired consciousness" she was forced to deny the legitimacy of her own action and simultaneously the legitimacy of "unreasonable" rage that women throughout the country were expressing in response to their social powerlessness in relation to men. The form of the first trial turned Garcia into a isolated object of the legal system, a mere "defendant" requesting mercy from a "masculine" legal structure . . . The most important feature of the second trial

⁷⁵ (1982-83) XI *Rev. of Law and Social Change* 369, 370.

⁷⁶ *ibid.*

⁷⁷ The first trial is discussed in C. Garry and A. Goldberg, *Street Fighter in the Courtroom* (1977), pp. 217-241. It is reported as *People v. Garcia* at 126 Cal. Rptr. 275, Cert. denied (1975) 426 U.S. 911. There is no law report of the retrial.

⁷⁸ See Garry and Goldberg, *op. cit.*, n. 77, p. 236.

⁷⁹ *ibid.*, p. 231.

⁸⁰ Because of an improper jury direction.

⁸¹ See Schneider and Jordan (1978) 4 Women's Rights L. Rep. 149. See also Donovan and Wildman (1980-1981) 14 Loy. L.A. L. Rev. 435.

⁸² *Op. cit.*, n. 75, p. 382.

⁸³ *ibid.*, p. 383.

⁸⁴ *ibid.*, pp. 383-384.

was that it reversed the power relations upon which the first trial was premised. The defence both affirmed the validity of Garcia's action, and allowed Jordan to join Garcia as co-advocate for a vast popular movement, to speak to the jury not as a State-licensed technician "representing" an abstract "defendant," but as a woman standing together with another woman. Together, the two women were able to put the act of rape itself on trial and to address the jurors ... about the true meaning of being a woman ... The effect of this was to transform the courtroom into a popular tribunal ... This shift in the vectors of power within the room also allowed the jurors to escape their own reification, to discover themselves as politically responsible for making a human, rather than a merely formal decision based on an application of existing law. Thus, the conduct of the second trial ... served to expand the power of the movement from which the political basis of the case derived, and to delegitimize the apparent necessity of existing legal consciousness ... Breaking through the sedimented authoritarian forms of legal proceedings in an overtly political case has radical implications ... it signifies that the existing order is *merely possible*, and that people have the freedom and power to act upon it."⁸⁵

Gabel and Harris use two other high-visibility political cases, the *Chicago 8 Trial*⁸⁶ and one of the early children's rights cases, *Tinker v. Des Moines School District*,⁸⁷ but they admit that the strategies described here are only relevant in such situations. For, "if there is one thing that critical legal scholars are agreed about it is that social change is not a matter of clever legal argument deployed by elite lawyers, but rather a process of democratic organisation and mobilization in which law will play a necessary part."⁸⁸ But C.L.S. subscribes neither to the liberal view that law can be a principal instrument of social change⁸⁹ nor to the Marxist view that marginalises law and lawyers to a "superstructural fringe",⁹⁰ rendering it largely irrelevant to political change. The C.L.S. position is more complex, reflecting a recognition of the complexity of law itself. As Boyle indicates, "it may be necessary to combine an exhaustive analysis of legal doctrine with a theoretical understanding of the hegemonic power of the law and a series of micro-phenomenological accounts of its application."⁹¹

C.L.S. has had an impact on legal education too, as the extract from Duncan Kennedy's polemic, "Legal Education as Training for Hierarchy" reveals.⁹² The word "hierarchy" is vague and, according to

⁸⁵ See also D. Kennedy (1985) 63 Texas L. Rev. 1377.

⁸⁶ *United States v. Dellinger* 472 F.2d 340; *Cert. denied* 410 U.S. 970 (1973).

⁸⁷ (1969) 393 U.S. 503. The case centred on whether freedom of expression extended to school children who wished to protest against the Vietnam War by wearing armbands.

⁸⁸ *Op. cit.*, n. 16.

⁸⁹ *Cf.*, e.g. Pound's view of social engineering (*ante*, 673).

⁹⁰ *Op. cit.*, n. 16. On the Marxist position, see *ante*, 958.

⁹¹ *Op. cit.*, n. 16. He cites the work of Regina Austin on employee abuse as a paradigmatic example of this work (see (1988) 41 Stanford L. Rev. 1).

⁹² See also his article on the political significance of the structure of the law curriculum (1983) 14 Seton Hall L.Rev.1. Further reference may be made to Toni Pickard (1983) 33 U.T.L.J. 279, and to A. Thomson in *Critical Legal Studies* (P. Fitzpatrick and A. Hunt (eds.), 1987), p. 183.

Kennedy, deliberately so.⁹³ Kennedy could have substituted a concept like "class" or "domination" with their relatively clear meanings. Instead, he wants to tell us what he feels intuitively is wrong with the system, how it separates subjects, ranks different law schools, (de)grades students. He says its a "typical American phenomenon,"⁹⁴ but much of what he says is increasingly recognisable is the United Kingdom too. It's an analysis which employs a mixture of social theories, with the influences of realism, of Foucault,⁹⁵ of feminism all at times apparent and at others submerged. It is an essay which premises "liberation from the constraints of hierarchy, the process of bondage, through the conscious practice of group self-determination."⁹⁶ but, it has to be said, it is one short on concrete proposals—though paying the law school janitor the same as the law school professors⁹⁷ would not be difficult to justify in some cases.

LEGAL THEORY AND SOCIAL THEORY

One of the principal advances of C.L.S. is to demonstrate the need to integrate legal theory within social theory. Drawing on Habermas,⁹⁸ Marcuse,⁹⁹ Mannheim,¹ Gramsci,² critical legal theorists have attempted to introduce into discourse about law the insights and models of analysis of social theory, in particular the relativity of truth to any given social or historical group. In this view, reality is not a product of nature, but is socially constructed.³ Social arrangements are not unproblematic, inexorable givens: what we see as the social order is merely where "the struggle between individuals was halted and truce lines were drawn up."⁴

Critical legal theorists are not the only thinkers about law to be convinced by its social contingency.⁵ But the novelty of their thinking lies in

⁹³ See his *Legal Education and The Reproduction of Hierarchy: A Polemic Against The System* (1983), p. 80.

⁹⁴ *ibid.*, p. 84.

⁹⁵ With Foucault, Kennedy shares a scepticism of the value of "global, totalitarian theories" (such as Marxism) (*Power/Knowledge* (1980), p. 80).

⁹⁶ *Op. cit.*, n. 93, p. 97.

⁹⁷ *ibid.*, p. 79.

⁹⁸ *Knowledge and Human Interest* (1972); *Legitimation Crisis* (1975); *The Philosophical Discourse of Modernity* (1990). See D. Held, *Introduction To Critical Theory* (1980) and W. T. Murphy (1989) 42 C.L.P. 135.

⁹⁹ See *Reason and Revolution* (1942); *One-Dimensional Man* (1964).

¹ *Ideology and Utopia* (1936); *Essays on the Sociology of Knowledge* (1952).

² See *Prison Notebooks* (1971) and *ante*, 981.

³ See P. Berger and T. Luckmann, *The Social Construction of Reality* (1966). See also *ante*, 5.

⁴ *Per A. Hutchinson and P. Monahan* (1984) 36 Stanford L. Rev. 199, 216.

⁵ See, e.g. L. Friedman (1969) 4 Law and Soc. Rev. 29, whose exploration of "legal culture" is an attempt to discover "those values and attitudes in society which determine what [processual and institutional] structures are used and why; which rules work, and which do not, and why" (p. 35).

their attempts to identify the role played by law and legal reasoning⁶ in the processes through which a particular social order comes to be seen as inevitable. Legal discourse is a discourse that concerns the basic terms of social life.⁷ By identifying and overturning existing forms of legal consciousness, exponents of critical legal studies hope to emancipate the individual. "By demonstrating that social life is much less structured and much more complex, much less impartial and much more irrational, than the legal process suggests, the interests served by legal doctrine and theory will surface."⁸

An example is Mark Tushnet's article "Corporations and Free Speech."⁹ It is an examination of some recent U.S. Supreme Court cases that have constricted the ability of the State to regulate the "speech" of corporations.¹⁰ He finds a common link in the cases in the idea that speech is a commodity that can be bought and sold. The court has been, he argues, applying the deep structure of capitalism to a particular area of constitutional law. Tushnet's explanation lies at the level of consciousness.¹¹ But what is the relationship between capitalism and consciousness? To speak of "capitalism" as a well-defined social order comes close to denying the social contingency thesis to which, it has been argued, C.L.S. is committed.¹² But, as we have seen, Kennedy, for one, is not prepared to relate the law inexorably to "any aspect of the social totality." He maintains that "the outcomes within the law have no inherent logic."¹³

Out of this theorising has come understanding of the status quo and, just occasionally, blueprints for different social orderings. A notable example is found in the writings of Roberto Unger.¹⁴ In his article entitled "The Critical Legal Studies Movement,"¹⁵ he offers, what he calls,

⁶ For example, Gabel, *ante*, 1047 and *post*, 1073. Note Gabel's argument that the supposed neutrality and objectivity of legal reasoning is more than a lawyer's imperative: it is a prerequisite for the legitimacy of the liberal state.

⁷ See R. Unger (1983) 96 *Harvard L.Rev.* 561, 576-83 (also published as *The Critical Legal Studies Movement* (1986)) and *post*, 1108.

⁸ *Op. cit.*, n. 4, p. 217.

⁹ In D. Kairys (ed.), *op. cit.*, n. 5, p. 253.

¹⁰ For example, *Central Hudson Gas and Electricity Corp. v. Public Services Commission* (1980) 447 U.S. 557 (striking down a regulation prohibiting an electric utility company from advertising to promote energy use).

¹¹ There is considerable controversy within C.L.S. over the nature (and origins) of legal consciousness. See R. Gordon, *post*, 1056. See also Unger, *op. cit.*, n. 7, p. 564. Some with neo-Marxist views like Gabel and Abel explain law in terms of stages of capitalist development. But Kennedy (see (1980) *Research in Law and Sociology* 3) and Unger (*op. cit.*, n. 7) depict the revolution of legal doctrine as an endless conflict between opposing and unassimilable world views. See the discussion between Gabel and Kennedy, "Roll Over Beethoven" in (1984) 36 *Stanford L.Rev.* 1.

¹² See *ante*, 1051. See also *ante*, 986.

¹³ See *op. cit.*, n. 9, p. 50 and *post*, 1103.

¹⁴ It is impossible to do justice to Unger's work within political and social theory and this discussion concentrates on his seminal article, subsequently published in book form. But see, in addition, *Social Theory: Its Situation and Task* (1987) and the three-volume *Politics: A Work In Constructive Social Theory* as well as *Passion: An Essay on Personality* (1984). See also *post*, 1053-1055.

¹⁵ *Op. cit.*, n. 7.

"a structure of no-structure."¹⁶ He describes his programme as "super-liberalism," "the building of a social world less alien to a self that can always violate the generative rules of its own mental or social constructs and put other rules and other constructs in their place."¹⁷ This represents an effort to make "social life" resemble what "politics" is like in liberal democracies, "a series of conflicts and deals among more or less transitory and fragmentary groups."¹⁸ He is concerned to protect freedom better and, in this venture, he sees a crucial role for law and legal thought. He has specific proposals: a "rotating capital fund"¹⁹ to finance projects and effect a "decentralisation of production and exchange." The legal counterpart to this is "the disaggregation of the consolidated property right."²⁰ But, so as not to throw out the baby with the bathwater, Unger accepts that some regime of rights is necessary if his blueprint is to succeed. He, therefore, suggests the creation of four types of rights: immunity rights which establish the "nearly absolute claim of the individual to security against the state, other organisations and other individuals."²¹ Secondly, "destabilization" rights, admitted by Unger himself to be "novel and puzzling," which entitle individuals to demand the disruption of established institutions and forms of social practice that have achieved the "very sort of insulation and have contributed to the very kind of crystallized plan of social hierarchy and division that the entire constitution wants to avoid."²² Thirdly, market rights which give a "conditional and provisional claim to divisible portions of social capital."²³ They are a substitute for existing absolute property rights. Finally solidarity rights ("the legal entitlements of communal life")²⁴: these foster mutual reliance, loyalty and communal responsibility.

Subsequent works have further developed this project. In *Passion*,²⁵ Unger addressed the situation of the self in modern society. In *Politics*,²⁶ political institutions were reconstructed to reflect this refined sense of self. In *What Should Legal Analysis Become?*,²⁷ the role of law and lawyers in this society is a central focus.

Passion is about "sympathy". This is based on the "opportunity for discovery and self-expression".²⁸ Solidarity, which had been key to his earlier writing, is now shown to result from the empowerment experienced by self-assertion. People feel a sense of affinity with others within a community that they feel they have helped to create. This is why the idea

¹⁶ *ibid.*, p. 666.

¹⁷ *ibid.*, p. 602.

¹⁸ *ibid.*, p. 661.

¹⁹ *ibid.*, p. 596.

²⁰ *ibid.*, p. 597.

²¹ *ibid.*, p. 599.

²² *ibid.*, p. 600.

²³ *ibid.*

²⁴ *ibid.*

²⁵ *Passion: An Essay on Personality* (1984).

²⁶ *Politics: A Work In Constructive Legal Theory* (1987) (2 vols).

²⁷ (1996). And *post*, 1108.

²⁸ *Op. cit.*, n. 14, p. 28.

of "sympathy" must be understood both as constitutive of, and constituted by, radical democracy.²⁹ Passion may seem to work at odds with "reason", but Unger sees them as complementary. Reason is important but it is not the motivating force of political action. The "rational actor" is a myth and passion (or emotions) is an essential ingredient of participatory democracy. Law is thus the expression of passion, and critical legal politics must be founded on passion.

In *Politics*, Unger turns to the demand for participatory government. Society belongs to us, and so do its laws. We are not constrained by so-called metaphysical foundations and so can change society. There are no social or legal "truths", nothing to stop our changing and reshaping society and its laws.³⁰ Unger is encouraged by modern social thought which has "an image of man that emphasises both his content-bound predicament and his context-smashing capabilities".³¹ But if law is going to be changed by those who feel oppressed by it, there must be "radical democracy". Much of the second volume of *Politics* is taken up with models of such democracy: democratic pluralism is a key to all of these. Unger sees rights, even entrenched rights, as essential for radical participatory democracy. There is a problem here for if rights are entrenched, they are features of society and its laws which are changeable. Unger's response—which hardly seems convincing—is that such rights have to be understood to express an "attitude" rather than to define "structures". And in a participatory democracy we rule, not the structures.

What Should Legal Analysis Become? is in two parts. The first is a critique of dominant trends in legal scholarship which, he argues, has not contributed to serious social reform. Thus, for example, he refers to one "dirty little secret of contemporary jurisprudence" as its discomfort with democracy. This, he says,

"...shows up in every area of contemporary legal culture: in the ceaseless identification of restraints upon majority rule, rather than of restraints upon the power of dominant minorities, as the overriding responsibility of judges and jurists; in the consequent hypertrophy of countermajoritarian practices and arrangements; in the opposition to all institutional reforms, particularly those designed to heighten the level of popular political engagement, as threats to a regime of rights; in the equation of rights of property with the rights of dissent; in the effort to obtain from judges, under the cover of improving interpretation, the advances popular politics fail to deliver; in the abandonment of institutional reconstruction to rare and magical moments of national refoundation; in the single-minded focus upon the higher judges and their selection as the most important part of democratic politics; in an ideal of deliberative democracy as most acceptable when closest in style to a polite conversation among gentlemen in an eighteenth-century drawing room; and, occasionally, in the explicit treatment of party government as a subsidiary, last-ditch source of legal evolution, to be tolerated when none of the more refined modes of legal resolution

²⁹ *ibid.*, pp. 8–15.

³⁰ See vol. 1, pp. 18–35, 135–137.

³¹ *ibid.*, p. 192.

applies. Fear and loathing of the people always threaten to become the ruling passions of this legal culture."³²

And, as can be seen, this is pertinent and biting, even savage.

The second part of the book is a prescription, a positive programme, but, it may be thought, a somewhat vague or elusive one. Legal analysis, he argues, has the potential "to become a master tool of institutional imagination in a democratic society".³³ So he looks to an ideal of commitment "to make adjudication serve the larger goal of advancing the power of a free people to govern themselves".^{34–35} Unger is surely right to believe that jurisprudence should develop conceptions of constitutionalism, legislation and adjudication which embody the democratic idea. But can this be done by *legal* analysis? Does the legal analyst, as Dworkin, Habermas³⁶ and Unger himself have done, not have to become a social scientist and/or a theorist of culture? Can jurisprudence get to democracy through law? Or is "democratic jurisprudence", as Waldron has suggested,³⁷ an oxymoron?

CONCLUSION

Like a meteor the Crits appeared, shone brightly for a short time and have gone. To Duxbury,³⁸ writing in 1995, they were in decline, to Tamanaha in 2000 they were a "dead horse".³⁹ To him, and to many others, they failed to live up to their promise as a transformative approach to law. It is now generally agreed they exaggerated the indeterminacy of law.⁴⁰ Perhaps also they underplayed the "critical". The most recent writings of Duncan Kennedy⁴¹ and Roberto Unger⁴² are rather conventional when compared with their work at the height of the Crits' movement.

Undoubtedly, they spawned other movements: critical race theory, critical feminist jurisprudence, LatCrit, critical race feminism, outsider jurisprudence more generally.⁴³ Ward, I believe, is right to observe that C.L.S. has lived on to take a "more directed"⁴⁴ set of paths. He identifies three: one is that just referred to (feminist and race theory). A second is

³² *Op. cit.*, n. 27, pp. 72–73.

³³ *ibid.*, p. 26.

^{34–35} *ibid.*, p. 115.

³⁶ *Ante*, 793.

³⁷ (1998) 98 Columbia Law Rev. 510.

³⁸ *Patterns of American Jurisprudence* (1995), pp. 426–428.

³⁹ (2000) 27 J. Law and Soc. 296.

⁴⁰ T. Endicott, *Vagueness In Law* (2000) whilst presenting an indeterminacy thesis distances himself from C.L.S. and similar movements.

⁴¹ *Critique of Adjudication* (1997).

⁴² *What Should Legal Analysis Become?* (1996).

⁴³ See *post*, Chap. 16.

⁴⁴ *An Introduction to Critical Legal Theory* (1998), p. 157.

the reconstructive liberalism, particularly associated with Roberto Unger.⁴⁵ The political import of this is an effective decentralisation of power. Similar theorising is found in Habermas, though there is no evidence that it was this "critical" thought which influenced him.⁴⁶ Unger was considered earlier in this chapter, Habermas in an earlier one.⁴⁷

The third direction is towards theories of language. Literary theory is of particular interest because it offers support to their belief in interpretive indeterminacy.⁴⁸ Ward singles out Allan Hutchinson.⁴⁹ "We are never not in a story",⁵⁰ argues Hutchinson, because "history and human action only take on meaning and intelligibility within their narrative context and dramatic settings".⁵¹ We are all living our lives like actors in a performance, and lawyers are merely trained to play a particular role. Once we understand this theatricality or pretence, we are ready to "debunk the elite fables of law",⁵² realise our constitutive role in the actual performance and play a more assertive role. This shift in critical focus has, Hutchinson argues, "produced a more urgent appreciation of the relation between language and social action".⁵³

ROBERT GORDON

Law and Ideology

(1988)⁵⁴

For the Crits, law is inherently neither a ruling-class game plan nor a repository of noble if perverted principles. It is a plastic medium of discourse that subtly conditions how we experience social life. Crits therefore tend to take the rhetoric of law very seriously and to examine its content carefully.

To get a picture of the way Crits think, consider all the habitual daily invocations of law in official and unofficial life—from the rhetoric of judicial opinions through advice lawyers give to clients, down to all the assertions and arguments about legal rights and wrongs in ordinary interactions between police and suspects, employers and workers, creditors and debtors, husbands, wives and neighbors, or television characters portraying such people. Sometimes these ways of speaking about law (*legal discourses*, let's call them) appear as fancy technical arguments, sometimes as simple common sense. ("An employer has the right to control what happens on his own property, doesn't he?") In whatever form, they are among the discourses that help us to make sense of the world, that fabricate what we interpret as its reality. They construct roles for us like "Owner" and "Employee," and tell us how to behave in the roles. (The person cast as "Employee" is subordinate. Why? It just is that way, part of the role.) They wall us off

⁴⁵ *Ante*, 1053–1055.

⁴⁶ He was influenced by the Frankfurt school, discussed *ante*, 981.

⁴⁷ On Unger see J. W. Harris (1989) 52 M.L.R. 42 and J. Finnis in J. Eekelaar and J. Bell (eds.), *Oxford Essays In Jurisprudence* (3rd series, 1987), pp. 146–165.

⁴⁸ See J. B. White, *Justice As Translation* (1990).

⁴⁹ *Dwelling On The Threshold* (1988). See also (2001) 21 *Legal Studies* 65.

⁵⁰ *ibid.*, p. 13.

⁵¹ *ibid.*

⁵² *ibid.*, p. 21.

⁵³ *ibid.*, p. 148.

⁵⁴ [From *Tikkun*, vol. 3, (No. 1).]

from one another by constituting us as separate individuals given rights to protect our isolation, but then prescribe formal channels (such as contracts, partnerships, corporations) through which we can reconnect. They split up the world into categories that filter our experience—sorting out the harms we must accept as the hand of fate, or as our own fault, from the outrageous injustices we may resist as wrongfully forced upon us. Until recently, for instance, an employer's sexual advances didn't occupy any legal category. They were a kind of indignity that a woman had to interpret as something her own dress and manner had invited, or as an inevitable occupational risk, given natural male aggression (and the statistical frequency of creeps), one that could get her fired unless she gave in or had incredible tact. Now such advances have the legal name of "sexual harassment." This doesn't always improve the practical situation of the victims—since vindicating legal rights costs money, emotion, smooth working relations, the chance of promotion, and maybe even one's career—but for many men and women the feminist politics that forced the change in legal categories has completely changed how they interpret and feel about the behavior.

Some of the basic points the Critics want to make about legal discourses are as follows:

These are discourses of power. Law is not, of course, uniquely the tool of the powerful. Everyone invokes the authority of law in everyday interactions, and the content of laws registers many concessions to groups struggling for change from below, as well as to the wishes of the politically and economically dominant. But to be able to wield legal discourses with facility and authority or to pay others (lawyers, legislators, lobbyists, etc.) to wield them on your behalf is a large part of what it means to possess power in society. Legal discourses therefore tend to reflect the interests and the perspectives of the powerful people who make most use of them.

Whether actually being used by the powerful or the powerless, legal discourses are saturated with categories and images that for the most part rationalize and justify in myriad subtle ways the existing social order as natural, necessary, and just. A complaint about a legal wrong—let's say the claim that one is a "victim of discrimination"—must be framed as a complaint that there has been a momentary disturbance in a basically sound world, for which a quick fix is available within the conventional working of existing institutions. A black applicant to professional school, whose test scores are lower than those of a competing white applicant, asks for admission of grounds of "affirmative action." Everybody in that interaction (including the applicant) momentarily submits to the spell of the worldview promoted in that discourse, that the scores measure an "objective" merit (though nobody really has the foggiest idea *what* they measure besides standardized test-taking ability) that would have to be set aside to let him in. A middle-aged widow buys a cheap promotional package of lessons at a dance studio. The studio hooks her on flattery and attention, then gets her to sign a contract for 4,000 hours of dance instruction. To break her contract, she will have to struggle to make a case that her situation is grotesquely exceptional—the result of serious fraud, and, even if she wins, she and her lawyers will have participated in and reinforced the law's endorsement of "normal" marketplace relations as unproblematically voluntary, informed, noncoercive, and efficient.

Thus legal discourses—in conjunction with dozens of other nonlegal discourses—routinely help to create and maintain the ordinary inequities of everyday social life: the coercions, dominations, and dependencies of daily relations in the marketplace, the workplace, and the family; the ordering of access to privilege, authority, wealth, and power by hierarchies of class, race, gender, and "merit."