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CLS AND MARXISM: A HISTORY OF AN AFFAIR

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In the 1857 *Introduction* Marx said: the concrete is a synthesis of many determinations. We might paraphrase him and say: men in the concrete sense are determined by a synthesis of the many determinations of the relations in which they are held and to which they are parties.

Louis Althusser, Essays in Self-Criticism (1976), p. 205

It is possible that another tradition may have had a greater influence on the development of CLS than Marxism, though, I must say, I find that hard to believe. Still, one must acknowledge this possibility, if only because so much as yet remains unknown about the early history of CLS. To go back to the epigraph: we do not have enough information even to *guess* how many of these multiple determinations which Althusser mentions there had been behind that history to begin with.

Of course, one could always respond that '[f]or Marxism, the explanation of any phenomenon ... in the last instance [will always be] internal: it is the internal "contradiction" which is the "motor".'

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The external circumstances are active: but [only] “through” the internal contradiction which they over-determine.¹ The internal contradiction that determined the history of CLS’s relationship with Marxism, it is commonly believed, sprang from an irreconcilable tension between the ‘what-I-want’ and the ‘what-I-know-to-be-true’ of the first-generation CLS scholars, *viz.*: their collective politico-ethical commitment to a softened version of Marxist socio-theoretic analysis (a.k.a. revisionist Marxism) and their highly nuanced understanding of the indeterminacy thesis (a.k.a. the linguistic turn-version of rule scepticism).

Much as it has a lot to recommend it (at first glance), this version of events seems to me entirely unconvincing. What I would replace it with, however, I am afraid I do not (yet?) know.

The vast majority of CLS histories that are available today fall by and large into two main categories:² (i) moderately personalised semi-autobiographical accounts written over the years by the movement’s leading figures and their associates;³ and (ii) decidedly uncomplimentary critical reviews

¹ Louis Althusser, *Essay in Self-Criticism* (trans. by Graham Lock; NLB, 1976) 80 n.2.

² For rare examples of the ‘third way’, see Ugo Mattei and Anna di Robilant, ‘The Art and Science of Critical Legal Scholarship: Postmodernism and International Style in the Legal Architecture of Europe’ (2001) 75 *Tulane Law Review* 1053; Pierre Schlag, ‘US CLS’ (1999) 10 *Law & Critique* 199; and Laura Kalman, *The Strange Career of Legal Liberalism* (Yale, 1996) 82-6.

³ For typical illustrations, see Duncan Kennedy, ‘Afterword’, in Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy* (NYU Press, 2004) 202; Jeremy Paul, ‘CLS 2001’ (2001) 22 *Cardozo Law Review* 701; Mark Tushnet, ‘Critical Legal Studies: A Political History’ (1991) 100 *Yale Law Journal* 1515; and John Henry Schlegel, ‘Notes Towards an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies’ (1984) 36 *Stanford Law Review* 391. NB: I am not really sure what to make of Peter Gabel, ‘Critical Legal Studies as a Spiritual Practice’ (2009) 36 *Pepperdine Law Review* 515.

written about the movement and its discursive ‘footprint’ by its direct ideological competitors.⁴ From a basic historiographic point of view, the value of the former seems fundamentally diminished because of the unavoidable suspicions raised with regard to their possible motivations; of the latter, because of the unfortunate failure, exhibited so persistently from one case to another, to confront the question of historical methodology with any degree of seriousness or coherence: just what exactly does one assume one ought to be writing about when one purports to illuminate the evolution of a legal movement, school, or tradition?⁵

(Before I progress any further, let me note this: it has been quite common among the movement’s critics to rely on Roberto Unger’s legendary 1983 essay⁶ as the de facto definitive guide to, or the final answer on, ‘what CLS really stands for’.⁷ My opposition to this practice, as can be inferred from my argument below, is motivated not by any qualms about essentializing/over-homogenizing the ‘CLS position’, but rather by my deep scepticism about this particular choice of the starting platform for doing so. Anyone familiar with the CLS literature will know, of course, how entirely mistaken it is to consider that article as representative of anything other than itself. Any

⁴ For a smattering of variously intentioned examples from this category, see E. Dana Neacsu, ‘CLS Stands for Critical Legal Studies, If Anyone Remembers’ (2000) 8 *Journal of Law & Policy* 415; Stephen Presser and Jamil Zainaldin, *Law and Jurisprudence in American History* 946-1005 (West Publishers, 4th edn 2000); Neil Duxbury, *Patterns of American Jurisprudence* (Oxford University Press, 1995); Peter Goodrich, ‘Sleeping with the Enemy: An Essay on the Politics of Critical Legal Studies in America’ (1993) 68 *NYU Law Review* 389; Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton University Press, 1990); and Harlon Dalton, ‘The Coloured Prism’ (1987) 22 *Harvard Civil Right and Civil Liberties Review* 435.

⁵ To be fair, it has not been, normally, the immediate aspiration of CLS’s critics to provide a coherent historical exposition of the movement’s evolution. For a brief overview of the basic structure of aspirations shared by CLS’s typical critic, see Richard Michael Fischl, ‘The Question that Killed Critical Legal Studies’ (1992) 17 *Law & Social Inquiry* 779.

⁶ Roberto Mangabeira Unger, ‘The Critical Legal Studies Movement’ (1983) 96 *Harvard Law Review* 561.

⁷ See, e.g., J. M. Finnis, ‘On “The Critical Legal Studies Movement”’ (1985) 30 *American Journal of Jurisprudence* 21.

possibility of using it as the window into the intellectual history of CLS has, therefore, been completely discounted for the purposes of the present argument.)

The basic account of CLS's relationship with Marxism *adopted within the movement itself*⁸ for the most part has tended to present it as an outcome of three main factors. Everything that needs to be known about why and how the relationship between CLS and Marxism has turned out the way that it did, goes the implicit assumption, can be traced down to the convergence of these three events: (i) the irreversible decline of the intellectual and institutional hegemony of the Legal Process school through the late 1960s and early 1970s; (ii) a Lyotardian-style loss of faith in all traditional meta-narratives that swept through the intellectually progressive circles in the US academia in the early to mid-1970s; and (iii) the gradual popularization within the same institutional context of an idea, so vividly captured later in Alvin Gouldner's *The Two Marxisms*,⁹ that throughout its history the theoretical organisation of the Marxist tradition in the West has been defined by a deep-structural division between the so-called 'Scientific Marxism' strand, a rigid, ultra-dogmatic theory of historical determinism, and the far more open-minded and intellectually sophisticated 'Critical Marxism' strand.¹⁰

Brought to the surface, the implicit argument/storyline seems to look something as follows:

⁸ I am not going to discuss here the views offered on this subject by the movement's critics. Virtually everything they have had to say on this front is extremely mean-spirited and, frankly, not very intelligent. For one of the more moderate but still very characteristic examples, see Phillip Johnson, 'Do You Sincerely Want to Be Radical?' (1984) 36 *Stanford Law Review* 247.

⁹ Alvin Gouldner, *The Two Marxisms: Contradictions and Anomalies in the Development of Theory* (Seabury Press, 1980).

¹⁰ For a standard CLS-ian elaboration of this thesis, see Schlegel, *supra* n.3, 393 n.9. For a more sceptical take on the whole idea of separating Marxism as science from Marxism as critique, compare Göran Therborn, 'Dialectics of Modernity: On Critical Theory and the Legacy of Twentieth-Century Marxism' (1996) 215 *New Left Review* 59, 62.

- (1) The sudden ideological void brought into the US legal academia by the early 1970s by the rapid falling-off of the Legal Process school made it possible for the first time in more than two generations that a whole set of new theoretical enterprises could be launched and brought to fruition not only at those sites and locales which would be conventionally regarded as part of the academic-institutional periphery, where the average levels of theoretico-entrepreneurial capital historically would have been rather modest, but also at the traditional centres of legal-academic power, like Harvard and Yale, where both the levels of theoretico-entrepreneurial capital and the general capacity for bold theoretical experimentation historically remained very high.

- (2) The Lyotardian-style loss of faith that started to spread across the broader academic scene over more or less the same timeframe, coupled with the general ideological exigencies of the Cold War, made it highly unlikely, however, that any such new enterprises could organise themselves as an extension of the traditional Marxist-theoretical project. Even if the general sense at the time may have persisted that ‘the central position to which all theories of knowledge [must] respond’ was Marxism,¹¹ as a matter of practical academic reality Marxism remained the ultimate slur word. ‘Even in the most liberal parts of the academic legal world, Marx meant Lenin; Lenin meant Stalin; Stalin meant the purges and gulags.’¹²

- (3) The sudden realisation against this background that the Marxist tradition consisted, in fact, of two mutually irreducible but fundamentally distinct components, only one of which, furthermore, had come to be associated in the popular consciousness with the label ‘Marxism’, marked in this regard a fundamental breaking point. In the first place, it helped precipitate the recognition that, under certain circumstances, the Marxist angle could still be kept open and, if need be, actively explored; in the second place, it also hinted at the general

¹¹ Mark Tushnet, ‘Legal Scholarship: Its Causes and Cure’ (1981) 90 *Yale Law Journal* 1205, 1220.

¹² John Henry Schlegel, ‘CLS Wasn’t Killed by a Question’ (2007) 58 *Alabama Law Review* 967, 972.

strategy for achieving that goal. The key was simply to stick to Critical Marxism, all the while vigorously publicizing the fact that ‘Marxism as such’ was synonymous only with Scientific Marxism.¹³ If executed successfully, this strategy would enable one, in effect, both to have one’s pie (borrow liberally from various Marxist theoretical toolkits)¹⁴ and eat it at the same time (publicly denounce Marxism as an intellectually vulgar and politically indefensible school of thought).¹⁵ All that would be necessary for this plan to become practically feasible would be to find a sufficiently plausible connection with another, ideologically safer intellectual tradition and claim one’s genealogical lineage in public as descended from that.

And thus it came to be that at some point in the mid-1970s a new scholarly movement came into existence at the very centre of the US legal-academic scene that decided to cast its lot with the Critical Marxism tradition of Lukacs, Korsch, and the Frankfurt School, all the while systematically¹⁶ removing what would be typically regarded at the time as the more egregious symptoms of a Marxist lineage and examples of Marxist lexicon from its discourse,¹⁷ declaring instead its official theoretical

¹³ An alternative strategy sometimes explored was to rehearse the kind of disclaimers introduced in Karl Klare, ‘Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941’ (1978) 62 *Minnesota Law Review* 265, 269 n.13.

¹⁴ Cf. Kennedy(n 3) 203 (describing the importance of ‘what we called the Marx Study Group (not the *Marxist* study group)’ [in which] we read and passionately discussed a good deal of Marx’s work and that of the “critical” or Western European Marxist current of the twentieth century’ – emphasis in the original).

¹⁵ *Ibid*, 208 (describing Marxists as ‘people who ... thought economy + class was the one and only key’ and ‘CLS [as] people [who] did not’).

¹⁶ Well, maybe not always very systematically. See, e.g., Karl Klare, ‘Contracts Jurisprudence and the First-Year Casebook’ (1979) 54 *NYU Law Review* 876, 878-9 n.10.

¹⁷ This pattern briefly changed in the late 70s, in particular after the movement had started expanding and admitted (recruited) into its fold a smattering of radical law-and-society types and various fellow-travelling out-and-proud Marxists. This phase, however, did not last very long, though it has certainly left a few interesting

genealogy to descend from a loose combination of French structuralism, Sartrean existentialism, German philosophy (a stand-in for Critical Marxism), and American legal realism à la Robert Hale and Karl Llewellyn. Enter Critical Legal Studies.

As the Reagan era advanced, the need to distance CLS from the M-word grew progressively more urgent. Motivated in part by the desire to protect themselves against the neo-McCarthyite backlashes of the mid-1980s, in part by the wish to entrench even further the Gouldnerian dichotomy, the movement's members took to producing ever more elaborate and categorical disclaimers designed to dispel any potential illusions about the movement's hidden Marxist sympathies.¹⁸ Statements such as the following became increasingly common:

Many of us do work in an intellectual tradition in which Marx plays an important role; indeed, his core insight that human belief systems are social constructs is the starting point for much modern social theory. But that hardly makes us Marxists. Indeed, to the extent that that reckless charge suggests that we favor totalitarianism and/or thought control, it describes a set of ideological commitments that are the polar opposite of those held by CLS.¹⁹

traces in the CLS bibliography. See, e.g., entries for 'David Greenberg' and 'Gary Young' in Duncan Kennedy and Karl Klare, 'A Bibliography of Critical Legal Studies' (1984) 94 *Yale Law Journal* 461.

¹⁸ Compare, for example, how much space comparatively was allocated to developing the 'CLS is not really Marxism'-theme in Peter Gabel, 'Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory' (1977) 61 *Minnesota Law Review* 601 and in James Boyle, 'The Politics of Reason: Critical Theory and Local Social Thought' (1985) 133 *University of Pennsylvania Law Review* 685.

¹⁹ Richard Michael Fischl, 'Some Realism about Critical Legal Studies' (1987) 41 *University of Miami Law Review* 505, 530 n.82. See also Guyora Binder, 'On Critical Legal Studies as Guerilla Warfare' (1987) 76 *Georgetown Law Journal* 1, 12 (noting the movement members' strategic decision to '[seek] respectability by

To be sure, to a large extent all this *was* true. By the mid-1980s, the infusion of French structuralism, feminist criticism, and Foucault coupled with the broad-church approach encouraged by the Critical Marxist culture of theoretical experimentation resulted in the emergence of such a deeply eclectic intellectual arena that the proposition ‘CLS has nothing to do with Marxism’ really did begin to seem accurate.²⁰ Against such a background, the rise of a new trend of intense disavowal was nothing if not perfectly logical. The old Gouldnerian ruse no longer seemed either relevant or attractive; the new Red Hunt, on the other hand, showed no signs of abating.²¹

And then the Cold War ended. The idea of acknowledging oneself to be an inheritor of any kind of Marxist legacy from being politically dangerous and unfashionable quickly turned into something risible and pathetic. The Berlin Wall came down and its bricks and mortar crushed any need to continue with the Gouldnerian agenda: a new era called for new theoretical solutions and new theoretical language games. But just as the sun of academic relevance began to descend over CLS’s illicit affair with Marxism, so too did it begin to descend over CLS itself. There was, in all

maintaining a cautious distance from Marxism’); Alan Freeman, ‘Truth and Mystification in Legal Scholarship’ (1981) 90 *Yale Law Journal* 1229 (noting the typical leftist law scholar’s deep-seated ‘fear of being too closely associated with the Marxist tradition ... and thereby denounced, silenced, and denied academic credibility’).

²⁰ For most CLS scholars at least: there were, as ever, some notable exceptions. See, e.g., Alan Freeman and Elizabeth Mensch, ‘The Public-Private Distinction in American Law and Life’ (1987) 36 *Buffalo Law Review* 237 (discussing openly and at length the enduring value of Marx’s analysis for the understanding of the modern legal system; still, note the Marx that is cited so approvingly here is, quite unmistakably, the Marx of the Critical Marxism tradition).

²¹ For a window into the spirit of that time, see Paul Carrington, ‘Of Law and the River’ (1984) 34 *Journal of Legal Education* 222; Peter Martin et al., ‘“Of Law and the River”, and of Nihilism and Academic Freedom’ (1985) 35 *Journal of Legal Education* 1; Jerry Frug, ‘McCarthyism and Critical Legal Studies’ (1987) 22 *Harvard Civil Rights and Civil Liberties Law Review* 665. See also Terry Eastland, ‘Radicals in the Law Schools’, *The Wall Street Journal*, 10 January 1986; Editorial, ‘The Veritas about Harvard’, *The Wall Street Journal*, 3 September 1986.

probability, no causal connection between the two events, and yet the fact that the two trajectories had converged so clearly still seemed rather striking. As the last of the first generation crits climbed aboard the train of Marxism-disavowal, the annual CLS conferences plumbed the depths of such intense acrimony²² that even in the minds of the most incorrigible optimists there was left now no doubt: whatever might be its broader intellectual legacy for the future, the CLS project as a movement was now ‘dead, dead, dead’.²³

I am not sure to what extent this version of events – I hesitate to call it the received wisdom on the subject of CLS’s relationship with Marxism because, quite clearly, a lot of CLS members would be inclined to dispute it – can be considered sufficiently accurate. I am certainly aware that there exist many other ways to retell the story of CLS’s affair with Marxism, some of which would be drawn to deploy narrative templates that seem remarkably similar to those typically used to describe the history of the (alleged) rise and fall of the American New Left. It is not clear to me what might be the reason for this kind of similarity, though sometimes, of course, one must accept that a cigar is only a cigar.

I am also aware that, given the current disciplinary trends in critical legal historiography, the greatest pressure today on anyone attempting to write a history of CLS from a crit-style perspective would be to try to produce it as either a history of ideas or a history of people: a foray into Hegelo-Skinnerian idealism versus a spot of good old-fashioned ‘ancestor fetishism’.²⁴ I am not sure, furthermore, all things considered, that it would be wise to pursue either of these avenues.

²² Costas Douzinas, ‘A Short History of the British Critical Legal Conference, or the Responsibility of the Critic’ (2014) 25 *Law & Critique* 187, 193.

²³ The remark was allegedly made by Kennedy in 1996. See Robert Ellickson, ‘Trends in Legal Scholarship: A Statistical Study’ (2000) 29 *Journal of Legal Studies* 517, 525 n.21.

²⁴ For the concept of writing legal history as a form of ‘ancestor fetishism’, see John Henry Schlegel, ‘A Tasty Tidbit’ (1993) 41 *Buffalo Law Review* 1045, 1069.

To wit, if one were to take the first route, the most common solution in the present case would be to develop a narrative whose basic trajectory would extend from the idea that ‘for CLS, legal reasoning was always inherently contradictory and indeterminate’ to the claim that ‘CLS (mis)understood Marxism as being all about economic determinism’, to the argument that ‘the dominant attitude towards law adopted in CLS was, essentially, a combination of nihilism and an ill-defined culture of political activism, neither of which really gelled that well with a Marxist view of (social) life’.²⁵

Taking the second route, by contrast, would most likely entail trying to recast the whole history of CLS’s relationship with Marxism as a quasi-supestructural outgrowth of the various networks of friendship, rivalry, and dependence created at the time among the movement’s key participants. On closer inspection, at least two such networks would seem to merit special attention right from the outset: the first one connecting Duncan Kennedy, David Trubek, and Mark Tushnet; the second connecting Kennedy, Roberto Unger, Morton Horwitz, and Karl Klare.²⁶ Depending on how

²⁵ Interestingly, one finds traces of this kind of ideas-centric methodological sensibility even in those accounts written from a purportedly Marxist-theoretic perspective. See, typically, Neacsu (n 4). For a non-Marxist example of such kind of ideas-centrism in CLS-ology, see Allan Hutchinson and Patrick Monahan, ‘Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought’ (1984) 36 *Stanford Law Review* 199.

²⁶ The first network reflects the early scene that developed at Yale Law School between 1967 and 1972 (Tushnet and Kennedy were Trubek’s students). The second network reflects the scene that was created at Harvard between 1972 and 1977 (the first CLS conference took place in 1977). NB: Trubek, alongside a few other proto-CLSers, was viciously denied tenure at Yale in the early 70s. This seems to have influenced Kennedy’s decision (a) to turn to Harvard; (b) to position himself, at least at the beginning, primarily as a legal historian; and (c) to downplay his interest in any form of Marxist thought on account of it being potentially prejudicial to his career prospects. While neither Klare nor Horwitz had the same doubts about the feasibility of a Marxist agenda, Unger apparently resented the very notion of it. This, along with Klare’s long-standing concerns about Marxism’s ongoing theoretical crisis – a fact which Unger simply took for granted – inevitably impacted on the readiness of the non-Yale segment of the second group to put up any kind of resistance against Kennedy’s proto-Gouldnerian

one felt about the relative importance of the second generation of CLS scholars, the next logical step then would be to add a few comments about the several cascades of inter-generational tensions that put these two groups on a collision course against the various confederations of femcrits, critical race scholars, linguistic turn postmodernists, and so on and so forth. Importantly, though, regardless of which of these inter-generational axes one would choose to concentrate on, the central connecting point in the story at all times would remain the figure of Duncan Kennedy – for no other reason that the vast majority of these second-generation crits would have been either his former students or junior associates.

Looking at things from this angle, then, it seems that approaching the question of CLS's relationship with Marxism from either of these perspectives runs the very obvious risk of reducing the enterprise of legal historiography to something that it probably should not want to become. In the first case, it effectively threatens to turn the process of writing CLS history into an exercise in neo-Platonic ideational fetishism; in the second case, to convert it into an extended political biography of Duncan

agenda (inspired as it was also by his deep fondness for Piaget, Sartre, and Levi-Strauss). Add to the mix Trubek's Weberian-inspired scepticism about the main tenets of orthodox Marxism, and the eventual endorsement of the Gouldnerian turn in early CLS becomes a done deal. Left on their own Tushnet and Horwitz, it seems, still fought the Scientific Marxism corner well into the late 70s. But the numbers were not on their side, and, at least for Horwitz, Kennedy, as Schlegel reminds us, was always just around the corner, ever ready to seduce and convert. By the early 1980s, it seems, he succeeded. See, generally, Laura Kalman, *Yale Law School and the Sixties* (University of North Carolina Press, 2006) (setting out in great detail the background of both the first and the second networks); Schlegel (n 24) 1048 and 1051 (speculating about Kennedy's role in Horwitz's decision to abandon Scientific Marxism); Schlegel (n 3) 392 (characterising Kennedy as having something of a 'revivalist preacher' about him); Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Beard Books, 2006) xxvi-xxxi and xxxix-xl (for Kennedy's own version of events on his arrival at Harvard and his intellectual relationship with Horwitz). Cf. Louis Schwarz, 'With Gun and Camera through Dark CLS-Land' (1984) 36 *Stanford Law Review* 413, 415-8.

Kennedy.²⁷ Whatever its appeal may be otherwise, neither option, from the methodological point of view, is, of course, very satisfactory. And yet, given the current state of legal-historical knowledge about CLS, could one really hope for anything more ambitious?

A difficult question, to be sure – I don't think even Kennedy himself would be able to answer it well – and so rather than trying to tackle it in one way or another, let me offer instead, in the remainder of this essay, a few brief remarks relating to a slightly different, though ultimately closely related, topic: what sort of critical-theoretical legacy have the first generation CLS scholars left behind that could be put today in the service of the newly revived Marxist legal tradition?

The first thing that needs to be noted about CLS discussions of Marxism is that a very considerable part of what CLS scholars have had to say about the Marxist legal tradition (MLT) seems essentially useless from the point of view a Marxist legal scholar.

The reason for this lies partly in the fact that often what has tended to be presented as 'Marxism' in CLS was actually something of a caricature,²⁸ which is, of course, perfectly

²⁷ For a very conservative listing of *some* of the difficulties that are raised by the idea that 'biography is the prism of history' coming from the pen of a self-avowed practitioner of this genre, see Laura Kalman, 'The Power of Biography' (1998) 23 *Law & Social Inquiry* 479. For a slightly more robust critique, see Chapter 2 of EH Carr, *What is History?* (Penguin, 1961) (challenging the value of 'the Bad King John theory of history' approach).

²⁸ Even in the 80s, very few actual Marxist theorists, for example, would recognise as an accurate summary of the Marxist vision statements such as: 'The liberal approach has been to picture society as a response to an impersonal set of technical imperatives rooted in the nature of the market. The Marxist alternative has been to depict social life as the acting out of a long-running historical drama with a predetermined sequence of acts and a triumphant final scene.' (Hutchinson and Monahan (n 25) 216). Even Plekhanov, the immovable stalwart of the Second International orthodoxy, would surely protest against such crude imputations of predestinationism. (Admittedly, it is not clear to what extent it might be fair to cite Hutchinson and Monahan in this context. It is

understandable: it was simply not the remit of such writings to give the Marxist tradition the opportunity to put its best foot forward. In the broader symbolic economy of the CLS project, the part that was most commonly allocated to Marxism was that of an essentially talentless but unfailingly big-headed distant relative in a second-rate Victorian novel, a supporting character whose sole reason for being introduced into the story was to help the reader perceive more efficiently the inherent moral superiority of the main protagonist.²⁹ Like in so many other jurisprudential situations,³⁰ the basic job assigned to MLT in CLS was simply to float gently in the background and look fundamentally unintelligent.

Nevertheless, there have been several important exceptions. A number of CLS texts over the years have tried to give MLT a relatively serious hearing. Some went beyond that, seeking to make, however haltingly, a direct contribution to the MLT project itself.³¹ The aspirations have not always been matched by the delivery, to be sure, but in a sense perhaps that was not so important. Looking at these writings now, from the perspective of today's critical legal discourse, it is difficult not to feel a certain sense of nostalgia.

arguable that neither of them was 'really' a part of the CLS scene, even though one of them has gone on to subsequently edit one of the most influential collections on the subject. Whether or not that is true, it is certainly true also that among the various fellow-travellers who shadowed the movement during its heyday they held some of the most CLS-sympathetic attitudes and authored some of the most well-informed studies of the CLS mindset.)

²⁹ This may not be the most charitable reading of these essays, but, on reflection, I think the characterisation is justified. So, see, by way of illustration, Boyle (n 18) and Fischl (n 19).

³⁰ It would be silly, of course, to presume that CLS was alone in developing this kind of attitude towards Marxism. For a similar structure of discursive manoeuvres, see also, e.g., Hans Kelsen, *The Communist Theory of Law* (Stevens & Sons, 1955) and Catharine MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press, 1989).

³¹ For notable examples, see Karl Klare 'Law-Making as Praxis' (1979) 40 *Telos* 123; Mark Tushnet, 'A Marxist Analysis of American Law' (1978) 1 *Marxist Perspectives* 96; and Peter Gabel, 'Reification in Legal Reasoning', in Steven Spitzer (ed), *Research in Law and Sociology*, Vol. 3 (Jai Press, 1980) 25.

The two such writings whose critical-theoretical legacy from the perspective of MLT has been greatest are Mark Tushnet's 1983 review essay *Marxism as Metaphor*³² and Duncan Kennedy's roughly contemporaneous *The Role of Law in Economic Thought*.³³

In *Marxism as Metaphor*, Mark Tushnet outlines a list of three basic challenges which in his view have historically confronted the enterprise of MLT and which, as he sees it, MLT has still not been able to resolve. He describes these challenges as follows:

(i) the 'problem of mechanism': what will happen to the Marxist concept of law if it cannot be shown that the law, in fact, always serves the interests of the ruling class? It has long been a central tenet of MLT that law constitutes one of the principal instruments of class oppression, that it is used by the ruling classes to advance their interests in their struggle with the oppressed classes, and that both in its form and content law is deeply class-biased. But what exactly is the mechanism by which this sort of dynamic is created? It seems to be a commonly agreed fact that in most, if not all, advanced capitalist societies today most, if not all, legal rules and processes remain

formally independent of class pressures, ... and that their social ties to the ruling class are loose enough to make it implausible that [all of them simply] are instruments of the ruling class. If all this is so, the non-Marxist asks, how then does the coincidence between law and ruling class interests come about?³⁴

³² Mark Tushnet, 'Marxism as Metaphor' (1983) 68 *Cornell Law Review* 281.

³³ Duncan Kennedy, 'The Role of Law in Economic Thought: Essays on the Fetishism of Commodities' (1985) 34 *American University Law Review* 939.

³⁴ Tushnet (n 32) 281.

(ii) the ‘problem of law’s constitutive function’: how can law be convincingly considered part of the social superstructure if any meaningful definition of the idea of the economic base depends analytically on the use of legal categories? It is a common assumption in all of Marxist theory that both the concepts of class relations and mode of production are

defined in terms of which class owns the means of production, and, yet, ownership is a legal category that takes on its meaning only because of its relation to all other available legal categories. Law thus seems to define or constitute class relations, in which case it is circular to say that the relations of production ... determine the law. How then is a Marxist analysis of law possible?³⁵

Or, as Kennedy puts it, however inventively one reformulates the theory of the economic base, it seems inevitable that a certain set of legal concepts (though not necessarily fully specified legal institutions) ‘are built into the base itself’.³⁶ If that is true, however – if legal concepts are indeed ontologically formative of the base – then it means that at least *some* kind of ‘ideas rather than material conditions drive history’.³⁷ Whither Marxist materialism?

(iii) the ‘problem of reification’: can there be a Marxist account of law that does not present law as some kind of over-homogenized, over-essentialized ‘thing’?

Most Marxists seem to want to say that [some great, internally unspecified social phenomenon called] law serves class interests. Yet the legal realists taught us that there never [existed such a phenomenon]. There were and always are rules and counterrules, rules with exceptions of such scope as to threaten the rule itself, rules whose force can be eliminated by drawing creatively on analogies to

³⁵ Ibid.

³⁶ Kennedy (n 33) 992-3.

³⁷ Ibid, 993.

apparently unrelated areas of law, and so on. Statutes too have to be interpreted ... and cannot be understood as a series of words whose meaning is fixed at the time of enactment.³⁸

Most MLT writings proceed on the implicit assumption that at some basic level all legal rules and regimes operate ‘as a single coherent block’ whose ideological content is decidedly pro-ruling-class-biased.³⁹ And yet even the briefest examination of the actual realities of legal practice seems to show how dubious this belief is. The law of contract has an entirely different operative logic from the law of administrative procedure; the law of negligence stands worlds apart in terms of its risk-distributing dynamics from the law of intentional torts; self-help remedies privilege a wholly different set of skills among the victims of legal breaches compared to centralised remedies; the practice of commercial arbitration relies on a set of assumptions fundamentally incommensurate with that animating compulsory litigation; Article 17 of the Third Geneva Convention (the questioning of a captured prisoner-of-war) has a completely dissimilar regulatory impact dynamic compared to Article 74(1)(1) of the German *Grundgesetz* (areas of concurrent federal legislative power); Chapter IV of the United Nations Charter (the constitution and the mandate of the General Assembly) can be read for its class-bias in any number of ways each of which would be equally unconvincing; the modernist approach to contract law relies on the use of both subjectivist-age sources (doctrines and caselaw) and objectivist-age sources but does so while consistently interpreting them in a way that seems fundamentally incompatible with their original meaning.⁴⁰ The list can be extended endlessly. Confronted with such evidence, how can one claim that *all* law works in the same manner?

³⁸ Tushnet (n 32) 281-2.

³⁹ Kennedy (n 33) 995.

⁴⁰ I trace this particular evolutionary trajectory in greater detail in Akbar Rasulov, ‘The Life and Times of the Modern Law of Reservations: The Doctrinal Genealogy of General Comment No. 24’ (2009) 14 *Austrian Review of International and European Law* 103, 147-55.

Taken each on its own terms, the first two of Tushnet's challenges do not seem very difficult to resolve.

In the first case, one very obvious response for MLT would be to emphasise, as a first step, the distinction between the macro- and the micro- levels of explanatory practice, i.e. the ability of a theory to predict the behaviour, e.g., of a certain cloud of gas vs. the behaviour of each individual particle; and to combine, as a second step, Hugh Collins's basic account of law and ideology⁴¹ – what grounds the mechanism of law's co-optation by the ruling class is the dominance of that class's ideology – and Wythe Holt's theory of general tilt⁴² – however difficult it may be to discover a clearly delineated linkage between the immediate form and content of an individual legal rule and the interests of the ruling class, this does not in the least vitiate the fact that the legal order *as a whole* does have a deeply-seated bias in favour of the latter *at the systemic level*. It would be fatuous to deny, for example, that 'in the first four decades of the nineteenth century, when capitalism was enveloping and penetrating much of American life, judges displayed tilt in addressing the organized economic activity of workers',⁴³ or that the introduction of aggressive Rule of Law programmes in the Third World in the aftermath of the Washington Consensus led to a massive redistribution of power and wealth in favour of the transnational capitalist class.⁴⁴

In the second case, a very effective solution for MLT would be to co-opt⁴⁵ Eugen Ehrlich's classic distinction between the 'living law' and positive legislation:⁴⁶ it is only the former that, as a

⁴¹ See Hugh Collins, *Marxism and Law* (Oxford University Press, 1982) 50-76; Tushnet (n 32) 283-5.

⁴² Wythe Holt, 'Tilt' (1984) 52 *George Washington Law Review* 280.

⁴³ *Ibid*, 286.

⁴⁴ See BS Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 *European Journal of International Law* 1.

⁴⁵ For an example of how this could be done, see Akbar Rasulov 'The Nameless Rapture of the Struggle': Towards a Marxist Class-Theoretic Approach to International Law' (2008) 19 *Finnish Yearbook of International Law* 243, 264-5 n.89.

tacitly practised set of material predispositions, forms an integral component of the constituent practices of economic base, the latter most definitely is part of the superstructure.

The third challenge, however, seems an entirely different story.⁴⁷ To understand better the general logic of the problem of reification, it may be useful to compare Tushnet's description of it with the argument outlined in Kennedy's essay.

In Kennedy's presentation, the greatest theoretical setback suffered by MLT had its roots in its fundamental inability to overcome its Hegelo-conceptualist legacy.⁴⁸ Whether one takes Pashukanis's celebrated essay on law as commodity form,⁴⁹ Lenin's bundle of hasty remarks in *State and Revolution*,⁵⁰ or Poulantzas's writings on Sartre's *Critique of Dialectical Reason* and law,⁵¹ the same essential pattern continuously repeats from one MLT context to another: as soon as the narrative moves from the exposition of an abstract, macro-level argument concerning law's external social function to the articulation of a concrete descriptive account of law's internal form and content, it invariably slips into the intellectual pathways of nineteenth century-style German conceptualist jurisprudence.

⁴⁶ See Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* 493-506 (Harvard University Press, 1936).

⁴⁷ This is not the place to develop this argument in any detail, but it needs to be noted that a large part of what makes the problem of reificationism so troubling for MLT is the fact that far more than any other modern philosophical tradition, Marxism has historically staked its claim to intellectual superiority on its unqualified rejection of all forms of objective idealism, of which reificationism, of course, is a prime example.

⁴⁸ Kennedy (n 33) 994-5.

⁴⁹ EB Pashukanis, 'The General Theory of Law and Marxism', in Piers Beirne and Robert Sharlet (eds.), *Pashukanis: Selected Writings on Law and Marxism* (trans. by Peter Maggs; Academic Press, 1980) 37-131.

⁵⁰ See, in particular, Chapter 5 in V. I. Lenin, *The State and Revolution* (Progress Publishers, 1970).

⁵¹ See James Martin (ed.), *The Poulantzas Reader* (Verso, 2008) 47-73.

The principal assumption at the core of conceptualist jurisprudence, in a nutshell, was the belief that every given legal concept, such as, e.g., ‘property’, ‘consent’, or ‘fair trial’, had at its core a certain fixed essence which ensured, firstly, that its use and application through time (and space) would remain fundamentally self-consistent and, secondly, that in principle it was possible to achieve such a setup where the process of *deducing any kind of conclusions* from it would involve no recourse to anything beyond the concept itself.⁵² At some point around the turn of the 20th century, both of these assumptions came under severe and sustained criticism. In the first place, numerous commentators from Rudolf von Jhering onwards had started challenging the naïve deductivist credo that permeated the conceptualist paradigm as fundamentally unsustainable.⁵³ In Anglo-American legal history, the most celebrated *locus classicus* on the matter was Justice Holmes’s dissent in the *Lochner* case.⁵⁴ In the second place, as the insights of modern pragmatism and analytical philosophy began to penetrate deeper and deeper into legal-theoretic milieu, another group of legal scholars – the main figurehead here was Wesley Hohfeld⁵⁵ – increasingly started to argue that the vast majority of everyday legal concepts were, in fact, nothing more than ‘empty shells’: conventionally adopted names more or less arbitrarily attached to contingently configured bundles of rights and duties whose composition, in the final analysis, was determined by nothing more complex or ambitious than mundane questions of public policy. Under the pressure of these twin developments, by the late 1910s, the conceptualist paradigm quickly began to lose its lustre: first, within the intellectually

⁵² For further discussion of conceptualism, see Felix Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 *Columbia Law Review* 809; Morton Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (Oxford University Press, 1992) 14-9; Laura Kalman, *Legal Realism at Yale* (University of North Carolina Press, 1986) 1-14.

⁵³ See, e.g., Rudolf Von Jhering, ‘In the Heaven of Legal Concepts’, in Morris Cohen and Felix Cohen (eds.), *Readings in Jurisprudence and Legal Philosophy* (Prentice Hall, 1951) 678.

⁵⁴ *Lochner v New York*, 198 US 45 (1905).

⁵⁵ See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1919).

progressive segments of left-leaning liberal academia, then, gradually, across the rest of the liberal-legal tradition as a whole. A decade later its credibility was permanently gone.⁵⁶

For reasons that still await their clarification, MLT found itself outside the reach of this theoretical revolution. It never experienced anything like the kind of powerful anti-deductivist momentum unleashed by Jhering and Holmes or the great analytical breakthrough initiated by Hohfeld and his followers. As its liberal competitors went on to develop ever more sophisticated accounts of the inner workings of the legal order, it remained hopelessly stuck in theoretical protocols derived from a previous age's juristic ideology, never getting around to penetrating inside the big black box of the legal form or, as Kennedy puts it, "breaking up the "law block"". ⁵⁷

Having failed to outgrow the idealist logic of conceptualist jurisprudence, MLT, writes Kennedy, never managed to come to terms with the basic phenomenon of the inherent nonclosure of legal reasoning: the idea which was so vividly articulated by Holmes as the principle that general propositions cannot decide concrete cases because every such proposition can always be given more than one valid interpretation. Without that kind of theoretic recognition, there was no chance of it ever developing a sufficiently workable account of field-specific agency enjoyed by practical legal actors and, with that, a theory of law's internal politics. Without a concept of nonclosure and a workable theory of legal politics, in turn, there was no possibility of MLT ever formulating a sufficiently practicable account of the inner mechanics of the legal field: either at the level of the theory of structural connections that exist between different legal regimes and institutions or at the level of the practical dynamics that animates the processes of legal decision-making.

Had such an account been developed, hints Kennedy, it is arguable that rather than becoming the poor relatives in the family, MLT scholars would have been able to take the much-deserved intellectual lead in the history of Marxist thought, by pushing the debate about the logic of social transformation away from that hackneyed revolution/reformism dichotomy that has obstructed the progress of Marxist theory so frustratingly over the last century. For, indeed, the whole point of

⁵⁶ Horwitz traces this trajectory in considerable detail in the first half of Horwitz (n 52).

⁵⁷ Kennedy(n 33) 997.

recognising the logic of nonclosure and the unsustainability of deductivist epistemology in a Marxist context would have been to bring one to the realisation that (i) the legal system can only influence the development of the economy ‘through particular rules applied in particular cases’ and not any kind of ‘general principles’ (which are all theoretically shapeless and empty anyway);⁵⁸ and (ii) ‘[t]he gradual accretion of decisions that are in this way ungroundable in first principles is *also the gradual reconstitution of the mode of production.*’⁵⁹

But in the end this was not to be. Despite all its efforts to rise above the limits of its original philosophic milieu, MLT has never managed to develop a sufficiently coherent explanation of how the legal order actually works at the level of everyday routine legal practices and what role, therefore, it really plays in the formation of the material conditions of social life. All it has been able to offer instead was just a shapeless collection of occasionally brilliant but for the most part imprecise and superficial impressions, random anecdotes, and highly reductive straw-man arguments. Pity, indeed, for it had all started out so promisingly.⁶⁰

There seem to be three basic patterns that characterise the deep logic of Tushnet and Kennedy’s arguments about MLT. The first pattern derives from what can easily be considered the most famous of all CLS themes: the relative indeterminacy (underdeterminedness) of law thesis. Taking their cue from legal realists, both Tushnet and Kennedy criticise MLT for its inability to recognise law’s fundamental indeterminacy both as regards its content (e.g. the doctrine of consideration can mean many different things) and as regards its form (e.g. the prohibition of unconscionable contracting can be articulated through many different configurations of Hohfeldian bundles). The idea is closely linked to the notion that law should not be treated as a single, coherent

⁵⁸ Ibid, 998.

⁵⁹ Ibid, 999 (emphasis added).

⁶⁰ Ibid, 992 (‘in [its] general form, Marx’s analysis was an extraordinary accomplishment’).

block and that the role of human agency in legal process should not be underestimated. Needless to say, the concept of agency that is invoked in this context does not imply any kind of belief in free will or authorial sovereignty: even if Tushnet chooses to stay slightly ambivalent about this, Kennedy is unquestionably a ‘paranoid structuralist’ on this count.⁶¹

The second pattern focuses on another classic CLS theme: the idea of the relative autonomy of law, or, in other words, the under-determinedness of causal connections between the legal instance and the economic instance. Both for Tushnet and for Kennedy one of the main differences between MLT and modern-day ‘legal science’ comes from the former’s over-exaggeration of the functionalist (in socio-theoretic terms) hypothesis. The argument works in both directions: a certain development in the economic dynamics may or may not be the reason for an apparently corresponding shift in the legal order; a certain development in the legal order may or may not lead to a respective development in the economic dynamics. The escalation of the over-accumulation crisis in the West since the 1970s may have provoked the acceleration of the globalisation of American-style mode of legal consciousness, but it may as easily have been provoked by it too.⁶² The hardening of the rule of law under some circumstances may hurt the interests of the oppressed classes just as easily as it can serve them under others.⁶³ There is no way really of figuring it out in advance: general laws of ‘social physics’ do not predetermine concrete situations. As much as he is a paranoid structuralist in the first case, in this case Kennedy is also an avid follower of ‘irrationalist semiotics’.⁶⁴

Finally, the third pattern centres on the idea of law’s constitutive power: the ground rules of property and contract (and, to some extent, tort too) are among some of the most important conditions which determine the course of economic struggle. If one wants to understand how the economic base really works, one needs to study the way in which the *particular* underlying regimes of property and

⁶¹ See Duncan Kennedy, ‘A Semiotics of Critique’ (2001) 22 *Cardozo Law Review* 1147, 1169-75.

⁶² See Duncan Kennedy, ‘Three Globalizations of Law and Legal Thought: 1850-2000’, in David Trubek and Alvaro Santos (eds.), *The New Law and Economic Development* (Cambridge University Press, 2006) 19.

⁶³ See Morton Horwitz, ‘The Rule of Law: An Unqualified Human Good?’ (1977) 86 *Yale Law Journal* 561.

⁶⁴ See Kennedy (n 61) 1178-82.

contract are configured.⁶⁵ Limiting one's description of the base to a single-category label like 'late capitalism' or 'neoliberalism' is not going to get one very far in terms of producing an actual understanding of it. There can exist, in principle, an infinite variety of late capitalisms and countless ways in which the idea of neoliberalism may be articulated in practice; each of them will be equally consistent with these general notions. To grasp how and why exactly *this* particular variety or articulation became reality, one should comprehend the full operative logic of the respective institutional environment. The most effective analytical apparatus for identifying, capturing, and recording this logic that is available to us today is that of legal analysis.

It is possible, in principle, to interpret these three patterns in any number of ways. In my view, however, the most important thing about them is that they point towards what ultimately must be considered CLS's most lasting legacy – or should it be 'gift'? – to the newly revived MLT project of today. It is not, to be sure, one that lends itself to an easy uptake or quick absorption. But then rich legacies rarely do and good gifts never should.

⁶⁵ 'The legal component of the mode of production is, in so much as it actually functions in the world, the collection of particular rules, not the general principles.' (Kennedy (n 33) 998.)