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Reconstructing Critical Legal Studies

ABSTRACT. It is an increasingly propitious moment to build another radical theory of law, after decades of relative quiescence in law schools since the last such opportunity. This Essay offers a reinterpretation of the legacy of critical theories of law, arguing that they afford useful starting points for any radical approach, rather than merely cautionary tales of how not to proceed. This Essay revisits the critical legal studies movement and imagines its reconstruction. Critical legal studies extended the social theory of law pioneered by legal realism and framed law as a forceful instrument of domination. However, critical legal studies also recognized that such a theory of law is compatible with both functional and interpretative underdeterminacy. Legal order oppresses, and the way it does so is never accidental or random—in other words, law is often determinate enough that it routinely serves oppression. Yet at the same time, law regularly accommodates alternative pathways of control and contestation through processes of interpretation of elusive or vague legal meaning by courts and other institutions. This Essay concludes by showing that the parameters of a radical social theory of 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. The law-and-political-economy movement is the most prominent leftist or at least progressive movement in law schools today, but critical legal studies challenges it to better identify its core principles. Had critical legal studies never existed, it would have to be invented today.

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ESSAY CONTENTS

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."[1] Indeed, neoformalist theory in both public and private law has been ascendant in recent decades, which would make legal realists — let alone those legal radicals who claimed their mantle — blanch.[2] At the same time, it is an increasingly propitious moment to build another radical theory of law, after decades of relative quiescence in law schools between the last such opportunity and now. Most notably, a law-and-political-economy movement has emerged, signaling new organizational spirit on the left, along with new practical and theoretical possibilities.[3] This Essay assesses the moment and argues for exploiting an option that risks being lost in early stages of radical discussion about what kind of legal theory to construct.

Scholars and students today are newly interested in how legal regimes reflect and shape social and state power, and in intersecting subordination based on gender, race, sexual orientation, disability, or indigeneity. And inspiringly and rightly so. The nascent law-and-political-economy movement is the most striking evidence of this trend, in part because — unlike some prior leftist or progressive frameworks — it has been alive from the first to the intersectional and multiform character of domination. But such a movement must be theorized persuasively. In particular, it needs to build a new insistence on the subjugating function of law while incorporating insights from earlier traditions — especially the insight that law is itself an element of social order and does not always function in simple ways, given that it is open to interpretative revision.

To that end, this Essay argues for a radical *social theory* of how law works, taking up where the critical legal studies movement left off. Law is not

1. Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 674 (1983).

2. On the right, consider the cases of "originalism" in public law or the neoformalist energy of the "new private law" movement. *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (endorsing a formalist account of originalist constitutional interpretation); Thomas B. Nachbar, *Twenty-First Century Formalism*, 75 U. MIA. L. REV. 113 (2020) (surveying other forms of right-wing public-law formalism); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (rev. ed. 2012) (reclaiming formalism for explaining the structure of private legal ordering). On the left, see generally Andrea Scoseria Katz, *The Lost Promise of Progressive Formalism*, 99 TEX. L. REV. 679 (2021), which revisits the history of formalist legal thought during the Progressive Era as a framework for progressive ends.

3. *See generally* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020) (offering a framework for a new law-and-political-economy approach to legal scholarship).

autonomous and therefore always needs to be situated within the social orders that give it form, meaning, and purpose. Most of the time, and in some way or other, law is involved in the making and maintenance — and, occasionally, remaking and renovation — of social order, albeit never on its own. This view of law — what the Essay calls "functionalism" — conceptualizes and criticizes law in relation to the (generally oppressive) social functions it serves.

But if a radical theory must emphasize that legal orders and rules matter because they institute, legitimate, and reproduce domination and oppression, it must also address the fact that such determination works compatibly with flexibility in interpreting law and plurality in reaching outcomes. Law remains a technology of rule of some over others, but one that is rarely simple and almost never unerring. This insight of critical legal studies — that law's determination is compatible with plurality of outcomes — is known as "functional underdeterminacy."[4] Likewise, law's performance of social functions coexists with prevalent underdeterminacy in legal meaning — what I will call "interpretive underdeterminacy."[5] The law allows different readings of constitutions, statutes, and customs. Such readings are manifest in court precedents from the past and historical narratives in the present that choose one meaning over others, not to mention in advocacy strategies that promote some understandings as correct or preferable as a means of achieving desired future outcomes.

The critical legal studies movement sought to assess how the generally troubling purposes that law serves are achieved through underdeterminate law. Even if some leaders of the movement drove too far either in emphasizing determination and subjugation or in highlighting complication and flexibility, the main reason to reconstruct critical legal studies is to show that it is simply not necessary to choose between these two poles. A vision of law emphasizing prevalent determination and determinacy must still make room for residual flexibility and plurality. This conclusion remains momentous for the law-and-political-economy movement and other parallel (including self-styled Marxist) ventures. And today, radical legal theory is being misled from the need to strike the right balance between such options in understanding specific regimes of domination and oppression. The mistake haunting legal theory now is not "false necessity."[6] 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 — the

4. *See infra* Section II.A.

5. *See infra* Section II.B.

6. *See* Roberto Mangabeira Unger, False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy 1 (1987) (coining this term to provide "an explanatory theory of society and a program for social reconstruction").

institutionalization, legitimation, and reproduction of regimes of production, exchange, and distribution—works. The law-and-political-economy movement sees necessity, but it does not yet grasp what legal theory already recognizes—that necessity works in mysterious ways. The other reason to strike the balance, which is even more important, follows directly from the first. Embracing underdeterminacy allows for the recovery of any pathways for change that exist in legally institutionalized and legitimated domination—and the recognition of our agency to pursue them. No credible theory of law could omit the situated freedom of agents to alter the terms of their domination or even, in rare instances, to lift it.

Intellectually, the world of legal theory is changing very quickly. In just a few years, a space has opened for constructing a radical challenge, one that did not seem available before.[7] The law-and-political-economy movement's emergence has already changed a great deal in the intellectual and practical life of law schools, forming groups at numerous institutions in the United States and beyond and influencing daily priorities through its website.[8] Thanks to its success, there is also space for reconstructing and remembering 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.[9] Upon examination, even emergent currents of Marxism in legal scholarship (and the law-and-political-economy movement itself) 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 noncommittal theoretically than it has been so far.[10] It also responds to recent impulses from

7. *Cf.* Samuel Moyn, *Legal Theory Among the Ruins*, *in* SEARCHING FOR CONTEMPORARY LEGAL THOUGHT 99, 100-04 (Justin Desautels-Stein & Christopher Tomlins eds., 2017) (portraying an interregnum period prior to a renaissance of radical legal projects since).

8. *See* LPE PROJECT, https://lpeproject.org [https://perma.cc/4TFL-U4HD].

9. This Essay tries to combine, generalize, and reformulate more recent pieces that are part of this larger whole. For examples of this recent scholarship that provides the starting point for this Essay, see generally Samuel Moyn, *From Situated Freedom to Plausible Worlds*, *in* CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES 517 (Ingo Venzke & Kevin Jon Heller eds., 2021); Justin Desautels-Stein & Samuel Moyn, *On the Domestication of Critical Legal History*, 60 HIST. & THEORY 296 (2021); and Samuel Moyn, *History, Law and the Rediscovery of Social Theory*, *in* HISTORY IN THE HUMANITIES AND SOCIAL SCIENCES 49 (Richard Bourke & Quentin Skinner eds., 2022).

10. *See infra* Section III.A. *See generally* Britton-Purdy et al., *supra* note 3 (offering a manifesto of sorts for the law-and-political-economy movement but in an avowedly preliminary and tentative spirit).

that larger movement[11] and even more from a narrower but overlapping set of Marxist theorists of law[12] to junk critical legal studies. For certain, any reclamation of that movement has to be discriminating. Nothing turns on what radicals label their framework or 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 because there is something perfect to revive, but rather 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, which demands 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 center stage—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 and banished by conventional legal academics in its time.[13] A review of the movement's contributions is far from being an antiquarian indulgence; it 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 I 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 II to 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. A survey of critical legal studies documents that one of its leaders committed to an excessively deterministic account of law and

11. *See, e.g.*, Talha Syed, Legal Realism and CLS from an LPE Perspective 3 (Nov. 14, 2023) (unpublished manuscript), https://ssrn.com/abstract=4601701 [https://perma.cc/UV2G-7RN3] (characterizing critical legal studies as a "deeply liberal" theory that is repudiated by the law-and-political-economy movement).

12. *See infra* Part IV.

13. *See generally* Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991) (offering a participant's narrative of the movement's origins and trajectory).

determinate possibilities of legal meaning, while another left the impression of a theory of "indeterminacy" that has dogged the movement's reputation. Meanwhile, the most promising option its members foregrounded—which sought balance—has been lost to memory.

The Essay then argues in Part III 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 is true—perhaps even more true—when the law-and-political-economy movement integrates the pathbreaking insights of movements such as critical race theory and feminist legal theory, and insists on gendered, racialized, and otherwise intersectional accounts of production, distribution, or exchange. No applicable forms of domination, like capitalism or white supremacy, are identically self-repeating no matter what. Instead, they are instituted through constant legal reinterpretation of underdeterminate norms.

Comparably, Part IV aims to show how contemporary Marxists have learned to occupy the middle ground recommended here, 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, often in an evolved form. Current Marxist approaches to capitalist law are intended to be consistent with functional and interpretive underdeterminacy, and thus with critical legal studies rightly understood.

I. TOWARD CRITICAL LEGAL STUDIES: A BRIEF SOCIAL THEORY OF LAW

Critical legal studies radicalized prior attempts to envision a social theory of law, rather than a formalist or normative one. It is important to begin, therefore, with what critical legal studies presupposed and what it added.

Whether we can imagine social orders without law,[14] we cannot imagine law without social orders. Law is made by social orders; it is a social phenomenon that reflects society's meanings and purposes, and it is also a tool for making and unmaking them. And whatever they may say, no one is interested in law for its own sake. Everyone is ultimately involved in the production and reproduction of social order, and anything one might do or not do traces back to that process. It was so important that critical legal studies resumed the more general project of constructing a social theory of law that it is worth beginning with the basic

14. For discussions of the possibility of nonlegal arrangements, see, for example, H.L.A. HART, THE CONCEPT OF LAW 91-99 (1961); and ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 123-264 (1991).

premises of any such project. This Part is a primer on those premises. It recalls the project of a social theory of law, which critical legal studies inherited and radicalized, and addresses the place of culture, meaning, and ideology in it.

A. Law in Social Theory

A general social theory is the indispensable setting for any credible legal theory.[15] The tradition of social theory presumes that the most determining and profound level of human reality consists of the regimes of meaningful social practices that produce the patterns and routines of life.

The rise of social theory is why functionalist and instrumentalist frameworks — explaining pragmatically or *realistically* how laws serve ends and generate outcomes, notwithstanding doctrinal obfuscation to the contrary — remain the single most revolutionary development in modern legal thought.[16] 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 multifariously and profoundly legal orders institute and promote domination.

According to social theory, law is a social institution, unthinkable apart from social purposes and practices. Social theory makes order from place to place and time to time intelligible. Doing so changes the terms and hopes for practical freedom (including interpretive freedom) from a relatively more metaphysical perspective to a relatively more institutional one. Moral 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 emphasize how alternative regimes of meaningful practice shape identity and outcome. They have thus posed the problem of freedom 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.

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15. On the tradition of social theory, see generally, for example, Louis Althusser, Politics and History: Montesquieu, Rousseau, Hegel and Marx (Ben Brewster trans., NLB 1972) (1959); and Geoffrey Hawthorn, Enlightenment and Despair: A History of Social Theory (2d ed. 1987). 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. For examples of works describing the relationship between colonialism and social theory, see generally Gurminder K. Bhambra & John Holmwood, Colonialism and Modern Social Theory (2021); and Durba Mitra, Indian Sex Life: Sexuality and the Colonial Origins of Modern Social Thought (2020).

16. *See generally* Rudolf von Jhering, Law as a Means to an End (Isaac Husik trans., MacMillan Co. 1921) (1877) (viewing the law as a tool for advancing social imperatives). For a representative American aftereffect, see, for example, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 821-34 (1935).

But even given this variation across social orders, there is always freedom under domination. Although social orders bear down on individuals and groups with immense force, they also construct a modicum of free agency. It is not just that there is no absolute control; it is that all action presupposes constituted agency and a context that opens some avenues for choice while forbidding other possibilities. Indeed, to the extent that social orders are neither fixed nor unified, they present their agents with specific options to pursue between relatively continuous reproduction and relatively discontinuous transformation. Such "situated freedom"[17] is an essential complement to the accounts of order in the tradition of social theory. Accounts of our situated freedom presuppose that social institutions and practices both generate and define practical agency: they produce the possibilities for changing the world—which are neither infinite nor nonexistent—and the constraints on doing so.

Law has been an essential topic in social theory from its invention in early modernity. Less often acknowledged, however, is that an animating impulse of social theory from the start was to demote law to an exemplary feature or instrumental tool of the establishment of social order. Order and value necessarily tracked not formal law but the preeminence of an informal order of relations that law rarely enacted and usually reflected. By focusing less on formal determinants of order—such as who ruled or what law said—than on institutions, patterns, and routines, social theory sought 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."[18] The study of customs or manners—what would now be called norms—demoted law to its rightful place. "Manners are of more importance than laws," wrote Edmund Burke in this vein.[19] "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."[20]

Social theory therefore treated law in two distinct ways. First, theorists turned to law as exemplary of forms of society—as a good example to illuminate deeper features of its distinctive shape. For example, Émile Durkheim compared the criminal sanction to modern contract law as an aperture revealing the shift

17. Maurice Merleau-Ponty, Phenomenology of Perception, at xxxi (Donald A. Landes trans., Routledge 2012) (1945).

18. 2 J.G.A. Pocock, Barbarism and Religion 20 (1999).

19. Edmund Burke, Three Letters Addressed to a Member of the Present Parliament on the Proposals for Peace with the Regicide Directory of France: Letter I, on the Overtures of Peace, *in* 4 The Works of Edmund Burke 330, 392 (Boston, Charles C. Little & James Brown 1839).

20. *Id.*

from "mechanical" to "organic" solidarity.[21] Second, theorists ascertained how law related to the institutionalization and reproduction of society in the making of the modern world. No assumptions were made in advance about when formal law ought to be separated and singled out for study, or about whether law had any causal preeminence in the making of social order or transformation. And generally, social theorists discovered that law served functional purposes or did ideological work, mostly as a lag rather than a lead variable. Alexis de Tocqueville agreed that "[t]oo much importance is attached to laws, too little to manners."[22] But he also cited the counterexample of the abolition of primogeniture as a legal change that fomented massive social change.[23]

B. Culture and Ideology

Social theory did not just bear on how law relates to society. The tradition also concerned itself intensively with culture—including law as a cultural form. By "culture," I refer to the meaningfulness of practices (including law) to social agents.[24] It is essential to review how social theory engaged this topic in order to assess the contributions of critical legal studies, and to guard against mistakes past and present. If every social order is established and perpetuated in and through meaning, it is also true that meaning is never separable from social practices generally. For legal theory, examining law as a realm of "ideology" and interpretation of meaning-laden norms can never be done on its own.

Social theory accorded great importance to culture, if never an exclusive monopoly in describing or explaining the coming or passing of order. Indeed, the greatest novelty of social theory was its discovery of the social conditions of significance, born of 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 classified regimes according to pervasive social practices, as they establish distinctive and wholesale modes of collective life (feudal or capitalist, *gemeinschaftlich* or *gesellschaftlich*, cold or hot, and so

21. Émile Durkheim, The Division of Labor in Society 31-87 (W.D. Halls trans., Free Press 1984) (1893).

22. Alexis de Tocqueville, Democracy in America 308 (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1st ed. 1966) (1835 & 1840).

23. *Id.* at 50-54; *see also* Thomas James Holland, *A Revolution in Property: Tocqueville and Beaumont on Democratic Inheritance Reform*, 21 Mod. Intell. Hist. 23, 30-34, 38-41 (2024) (recounting Alexis de Tocqueville's theory of the abolition of primogeniture).

24. *See, e.g.*, William H. Sewell, Jr., Logics of History: Social Theory and Social Transformation 81-123 (2005).

forth).[25] What that means, too, is that the ideational and ideological is not free-standing, but bound up with the institutions and practices of a particular time and place.[26] Within social theory, therefore, culture was of momentous significance. Some social theory spotlighted the occasional role of cultural developments in fomenting practical change – Max Weber's theory of the Protestant origins of capitalism being the classic example.[27] But if meaningfulness is not autonomous from social relations in the broadest sense, it usually turns out that the role of the ideational and ideological is to reflect change, rationalizing and stabilizing it.

All of this applies to law as a cultural phenomenon. Law does not simply arrange and rearrange by creating and sustaining institutions or dictating legal outcomes; it is also a meaningful practice that works in and through the self-conception of the agents who produce and reproduce society. Many explorations of legal culture in the last generation, while sometimes insisting that legal meaning is collectively constructed and shared by definition, insist on severing any connection between that meaning and the practices it animates, obfuscates, and sustains.[28] Social theorists never made this mistake. Their prize was explaining social order and its reproduction, and so they could not treat culture as free-standing. This framework has obvious implications for the obsessive concern of the legal academy in recent decades: how to *interpret* legal meaning. The interpretive freedom that agents exercise in relation to legal materials is best understood as a dimension of social freedom, though it may be easier to achieve than

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25. *See generally* 1 KARL MARX, CAPITAL (Ben Fowkes trans., Pelican Books 1976) (1867) (describing a transformation from feudal to capitalist modes of production); FERDINAND TÖNNIES, COMMUNITY AND SOCIETY (Charles P. Loomis trans., Mich. State Univ. Press 1957) (1891) (distinguishing between "communal" and "social" organizations); CLAUDE LÉVI-STRAUSS, THE SAVAGE MIND (George Weidenfeld & Nicolson Ltd. trans., 1966) (1962) (distinguishing between cold and hot societies).

26. *See* ALTHUSSER, *supra* note 15, at 23 ("Religion and morality, which [Montesquieu] correctly refuses the right to judge history, are no more than elements internal to given societies which govern their forms and their nature."). This commitment is what distinguishes social theory from the normative theory prevalent today. *Cf.* STEPHEN P. TURNER, EXPLAINING THE NORMATIVE 4-9, 29-63 (2010) (explicating how social theory relates to normative theory).

27. MAX WEBER, *The Protestant Ethic and the "Spirit" of Capitalism*, *reprinted in* THE PROTESTANT ETHIC AND THE "SPIRIT" OF CAPITALISM AND OTHER WRITINGS 1, 122 (Peter Baehr & Gordon C. Wells eds. & trans., Penguin Books 2002) (1905) ("[I]t 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.").

28. *See, e.g.*, PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 102-03 (1999) (defining law as "an autonomous cultural form," as if stepping outside reformist imperatives required affirming the independence of law from social practices in the round). Out of critical legal studies, as we will see below, Jack M. Balkin built a culturalist theory of ideology. J.M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY, at ix-xii (1998).

some other forms of social freedom. It is, after all, simple to reinterpret a text or to read new content into it, compared to other activities—though, even then, reinterpretation of law is typically possible only because something else has already changed first.

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.[29] 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 practices. 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 "cultural study of law" therefore has to be reaffirmed as an inextricable part of the social theory.[30]

The distracting legitimation that law provides social orders as one of its functions—leading to acceptance of hierarchy and inequality—is sometimes called *ideology*. That category specifies one kind of work that culture does, as the meaningfulness of practices legitimates them or screens out certain features of them. Marxist social theory, devoted to explaining why class rule is accepted or unseen, understandably elevated the importance of investigating and theorizing this function. A theory of law as ideology can come in different versions. But all 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 meaning and social practices, explicating how law is implicated in oppression. They never presuppose the independence of meaning from 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.[31]

People are embodied and practical in their social relations, rather than just language users, or even meaning makers, alone. They must 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 webs of significance are spun.

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29. Clifford Geertz, a cultural anthropologist, was formative in this regard. His most influential essays were collected in CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES: SELECTED ESSAYS (1973). The most cited, if idiosyncratic, culturalist in legal theory was Robert M. Cover. His most notable work is Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983).

30. *Cf.* KAHN, *supra* note 28, at 1 (defending attention to "[t]he culture of law's rule," which "needs to be studied in the same way as other cultures").

31. *Cf.* Clifford Geertz, *Ideology as a Cultural System*, *in* IDEOLOGY AND DISCONTENT 47, 71-72 (David E. Apter ed., 1964) (calling ideology "apologetic" but not, as in Marxism, in relation to the entire universe of social practices).

Meaning, including linguistic meaning, is therefore inextricable from the practical realities that law can help constitute, occult, and rationalize. This is a reality that no interpretive fiat can simply wish away. Interpretive flexibility, it follows, operates 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 humans never possess freestanding interpretive power that can demiurgically transform the practices with which cultural meaning is always bound up. Social relations constitute imaginative possibilities more than the other way around.

C. Radicalizing Social Theory: The Birth of Critical Legal Studies

It was essential that the founders of critical legal studies—the first radical theory of law—drank deep at the well of social theory.[32] They aspired to radicalize that 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—ironically, 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. That influential American school of thought had flourished in the first half of the twentieth century. It had been the first theory of law made in the image of modern social theory, albeit a generally nonradical one. Like critical legal studies after it, and the law-and-society movement in between, legal realism insisted on restoring law analytically and prescriptively to its social life.[33] But the founders of critical legal studies did not believe, as most legal 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 from judges to administrators. The radicals saw that legal 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

32. One could qualify the priority claim here by looking before World War II and/or outside Anglophone theory. For the best examples of the genetic relationship of critical legal studies and social theory, see generally David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 Wis. L. Rev. 720; and Roberto Mangabeira Unger, Law in Modern Society: Toward a Criticism of Social Theory (1976).

33. *See, e.g.*, Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 Green Bag 607, 615 (1907).

only proceeded to tweak it, before attempting to stabilize the apparent end of ideological strife they observed through the notorious theory of "legal process."[34]

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. They therefore imagined the much greater transformation that would be required to undo that domination. This appraisal is what made them radical. It also makes any current or future radicals their heirs.

But critical legal studies did more than this: it attempted to reckon with the *underdeterminacy* of law's social functions and of law's interpretive stability in accounting for oppression—and to draw the consequences for seeking a way out. This contribution remains both its most misunderstood and most relevant legacy to the renewal of a social theory of law today, whether under the heading of "law and political economy" or any other. This Essay therefore now turns to the intramural argument within critical legal studies about how to integrate functional and interpretive underdeterminacy into a radical social theory of law.

II. 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.[35] For example, it is not—and has never been—just an accident that law serves economic hierarchy and inequality. The same 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 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.[36] A radical theory would illustrate the determinate necessity—whether economic, patriarchal, racialized, or otherwise—with which legal orders and rules shape individual and collective life. 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

34. *See generally* 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) (providing the foundational account of the legal process school).

35. On functionalism in social explanation, see *infra* Section II.A.

36. *See, e.g.*, THOMAS HOBBES, LEVIATHAN 183-201 (Richard Tuck ed., Cambridge Univ. Press rev. student ed. 1996) (1651).

exclusively determinate and necessitarian or that it is generally indeterminate and plastic.

This Part offers a reading and reconstruction of some classic arguments 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 role that law plays to advance nonlegal 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 third strand 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,[37] it treats the founders of critical legal studies and some of their immediate disciples as having laid out options still live today. Those interested in centering political economy (or gender or race) today have come close to reinstating Morton J. Horwitz's crude or vulgar functionalism.[38] This is a mistake, unjustified even when inspired by a wish to repudiate Duncan Kennedy's apparent emphasis on the limits of functionalism and on the indeterminacy of law. Doing so neglects altogether Roberto Mangabeira Unger's refusal to choose between such positions and his pursuit of balance instead. Kennedy's followers have often been mistakenly treated, especially retrospectively, as a synecdoche for critical legal studies (which also sometimes accounts for the angry repudiation of critical legal studies in leftist theoretical circles today). 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"

Horwitz's epoch-making 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.[39] According to Horwitz's narrative, "economic interests" dictated a conscious and self-aware use by

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37. 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.

38. *See infra* Part III.

39. *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977) (arguing that the legal system was reshaped to promote industrial capitalism during the antebellum period).

jurists of legal-rule change to abet economic development.[40] And once the economic transformation and the rule change had been achieved, the need to legitimate and stabilize the results dictated a switch from instrumentalist legal thought to formalist legal thought.[41] This new style of rationalization presented the law as comprehensive and harmonious and called on judges to deduce outcomes from norms mechanically.[42] Horwitz's reconstruction 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 once they had achieved the desired outcomes and stabilized their victory through theory change.[43]

Much could be said about the controversies Horwitz inspired, but what is of greatest interest are the controversies *within* nascent critical legal studies about the viability of such a model. 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."[44] Horwitz was neither self-consciously nor unwittingly a Marxist. He did, however, revive what was in effect a "vulgar" Marxist scheme about the economic base and the legal superstructure from American progressives, such as Charles A. Beard, whose public-law historiography Horwitz enterprisingly adapted to private-law developments.[45] In Horwitz's account, relations between the functional imperatives of "capitalism" and the legal order were direct, one-way, and uncomplicated. Kennedy may also have been in conversation implicitly with Marxism, but his reception by some of his most prominent followers repudiated it in any reductionist version.[46] Indeed, those who have referred to critical

40. *Id.* at 160-210.

41. *Id.* at 253-66.

42. *Id.*

43. *Id.* at 254 ("The rise of legal formalism can be fully correlated with the attainment of these [capitalist] substantive legal changes . . . [and dominant] groups could only benefit if both the recent origins and the foundations in policy and group self-interest of all newly established legal doctrines could be disguised.").

44. Duncan Kennedy, The Rise and Fall of Classical Legal Thought 2 (2006).

45. *See, e.g.*, Robert W. Gordon, *Morton Horwitz and His Critics: A Conflict of Narratives*, 37 Tulsa L. Rev. 915, 916, 920-22 (2002). *See generally* Charles A. Beard, An Economic Interpretation of the Constitution of the United States (1913) (providing a historiographical account of the Constitution grounded in economics). In this Essay, I use the terms "crude" and "vulgar" interchangeably to refer to unacceptably reductive explanations. *Cf. infra* note 162 and accompanying text (providing an example of the use of the phrase "vulgar Marxism" to discuss the rejection of "overly simplistic functionalism").

46. See *infra* text accompanying note 166 for more detail on Duncan Kennedy as a kind of antireductionist participant in Marxist traditions.

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.[47]

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," defined as "the total contents of mind."[48] In particular, Kennedy aimed to decipher the integrating, structuring elements of legal consciousness that differentiated one age of legal thought from another. True, he acknowledged, the "autonomy" of legal consciousness was "no more than relative. Not only the particular concepts and operations characteristic of a period, but also the entity they together constitute, are intelligible only in terms of the larger structure of social thought and action."[49] 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.[50] Doing so, he thought, would help us "learn things about our present situation which were obscured by the simpler version of an unmediated interplay of purposes and outcomes."[51]

In fact, Kennedy's intervention was characteristically structuralist, with its own peculiarities.[52] Notwithstanding his 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

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47. *See, e.g.*, Jane Mayer, *Ted Cruz Responds—And Still Sees Red at Harvard Law*, New Yorker (Feb. 23, 2013), https://www.newyorker.com/news/news-desk/ted-cruz-respondsand-still-sees-red-at-harvard-law [https://perma.cc/U9DF-8TDF].

48. See the glossary in Kennedy, *supra* note 44, at 33.

49. *Id.* at 8.

50. *Id.*

51. *Id.*

52. 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—of Michel Foucault (in one phase of his career), Jean Piaget, and Claude Lévi-Strauss. To avoid confusion, I have referred throughout (except in quotations I cannot alter) to social theory as an attempt to account for social *orders* or *regimes* rather than cognitive or other *structures*. On structuralism, see generally, for example, Jonathan Culler, Structuralist Poetics: Structuralism, Linguistics and the Study of Literature (1975), which was published the same year as Kennedy's manuscript. 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." Kennedy, *supra* note 44, at xiv. For his other classic effort in this vein, see generally Duncan Kennedy, *The Structure of Blackstone's* Commentaries, 28 Buff. L. Rev. 205 (1979). *See also* Justin Desautels-Stein, The Jurisprudence of Style: A Structuralist History of American Pragmatism and Liberal Legal Thought 35-70 (2018) (reviewing structuralist approaches to legal theory).

repudiation of Horwitz's reductive functionalism.[53] The next year, in a classic article, Kennedy edged close to poststructuralism, calling for a "method of contradictions" in the study of legal consciousness.[54] He identified not how cognitive or discursive structures managed contradiction,[55] 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 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."[56] 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.[57] However, it does look like the antifunctionalist theory that Kennedy proposed reflected a certain compensatory reaction to political failure characteristic of an entire generational cohort.[58] Seeing the 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 result was an equally extreme position that, had it defined the legacy of critical legal studies as a whole, would entitle it to be rejected root and branch today in favor of starting again in another place. After all, reductive functionalism was at least a rudimentary attempt to relate law and society; Kennedy's disciples abandoned that project altogether.

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53. 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, *supra* note 44, at xxvii.

54. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1712-13 (1976).

55. *See, e.g.*, KENNEDY, *supra* note 44, at 14.

56. Kennedy, *supra* note 54, at 1712.

57. *Id.* (describing the method of contradiction as "pessimistic . . . even . . . defeatist").

58. *See generally* PHILIPP FELSCH, THE SUMMER OF THEORY: HISTORY OF A REBELLION, 1960-1990 (Tony Crawford trans., 2022) (2015) (exploring the fascination with theory from 1960-1990 in West Germany, with implications for elsewhere).

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.[59] 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 to think that law is often functionally underdetermined. Gordon started very persuasively by showing how, even before critical legal studies emerged, historians were undermining crude functionalism.[60] One response was to retreat to supposedly more sophisticated positions, but the results were "discouragingly ad hoc."[61] And critical legal studies had gone the furthest, showing 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."[62] These points were and are incredibly well taken. For historians, what is supposed to follow is charting how the underdeterminacy 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," which severed the study of law from a larger explanatory social theory, threw out the baby with the bathwater.[63] 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 . . . ."[64] The allusions to the aspirations for "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 excellent things—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 functional underdeterminacy is so prevalent.

I do not mean just that Gordon conceded so much to critiques of functionalism and took their critical radicalization as far as he could, so as to make

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59. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

60. *Id.* at 67-71.

61. *Id.* at 87; *see also id.* at 71-100 (describing functionalist historiography and its reductive tendencies).

62. *Id.* at 100.

63. *Id.* at 88; *see also id.* at 88-93 (criticizing attempts to understand law in isolation).

64. *Id.* at 101.

functionalism itself seem incredible. Rather, Gordon systematically obfuscated how much necessity there in fact is in social life, past and present, and therefore in the life of law. Domination means not getting to exploit underdeterminacy all that much or often, especially if you are a victim.

And then Gordon concluded with a flourish. The reason for pervasive functional underdeterminacy, he explained, was that "law is indeterminate at its core, in its inception, not just in its applications."[65] He added, in an unmistakable allusion to Kennedy, that "legal rules derive from structures of thought . . . that are fundamentally contradictory."[66] 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."[67] 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.[68]

Left for an unintegrated afterthought was the otherwise arresting suggestion that Kennedy's disciples did not "mean—although sometimes they sound as if they do—that there are never any predictable causal relations between legal forms and anything else."[69] Officially or unofficially, Gordon, invoking Kennedy, ditched functionalism altogether.

After Gordon routinized what he took from 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, liberal, or moderate—as the twin commitments that law is "constitutive" and "contingent."[70] Partial truths were elevated into research programs that did a great deal to postpone 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

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65. *Id.* at 114.

66. *Id.*

67. *Id.*

68. *Id.* at 116.

69. *Id.* at 125.

70. *See, e.g.*, Ariela J. Gross & Susanna L. Blumenthal, *Celebrating Bob Gordon's* Taming the Past, 70 STAN. L. REV. 1623, 1623 (2018) ("[I]t 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.").

stressed that law constitutes the social world and should be studied as such.[71] "[L]egal relations," Gordon observed, "to an important extent define the constitutive terms" of "any set of 'basic' social practices."[72] It is, of course, almost trivial to say so, once one adds "to an important extent." Yet Gordon's reclamation of law's constitutive significance exaggerated the important but episodic, occasional, and (often) superficial role of law in overall social relations.[73] Anyway, law cannot constitute society if, as Gordon held, the distinction between "law" and "society" is eroded in the first place.[74]

The other half-truth—far more important for these purposes—is that law is "contingent." Gordon's intervention launched a thousand ships that all discovered the continent where law could have been different because it is functionally underdetermined. And then the analysis stopped. Alternatives that held more promise had been "lost" as worse ones fortuitously gained the upper hand.[75] This or that legal order or outcome was "accidental" in its origins.[76]

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 underdeterminacy that results are aleatory or random. Underdeterminacy is not indeterminacy. In fact, some might worry that functional underdeterminacy itself is

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71. Gordon, *supra* note 59, at 102-09.

72. *Id.* at 103.

73. 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. For examples of such explorations of norms, see generally Ellickson, *supra* note 14; and Eric A. Posner, Law and Social Norms (2000).

74. Gordon, *supra* note 59, at 102, 107-08.

75. For an example of this sort of argument with respect to civil-rights laws, see generally Risa L. Goluboff, The Lost Promise of Civil Rights (2007).

76. *See generally* John Fabian Witt, The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law (2004) (tracing how happenstance developments in accident law led to foundational features of the modern American state). I am just trolling his book title, but for his own attempt to balance "contingency" and "inevitability," see generally John Fabian Witt, *Contingency, Immanence, and Inevitability in the Law of Accidents*, 1 J. Tort L., no. 2, 2007, art. 1. *Compare* Nate Holdren, Injury Impoverished: Workplace Accidents, Capitalism, and Law in the Progressive Era 175-217 (2020) (arguing that workers' compensation only legitimates a capitalist system that renders workers' injuries inevitable), *with* John Fabian Witt, *Radical Histories Versus Liberal Histories in Work Injury Law*, 60 Am. J. Legal Hist. 564, 564 (2020) (reviewing Holdren, *supra*) (responding in the antireductionist spirit of his mentor Robert W. Gordon to Nate Holdren's ostensibly too reductionist account of tort law's history).

incoherent. Isn't everything caused? Doesn't everything happen for some reason?[77] A radical theory of law needs to make room for freedom—which is always constituted among old or newly formed 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.[78] Stressing functional underdeterminacy 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 another. Gordon's 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—not in the least—is that those results could have been anything, or were "accidental" or "contingent," as if social relations were a series of rolls of the dice.[79]

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

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77. Unlike in other domains, and for better or worse, the critique of functionalism in law wasn't really about whether there are *other kinds of explanations than functional ones*. Analytic Marxists had one famous version of the discussion to this effect, evolutionary theorists another. For the classic interventions by analytic Marxists, see generally G.A. Cohen, *Functional Explanation: Reply to Elster*, 28 POL. STUD. 129 (1980). For an example of discussions by evolutionary theorists, see generally 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'Y BIOLOGICAL SCIS. 581 (1979).

78. 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, *supra* note 59, at 112. Both sound like excellent functional explanations to me, not "underdetermined" ones.

79. I am reliably informed that I once wrote that "human rights" arose contingently, but I did not mean it in this sense, or I take it back if I did. SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 225 (2010) ("Instead of turning to history to monumentalize human rights by rooting them deep in the past, it is much better to acknowledge how recent and contingent they really are."). 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'Y 127, 140-49 (2019) (interpreting Foucault's genealogical critique as offering potent possibilities for radical social change), *with* Andrew Sartori, *Genealogy, Critical Theory, History*, 7 CRITICAL HIST. STUD. 63, 63-74 (2020) (construing Foucault's genealogical critique as largely descriptive and uninterested in theorizing social change).

determination. And this was essentially the position that Unger 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 that 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.[80] 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 that 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.[81]

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."[82] But it was an anti-necessitarian *social theory*, conforming to the requirements of all imaginable social theories.[83] The details do not 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, on the one hand, and a cult of underdeterminacy that abjured explanation (not to mention radicalism itself), on the other.

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.[84] One was functionalism, "the thesis that law and legal doctrine reflect, confirm, and reshape the social divisions inherent in a type or stage of social organization."[85] But, in a nod to the kind of thing Gordon would shortly canonize, Unger noted that this approach "has been increasingly modified by the

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80. Roberto Mangabeira Unger, Knowledge and Politics 12-13 (1975).

81. Roberto Mangabeira Unger, Knowledge and Politics 337-41 (1984 ed.) (discussing this in the postscript to a newer edition of the book).

82. Unger, *supra* note 6, at 1 ("[*False Necessity*] offers a relentlessly anti-necessitarian view . . . .").

83. *Id.* (describing the theory as "an explanatory theory of society," which "generates a broad range of social and historical explanations" and "carries to extremes the thesis that everything in society is politics").

84. Unger, *supra* note 1, at 563 n.1.

85. *Id.*

awareness that institutional types or stages lack . . . cohesive and foreordained character."[86] 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 cultural history."[87] At this point, Unger was making nice, proposing to save what was worthwhile in these approaches while rejecting their extremism and irreconcilability.[88]

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 underdeterminacy. 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 of all other sectors of social life). When Marxist theorists of law express frustration with critical legal studies across the board, it is because critical legal studies is alleged to have discarded necessity altogether and enthroned "false contingency"[89] out of a horror of what Unger called false necessity.[90] 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 underdeterminacy 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

86. *Id.*

87. *Id.*

88. We know this because he caustically presents his approach as an alternative to those of Morton J. Horwitz and Kennedy in his own retrospective. Roberto Mangabeira Unger, The Critical Legal Studies Movement: Another Time, a Greater Task 26-30 (2015).

89. Susan Marks, *False Contingency*, 62 Current Legal Probs. 1, 1 (2009). Even Susan Marks acknowledges that "Unger is certainly aware of the problem of false contingency," since the whole point of his theory is "limits and pressures." *Id.* at 11. But she worries that "we are never invited or encouraged to scrutinize these, at least not in any sustained fashion." *Id.* at 11-12. I see what she means, but at worst, it would be a failure of exemplification and specificity.

90. Unger, *supra* note 6, at 1.

other hand, however, no higher-level order governs the history of these structures or determines their possible identities and limits.[91]

In short, the domination and oppression of social orders are real; their forms and paths are underdetermined. Unger repeated this mantra over and over.[92] If it is the only credible framework for a radical legal theory, we should repeat it too.

B. Interpretive Determinacy and Underdeterminacy

Law plays various functions, but no account of them can dispense with the cultural meaningfulness of all practices. And cultural meaning is also the terrain of what people call "ideology," which provides false legitimation for hierarchy or distracting obfuscation of it. The ideological role of law in the perpetuation of oppressive social orders remains of great significance even or especially now, and it is the authentic quarry of any "cultural study of law."[93]

While functional underdeterminacy 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 are any constraints in legal interpretation was probably the true "question that killed critical legal studies."[94] Ironically, no leading members even asked that question; instead, they posed the essential and outstanding question of how legal culture and meaning help both legitimate and obfuscate law's oppressions. But the answer has been postponed as critical legal studies became ensnared in the charge that the movement stood for the proposition that law is "indeterminate" rather than ideological.

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91. Unger, *supra* note 1, at 665.

92. I have privileged *The Critical Legal Studies Movement* as the first version of this theory. But the main exploration of it was in Roberto Mangabeira Unger, Social Theory: Its Situation and Its Task 1-17, 99-113 (1987).

93. Kahn, *supra* note 28, at 37.

94. This phrase is an allusion to Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 Law & Soc. Inquiry 779 (1992). Fischl himself blames the end of the movement on its failure to offer alternatives. *Id.* at 780 (recounting an exchange where Fischl suggested that if critical legal studies is, in fact, dead, its failure to "offer any alternative program" is what "did [it] in"). It is true that this was on the minds of some scholars who failed to do all of the reading. *See, e.g.*, Owen M. Fiss, *The Death of the Law*, 72 Cornell L. Rev. 1, 9-10 (1986) (providing an exasperated account). But it neither is 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.

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 that decision makers have within frames of higher norms (in Kelsen's case) or in penumbral spaces (in Hart's).[95] 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.[96] But it was not widely shared in the critical legal studies movement, to the extent it was enunciated at all.

There is something hilarious, in fact, about how central indeterminacy was to how that movement was attacked in its time, and there is something unfortunate about how central it is to how the movement has been remembered since.[97] 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 decision-making. But this preoccupation led Kennedy and his disciples to a radical theory not merely with a strikingly doctrinalist focus on judicial decision-making, but also with its own neoformalist schemes characteristic of high structuralism.[98]

If the debate that critical legal studies inadvertently sparked around legal interpretation and indeterminacy remains useful, for all its logorrhea, it is because any radical theory of law must have *something* to say about interpretive flexibility. And this account will need to be part of something like a theory of "ideology": exploring how law not only institutes and reproduces but also legitimates and

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95. Hans Kelsen, Introduction to the Problems of Legal Theory 77-91 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Oxford Univ. Press 1992) (1934); Hart, *supra* note 14, at 120-51.

96. Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. Chi. L. Rev. 462, 462 (1987). Lawrence B. 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). *See* Solum, *supra*, at 464 (citing Singer, *supra*). For various broader comments from the time, see generally Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Pa. L. Rev. 549 (1993); Ken Kress, *Legal Indeterminacy*, 77 Calif. L. Rev. 283 (1989); and Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 Quinnipiac L. Rev. 339 (1997).

97. *See, e.g.*, Syed, *supra* note 11, at 2 ("The indeterminacy critique is a confusion and red herring on all fronts.").

98. Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. Rev. 429, 471-85 (1987).

obfuscates social order, notwithstanding the self-evident flexibility of rule and doctrine. Critical legal studies placed novel and unprecedented focus on the need for a theory of law as ideology, but it never produced that theory. But here too, rejecting Horwitz's assumption of determinate law, and having helped Kennedy toward a strategy that invited charges of indeterminacy, Unger adopted the view that *prevalent underdeterminacy is enough* both as a general proposition about legal meaning 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 extralegal 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.[99] In doing so, the judges did not so much exploit the malleability of law as self-consciously change its content. To remove equitable constraints on contracts, for example, judges did not need prior norms to be underdeterminate enough to allow their work, let alone indeterminate; they just changed the norms.[100] As for how formalist theories of law arose to rationalize the results in the later nineteenth century, Horwitz did harbor and require 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 changes but also so that present judges would "mechanically" follow the new rules, without 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 legal 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." Kennedy was right to push away from false determinacy, as he certainly did. But contrary to his reputation, Kennedy did not really push for a theory of the radical indeterminacy of legal interpretation either. Indeed, the whole point of the cognitive or discursive structuralism of Kennedy's thought in his pivotal writings of the mid-1970s is constraint: people are hostage to the structures of consciousness or language they use, even to the point of losing their agency. Language speaks humanity,

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99. HORWITZ, *supra* note 39, at 1-31.

100. *Id.* at 161-73.

not the other way around.[101] 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, which are riven by specific contradictions between principles and counterprinciples such as altruism and individualism.[102] 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 became so associated with the belief in radical indeterminacy that it was not so clear after a certain point that it was not his view. Of course, Kennedy's long obsession with judicial decision-making, especially in the common-law tradition, had many facets. It led to a theory of freedom and constraint in adjudication that remains useful insofar as judicial behavior *in situ* remains a persistent obsession of legal academia.[103] No one would want to abandon the debunking of the false determinacy of much legal reasoning that critical legal studies, building on legal realism, revealed. When it comes to interpretation, the effective curriculum in law schools today just *is* critical legal studies—that rules and the precedents interpreting them are manipulable, and outcomes are not foreordained in many cases; they simply require enough 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, social functions (including ideological legitimation) are fulfilled in and through interpretation. Worse, Kennedy's contribution badly overstated the centrality of a theory of judicial decision-making, 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; it was quite another to see that fact as reflecting "fundamental contradiction" and to end the analysis there—without making it the prime

101. 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 (Mar. 27, 2023), https://lpeproject.org/blog/what-cls-meant-by-the-indeterminacy-thesis [https://perma.cc/RA6D-Y7SV]. 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, Carl Lisberger & Max Utzschneider, *Law on the Left: A Conversation with Duncan Kennedy*, 10 Unbound 1, 27 (2015).

102. Kennedy, *supra* note 54, at 1766-76.

103. *See, e.g.*, Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. Legal Educ. 518, 558-59 (1986); Duncan Kennedy, A Critique of Adjudication (Fin de Siècle) 3-5 (1997) [hereinafter Kennedy, A Critique].

agenda to account for what Horwitz and others (including Wythe Holt, who coined the term) called the "tilt" by means of which domination is indeed instituted, legitimated, and reproduced in and through the legal order.[104] 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 conflicts to irremediable existential diremption, or even 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 M. Balkin took this syndrome in his own original direction. Another onetime follower and former student of Kennedy, Balkin carefully and lucidly formalized his teacher's structuralist account of legal reasoning. He showed that legal reasoning is based on hierarchically arranged "nested oppositions" of principles and counterprinciples in different legal domains.[105] And, building on Kennedy's insistence that, at least "phenomenologically," adjudication involves felt constraint, Balkin suggested that one purpose of a theory of ideology should be to show how legal actors do *not* exploit available interpretive underdeterminacy.[106] In Balkin's later terminology, rooted in his early critical work, it is a comparatively rare event for a given legal possibility inherent in the materials to shift from "off the wall" to "on the wall."[107] Not merely as a reading of Kennedy's thought, but in building his own, Balkin was peremptory in rejecting any association with "radical indeterminacy" in interpretation.[108] But it was quite another step to follow Kennedy into a culturalist

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104. Wythe Holt, *Tilt*, 52 Geo. Wash. L. Rev. 280, 280 (1984); Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. Va. L. Rev. 173, 175-76 (1986).

105. See J.M. Balkin, *The Crystalline Structure of Legal Thought*, 39 Rutgers L. Rev. 1, 1 (1986), which credits Kennedy for "open[ing] [his] eyes to a new way of thinking about law"; and, especially impressively, J.M. Balkin, *Nested Oppositions*, 99 Yale L.J. 1669, 1684-85, 1685 n.49 (1990) [hereinafter Balkin, *Nested*] (reviewing John M. Ellis, Against Deconstruction (1989)). Another student-turned-colleague, David Kennedy, formalized structuralism in international-law debates. For Kennedy's formalization of structuralism in this context, see generally David Kennedy, International Legal Structures (1987). For commentary, see generally Samuel Moyn, *Knowledge and Politics in International Law*, 129 Harv. L. Rev. 2164 (2016) (reviewing David Kennedy, A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy (2016)).

106. J.M. Balkin, *Ideology as Constraint*, 43 Stan. L. Rev. 1133, 1166-67 (1991) (reviewing Andrew Altman, Critical Legal Studies: A Liberal Critique (1990)).

107. See, for example, Jack M. Balkin, *Deconstruction's Legal Career*, 27 Cardozo L. Rev. 719, 734-35 (2005); and later, Jack M. Balkin, Constitutional Redemption: Political Faith in an Unjust World 179-83 (2011).

108. On Kennedy, see, for example, Balkin, *supra* note 106, at 1156 n.88, which notes 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 19th and 20th centuries." In his own voice,

account of ideology that forsakes any attempt to trace law back to its place in social relations generally, in order to help explain outcomes.[109] If a theory is not about the occultation and rationalization of powerful social practices, it is not a theory of ideology.

2. *Beyond Indeterminacy*

In another irony, Unger has his share of blame in the rise of the indeterminacy meme. As Kennedy himself later stressed, Unger 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.[110] But Unger's 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 at all with their obsession with judicially evolved private-law doctrine. But his theory of judicial decision-making in *The Critical Legal Studies Movement* in the mid-1980s was altogether distinctive. Doctrine is mostly a 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, Unger was right that there are "principles and counterprinciples [to] be found in any body of law."[111] Yet while 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.[112] Unger's deviationist doctrine sought to coax future social alternatives from interpretive instability, taking

see, for example, Balkin, *Nested*, *supra* note 105, at 3, which reports that "the form of deconstructive analysis that I advocate does not involve any . . . claims of radical incoherence or indeterminacy."

109. *See* Balkin, *supra* note 28, at ix (describing his book about ideology as "about culture").

110. *See* Unger, *supra* note 80, at 88-100; Kennedy, A Critique, *supra* note 103, at 276.

111. Unger, *supra* note 1, at 578.

112. Balkin assimilated critical legal studies to his own rendition of deconstruction in legal theory. *See, e.g.*, J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 Yale L.J. 743, 763 n.60 (1987) (crediting Kennedy with anticipating deconstruction). But Jacques Derrida never worked with Unger's notion 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 occurred at the level of social relations (not consciousness or language alone), 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.

advantage of "disputes of legal doctrine [that] repeatedly threaten to escalate into struggles over the basic imaginative structure of social existence."[113]

Unger's examples of deviationist doctrine in antidiscrimination and contract law were once well known. The details don't matter much now; what matters 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 purpose for doctrine in the first place is the ideological stabilization that it affords contestable social orders. "Every stabilized social world," Unger wrote, "depends, for its serenity, upon the redefinition of power and preconception as legal right . . . ."[114]

This does not mean, however, that the rationalizing functions of law create a perfect system of belief and control, which forbids locating alternatives within the very carapace of legally rationalized domination. Nor was Unger's suggestion, as in familiar interpretive exercises—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.[115] Rather, the point was that there is no source of dominant alternatives in social life other than the radicalization of recessive alternatives—not all but some of which are to be found in existing legal materials.[116] At the same time, exploring doctrinal flexibility and envisioning steps that 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."[117]

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) blaming Kennedy for propagating it, Unger rejected it in withering terms. It wasn't 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."[118] Precisely because law can achieve some modicum of determinacy, "law can be something, and . . . it

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113. Unger, *supra* note 1, at 579.

114. *Id.* at 582.

115. *See id.* at 615-16 ("[T]he particular results for which I have argued could never be made to triumph through a doctrinal putsch.").

116. *Id.* at 581 ("We have no stake in finding a preestablished harmony between moral compulsions and institutional constraints.").

117. *Id.*

118. Roberto Mangabeira Unger, What Should Legal Analysis Become? 121 (1996).

matters what it is."[119] 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 own purposes and find both servants to interpret it 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 recognized as 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 no 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. 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 always radically indeterminate, or that anyone ever believed it was, has been that no one has built the full-scale account of legal interpretation that 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 account of how this works, both in general and in detail. Although critical legal studies is now associated with some false paths, it at least also provided the true one in the right direction toward this project.

III. 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. In recent years, accelerating after the financial crisis of 2007-08, it has become common sense to begin with the fateful character of political economy, which is often theorized intersectionally in relation to regimes of ableist, heteronormative, patriarchal, racialized, or colonial domination. Understandably so. It was long overdue, and it was surprising that it took so long to form a consensus that production, exchange, distribution, and consumption set oppressive terms for social life. Nonetheless, it is an extraordinary achievement of the law-and-political-economy movement to create a new space for that consensus, to take on board the gendering and racialization of

119. *Id.* at 122; *cf.* UNGER, *supra* note 88, at 26-28 (describing the misdirection of the radical indeterminacy thesis).

domination in and through markets, and to investigate how law helps entrench and perpetuate intersectional subordination.[120]

This Part assesses what, if anything, a reconstructed critical legal studies must abandon or modify in response. If it is not necessary to choose between the priority of functional and interpretive determinacy, on the one hand, and elements of flexibility and freedom, on the other, then this is also true when radical legal theory moves to organize itself around "political economy" in general or "neoliberalism" in particular, or when that political economy is conceived intersectionally as "social reproduction"[121] or "racial capitalism."[122] 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 the law-and-political-economy movement, even if its own relationship to critical legal studies remains unclear. It then turns to earlier and ongoing schools of legal thought that the current law-and-political-economy movement integrates so compellingly, including feminist legal theory and critical race theory, to show how they failed the theoretical project of searching for balance.

A. Law and Political Economy

The emergence of the law-and-political-economy movement testifies to the reemergence of the left in law schools—both at the level of the faculty it groups together and among students. Chapters have been formed and conferences have been held across the country and even around the world.[123] No one could disagree about what law and political economy represents practically: a breath of fresh air after a stale era of quiescence and stasis. Our focus falls on what its theory of law (and of law and political economy) actually is.

The manifesto of the incipient movement bracingly and correctly contests the hegemony of the law-and-economics movement in legal academia.[124] And it proposes a shift of optics so that legal scholarship can confront the presupposed realities that the law-and-economics movement obfuscates, as well as values

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120. See, canonically, Britton-Purdy et al., *supra* note 3, at 1823-27.

121. *See, e.g.*, Silvia Federici, Revolution at Point Zero: Housework, Reproduction, and Feminist Struggle 57-88 (2012).

122. *See* Cedric J. Robinson, Black Marxism: The Making of the Black Radical Tradition 9-28 (1983).

123. According to the movement's website, there are thirty-one groups, including one in England and two each in Canada and India. *See Student Groups*, LPE Project, https://lpeproject.org/student-groups [https://perma.cc/ZH89-P4V4].

124. *See* Britton-Purdy et al., *supra* note 3, at 1794-1818.

such as "equality" and "democracy" that those realities betray.[125] However, the manifesto does not aspire to explain law and political economy, or even the rise of neoliberalism, except intellectually within law schools through its depiction of the law-and-economics movement.[126]

According to its manifesto, law and political economy does not currently rest on a general social theory or even on more than the beginnings of a legal theory. The manifesto gestures toward a relatively simple form of functionalism. The point to make about law is that it "is perennially involved in creating and enforcing the terms of economic ordering."[127] But nothing is said about functional underdeterminacy. Nor does the malleability of rules and doctrines surrounding them figure. The incipient legal theory of the manifesto, which asserts a relationship between contemporary legal ordering and neoliberal political economy, comes 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.[128] Indeed, the manifesto most clearly situates itself in relation to legal realism—but minus the explanatory ambition in general and the sociological aspiration in particular.[129] At the same time, the manifesto 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."[130] But nothing is said about interpretive underdeterminacy: how neoliberalism wins out in and through the resolution of legal controversy on diverse scales.

These are not criticisms; rather, they suggest that theory cannot be avoided 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

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125. *Id.* at 1818-32.

126. Note in passing that it may be no fairer 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. *See* Unger, *supra* note 1, at 564 ("My version . . . is more proposal than description.").

127. Britton-Purdy et al., *supra* note 3, at 1833.

128. *See id.*

129. *See id.* at 1819 (citing ROBERT HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER (1952), among other references to legal realism sprinkled through the manifesto).

130. *Id.* at 1833.

of ideology.[131] It is worth noting that part of the setting for law and political economy 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 amid an exciting and multifarious progressive mobilization, not amid the defeat and failure of radical politics. Ultimately, however, law schools are for schooling and scholarship, the main purpose of which has to be teaching and theorizing why the world is the way it is and what the grounds are for changing it.

To date, the law-and-political-economy movement appears to postpone theory not because it is irrelevant, but out of indecision and, above all, strategy.[132] There are hard theoretical choices to make; they can divide rather than unite. And fledgling movements have to hold together. 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 and political change.[133] Remarkably, the strategy is paying off: though it has achieved nothing like the impact or notice critical legal studies once 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.[134]

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131. 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. *See* Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 Law & Contemp. Probs., no. 4, 2014, at 71, 71-73, 88-97. 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, the only legal academic in the United States to reframe his theory after 1989 around the problem of neoliberalism. *See* Roberto Mangabeira Unger, Democracy Realized: The Progressive Alternative 52-132 (1998).

132. Britton-Purdy et al., *supra* note 3, at 1791 ("We . . . offer some preliminary ideas about how we might best reconstruct legal scholarship to address the fundamental challenges of our time."); *see also* Jedediah Britton-Purdy, Amy Kapczynski & David Singh Grewal, *Law and Political Economy: Toward a Manifesto*, LPE Blog (Nov. 6, 2017), https://lpeproject.org/blog/law-and-political-economy-toward-a-manifesto [https://perma.cc/DT59-CZEN] (making a similar point in an earlier work by three of the four authors of Britton-Purdy et al., *supra* note 3).

133. 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.

134. *See, e.g.*, Harlon L. Dalton, *The Clouded Prism*, 22 Harv. C.R.-C.L. L. Rev. 435, 438-39 (1987) (comparing the "biography of the typical Crit" with the "biography of the black, brown, red, and yellow folks who have circled around CLS' door in fluctuating numbers for the last ten years, always invited in for tea, but rarely invited to stay for supper, lest we use the wrong intellectual fork"). For some narratives of critical race theory as a partial or total revolt from critical legal studies, see Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*,

From the start, the law-and-political-economy manifesto and other sources show that it refuses to conceptualize "political economy" nonintersectionally, which helps ward off the possibility of movement schism.[135] It is one of the most irresistible features of the law-and-political-economy movement—and hardly one adopted on strategic grounds, given the movement's principled refusal to privilege economic subordination as if gender or race did not matter. However, 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, I will reconsider 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).[136] 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 that, as I have argued, critical legal studies embodied. I do not intend 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 feminist legal theorist Catharine A. MacKinnon, who prioritized social and legal theory almost from the first. MacKinnon's version of feminist legal analysis was bold in that it took Marxism as a model theory of social order while replacing its account of class domination with a theory of sexual domination.[137] Her goal was not to develop a Marxist or even broader socialist feminism centered on social reproduction through the

26 LAW & SOC'Y REV. 697, 707-10 (1992); and Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 745-58 (1994).

135. Indeed, some founders of critical race theory are deeply involved in the law-and-political-economy movement. *See, e.g.*, Angela P. Harris & James J. Varellas III, *Introduction: Law and Political Economy in a Time of Accelerating Crisis*, 1 J.L. & POL. ECON. 1, 1-2, 9-10 (2020).

136. On rights, see PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 146-66 (1991).

137. *See generally* Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982) (developing an account of sexuality as power through analogy to Marxist class-based analysis).

gendering of labor, but rather to forge an account of patriarchy by itself.[138] One of the reasons that MacKinnon insisted on the sexual foundations of gender domination, indeed, was that she thought Marxism's attention to the gendering of political economy downplayed or overlooked the original rationale for gendering and why it persisted.[139] In turn, gender reductionism was predicated on sex reductionism.[140] MacKinnon's account explicitly mimicked Marxist accounts of class domination, with the mode of production replaced by sexuality as the driving force. The sexual exploitation of women by men replaced the economic exploitation of men by men. The very binary of women and men was artificially constructed for the sake of domination, much like classes under capitalism were.

It was lastingly illuminating that MacKinnon built a social theory based on 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 does not 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. Capitalism is modern, and many societies do not use race as an organizing principle. But no known society has lacked a 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.[141] 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. Vulgar Marxism was the social theory she both copied and replaced with a "vulgar" feminism. MacKinnon's crude functionalism was glaring from the start—a social explanation centering on the sexual interests of men as the ruling class—though it contained more truth than any comparable functionalism. When she mimicked Marxist functionalism, MacKinnon adopted a theory of law as an instrument and ideology of sexual

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138. *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.").

139. *See, e.g.*, *id.* at 526.

140. *See, e.g.*, *id.* at 533 ("[S]exuality is the linchpin of gender inequality.").

141. Catharine A. MacKinnon, *Does Sexuality Have a History?*, 30 MICH. Q. REV. 1, 5-6 (1991) ("[T]he actual practices of sex may look relatively 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."). But 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?

domination.[142] Law is superstructural and has obeyed the functional imperatives that brought it about.

MacKinnon did gesture 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."[143] But this was not because she affiliated with critical legal studies, with its emphasis on functional and interpretive underdeterminacy. Its perspectives, she wrote, were "less useful for those for whom law is all too determinate."[144] 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 — the same thing the law-and-political-economy movement risks doing today.

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."[145] Even making 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, as well as 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."[146] These suggestions remain both edgy and momentous even now, but they also have serious limits. And beyond his mechanisms, there was no general theory of how underdeterminate law works to achieve, 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

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142. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 Signs 635, 635-40 (1983).

143. *Id.* at 658.

144. Catharine A. MacKinnon, Toward a Feminist Theory of the State 290 n.18 (1989).

145. Derrick Bell, *Racial Realism*, 24 Conn. L. Rev. 363, 369 (1992).

146. Derrick Bell, Faces in the Bottom of the Well: The Permanence of Racism 12 (1992) ("Black people will never gain full equality in this country.").

clients, which 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.[147] That litigation, Bell argued, had been premised on a set of overly optimistic assumptions about the erosion of white supremacy and the predictability of its self-reproduction.[148] No wonder, then, that attempts to integrate schools inevitably caused backlash and sometimes worsened the situation of Black children. Equally important, Bell's depiction of the divergence of interests between litigators and Black clients fits with a convergence of interests between Black elites who often led the litigation and white liberals who often funded it.[149]

With roots in Black nationalism, Bell's contentions were not new.[150] But his application of them was potent because it coincided with the clear emerging limits of school desegregation in the aftermath of the noxious Supreme Court decision in *Milliken v. Bradley*,[151] in which the Justices ratified white flight and in effect abandoned integrationist ideals themselves. Bell's radicalism was to notice right away that the Court itself was returning to form in the entrenchment of racialized oppression, notwithstanding enduring beliefs in the beneficence not just of the higher judiciary, but also of the "rule of law" itself.[152]

However, 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.[153] They would require a showing of how law can and does function in the midst of alternative pathways to perpetuate or reinvent oppression. The Equal Protection Clause is a great example of a legally indeterminate (or at least endemically vague) provision that nonetheless continues to

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147. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470, 470-72 (1976). The piece is the first, for example, in Critical Race Theory: The Key Writings That Formed the Movement (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).

148. *See* Bell, *supra* note 147, at 478-80.

149. *Id.* at 490 n.59 (citing and depending more than is commonly understood on former NAACP colleague Leroy D. Clark's earlier but less conclusive writing on coopted litigating elites and self-serving whites); *see* Leroy D. Clark, *The Lawyer in the Civil Rights Movement—Catalytic Agent or Counter-Revolutionary?*, 19 Kan. L. Rev. 459, 459-73 (1971). Derrick 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., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 518-33 (1980).

150. *See, e.g.*, Gary Peller, *Race Consciousness*, 1990 Duke L.J. 758, 758-63.

151. 418 U.S. 717 (1974).

152. *See generally* Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1989) (discussing the law's return to racialized oppression).

153. *See, e.g.*, Frank B. Wilderson III, Afropessimism 14-15 (2020).

be interpreted compatibly with oppression, as it has been in American history since its enactment.[154] 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).[155]

Even today, Bell is exemplary to this extent: radicals of all stripes cannot fail to bypass the explanatory demands that critical legal studies imposed on 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.[156] All radicals are in the same boat. The desire to center or restore fateful necessity to accounts of social life, and therefore to law, could risk oversimplifying the very functionalism in explanation and stability in interpretation that critical legal studies struggled to balance with insights into underdeterminacy. Bell was right (and not merely about race) about the predictable reinvention of hierarchy over and over again. But such reinvention is never verbatim, and it continues to happen by way of the functional and interpretive underdeterminacy of law.

IV. MARXISM EVOLVES . . . INTO CRITICAL LEGAL STUDIES

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

154. 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 M. Fiss's racial-optimist attempt to refound Equal Protection Clause jurisprudence around antisubordination rather than anticlassification. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 157-58 (1976). It now seems that it was too early or late, if not outright wrong, to retain this optimism.

155. For one account of the fecundity of debate within critical race theory on (economic) determinism and how ideology works, see RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 30-40 (2d ed. 2012), which discusses "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 Gathii, *Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn from Each Other*, 67 UCLA L. REV. 1610, 1612 (2021).

156. 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, 139-40.

of examining law and legal reasoning under capitalism."[157] "The inattention to capital" in critical legal studies, another remarked, "renders its legacy inadequate for the purposes of guiding critical legal inquiry."[158]

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 U.S. 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 converted to his law school classmate Kennedy's camp of the movement.[159] It is an amazing fact that the most prominent explicit Marxism in the U.S. legal academy to date has been MacKinnon's mimed version in her feminist account of sexual domination.[160] 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, even 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 has never given up its fundamental commitment to how "capitalism" shapes modern lives with determining forcefulness. Marxism, like feminist legal theory, critical race theory, and especially law and political economy, reflects an imperative that has always defined social theory: to grasp the determinate reasons why law takes one form rather than others and sponsors some outcomes rather than others. At the same time, Marxism today is being

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157. Umut Özsu, *The Necessity of Contingency: Method and Marxism in International Law*, *in* CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES, *supra* note 9, at 60, 62.

158. Rob Hunter, *Critical Legal Studies and Marx's Critique: A Reappraisal*, 31 YALE J.L. & HUMANS. 389, 392 (2021).

159. *See* Mark Tushnet, *A Marxist Analysis of American Law*, 1 MARXIST PERSPS. 96, 103-07 (1978); Mark Tushnet, *Duncan Kennedy as, Yes, Mentor*, 10 UNBOUND 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 V. Tushnet, *Marxism as Metaphor*, 68 CORNELL L. REV. 281, 287 (1983) (reviewing HUGH COLLINS, MARXISM AND LAW (1982)) (reflecting a departure from Marxist premises); Mark Tushnet, *Is There a Marxist Theory of Law?*, 26 NOMOS 171, 184-85 (1983) (same). For the best reflection on this material, see generally 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.

160. *See supra* Section III.B.

thoroughly revised to accommodate once-dissident perspectives within and outside the tradition that target intersectional and multiform oppression for analysis and critique.[161] But the question remains how to fulfill its explanatory imperatives in light of functional and interpretive underdeterminacy.

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 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 underdeterminacy, as if scapegoating critical legal studies could ever complete its account.

Like law and political economy, neo-Marxist legal theories can return to 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,[162] and it seems that current Marxists in legal theory are alive to both functional and interpretive underdeterminacy. But if they sternly reject the abandonment of the explanation of the making, rationalization, stabilization, or transformation of social order, while framing Marxism as capable of meeting the challenge of underdeterminacy, then Marxists are working within the best schemes of critical legal studies.[163]

For these purposes, it doesn't matter much 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 it helped frame the problem of ideology. A generation ago, G.A. Cohen volunteered to attempt to salvage the Second International's Marxism, including its

161. *See, e.g.*, FEDERICI, *supra* note 121, at 19-23; ROBINSON, *supra* note 122, at 287-91.

162. *See, e.g.*, Edward Baring, *Who Are You Calling Vulgar?: Lukács, Kautsky, and the Beginnings of "Western Marxism,"* 35 RETHINKING MARXISM 467, 471-72 (2023).

163. 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 the interpretive underdeterminacy of law. For one recent rendition, see ZOE ADAMS, LABOUR AND THE WAGE: A CRITICAL PERSPECTIVE 43-56 (2020).

reduction of law "uncontroversially" to superstructure.[164] Today's Marxism looks very different. It is not just the now-commonplace rejection of any distinction between base and superstructure.[165] There is a case to be made that, in his talk of the "relative autonomy" of law, Kennedy intended to participate in the evolution of Marxist legal theory, merely of a nonreductionist kind.[166] Regardless of whether this is true, it is remarkable how Marxist legal theory today often embraces the functional and interpretive underdeterminacy of law, as two brief examples show.

Umut Özsu, a leading Marxist legal theorist, contends that Marx himself believed in contingent outcomes. A "sensitivity to contingency is not limited to Marx," he adds, "but is rather a distinctive feature of the Marxist tradition."[167] Far from rejecting what I have been calling functional underdeterminacy, 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."[168] 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.

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164. G.A. Cohen, *Reply to Elster on "Marxism, Functionalism, and Game Theory*," 11 Theory & Soc'y 483, 485 (1982); *see also* G.A. Cohen, Karl Marx's Theory of History: A Defence 216-48 (1978) (endorsing base/superstructure theory).

165. The most popular cite here would be Ellen Meiksins Wood, Democracy Against Capitalism: Renewing Historical Materialism 49-75 (1995). *See also* Nate Holdren & Rob Hunter, *No Bases, No Superstructures: Against Legal Economism*, Legal Form (Jan. 15, 2020), https://legalform.blog/2020/01/15/no-bases-no-superstructures-against-legal-economism-nate-holdren-and-rob-hunter [https://perma.cc/SAB7-8HA5] (describing different "broad approaches to thinking critically about the law and state," only one of which has the base/superstructure framework).

166. Here the crucial event was the publication of Nicos Poulantzas's writings. *See, e.g.*, Nicos Poulantzas, *The Problem of the Capitalist State*, 58 New Left Rev. 67 (1969); Nicos Poulantzas, Political Power and Social Classes (Timothy O'Hagan trans., NLB 2d impression 1975) (1968). Though not cited by Kennedy, Poulantzas made the idea of the "relative autonomy" of the juridical and the state famous, abetted by Louis Althusser's theory of ideological state apparatuses. *See also* Isaac D. Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 Law & Soc'y Rev. 571, 571 (1977) (exploring the relative autonomy of the law and its antireductionist consequences).

167. Özsu, *supra* note 157, at 61.

168. *Id.* at 63.

In a notable recent book, Ntina Tzouvala incorporates interpretive indeterminacy into a Marxist analytic.[169] 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.[170] Much like Hans Kelsen's account of norm generation and law application as framed "indeterminacy,"[171] Tzouvala gives that concept far more of a role than most critical legal studies proponents ever did. 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, she says.[172] More generally, she seeks 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.[173]

Finally, Marxists and post-Marxists inside and outside legal theory continue to struggle with a theory of ideology, which requires complex accounts that can register how the mystification, rationalization, and stabilization of order work.[174] In these traditions, avoiding culturalism and idealism remains crucial for explaining how ideology renders the totality of social practices more justifiable, less transparent, or both. However, 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 in general.

To a remarkable extent, in short, Marxism has *become* critical legal studies.[175] The contention does not simply end in virtue of this fact, for Marxists legitimately demand an understanding of what precisely covertly Marxist 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

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169. Ntina Tzouvala, Capitalism as Civilisation: A History of International Law 16 (2020) [hereinafter Tzouvala, Capitalism as Civilisation] (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, 315 (2022) ("I am on the record arguing that Marxists can and should grapple with legal indeterminacy . . . .").

170. Tzouvala, Capitalism as Civilisation, *supra* note 169, at 16.

171. Kelsen, *supra* note 95, at 77-89.

172. Tzouvala, Capitalism as Civilisation, *supra* note 169, at 16.

173. *See* Ioannis Kampourakis, *The Standard of Civilisation: Between Legal Indeterminacy and Political Economy*, 14 Transnat'l Legal Theory 90, 93 (2023) (reviewing Tzouvala, Capitalism as Civilisation, *supra* note 169).

174. For my favorite example, see Claude Lefort, The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism 181-237 (John B. Thompson ed., 1986).

175. One response to this claim is that critical legal studies became *Western* Marxism—which, as Edward Baring recently has written, was always defined against vulgar explanation—and inherits its opportunities and problems alike. Baring, *supra* note 162, at 471-72.

engaged in a self-conscious debate about what to ditch from Marx himself, rather than just 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 in 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.[176] But even here, there is common ground.

Unger did not want to abandon social explanation or call out domination in and through markets or neoliberalism. Far from it.[177] He did believe that challenging certain 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 over that conclusion than about the impulses that led Unger to it.[178]

Even for Marxists today, "capitalism" is not a take-it-or-leave-it system to be kept or replaced, but rather an already-ramshackle construction characterized by meaningfully different forms of institutionalization and reproduction, both legal and nonlegal. This variation could even lead one to conclude that there is "no such thing as capitalism."[179] But this conclusion couldn't mean that there is no such thing as the institution of social order, with all the domination and oppression such order characteristically involves. If we agree that 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.

The main point is that reconstructing Marxism requires the integration of critical legal studies, as has been reconstructed in these pages. Or, more generously put, critical legal studies and Marxism must converge, perhaps in a

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176. *See* UNGER, *supra* note 92, at 87-120.

177. *See generally* ROBERTO MANGABEIRA UNGER, PLASTICITY INTO POWER: COMPARATIVE-HISTORICAL STUDIES ON THE INSTITUTIONAL CONDITIONS OF ECONOMIC AND MILITARY SUCCESS (1987) (offering economic and military histories attempting to illustrate the balance of determinacy and freedom).

178. *See id.* at 1 (criticizing Marxist explanations).

179. 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).

different guise than either one has assumed so far on its own. That new theory would intensify Marxism'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 insights of critical legal studies 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.

CONCLUSION

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

Legal orders 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 unshackling 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.