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From Criticism to Critique: Preserving the Radical Potential of Critical Legal Studies Through a Reexamination of Frankfurt School Critical Theory

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FROM CRITICISM TO CRITIQUE:
PRESERVING THE RADICAL POTENTIAL OF
CRITICAL LEGAL STUDIES THROUGH A
REEXAMINATION OF FRANKFURT SCHOOL CRITICAL THEORY

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FROM CRITICISM TO CRITIQUE: PRESERVING THE RADICAL POTENTIAL OF CRITICAL LEGAL STUDIES THROUGH A REEXAMINATION OF FRANKFURT SCHOOL CRITICAL THEORY

JASON E. WHITEHEAD*

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I. INTRODUCTION

Critical Legal Studies (CLS) embodies both a difficulty and a possibility. The difficulty is that in attempting to separate its understanding of law from its understanding of the larger system of social and economic arrangements, CLS loses sight of its goal to *critique*¹ law and degenerates into mere *criticism* of the form and outcome of

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1. Throughout this Article, I use the term “critique” in the traditional Kantian sense to refer to a theory that attempts to analyze both the potential and the limits of using human reason as the sole judge of truth. See Immanuel Kant, *Preface to the First Edition of IMMANUEL KANT, CRITIQUE OF PURE REASON* at xix-xx (F. Max Muller trans., 2d ed. rev. 1949). See generally OTFRIED HÖFFE, *IMMANUEL KANT* 33-34 (Marshall Farrier trans., SUNY Press 1994) (1992) (explaining the Kantian notion of critique). As Paul Piccone notes, this interpretation of Kant, via Hegel and certain nineteenth-century German, French, and Italian philosophers, was used to replace nature with culture and science with history as the focus of philosophical concern and thus broaden the notion of “critique.” See Paul Piccone, *General Introduction to THE ESSENTIAL FRANKFURT SCHOOL READER* at ix, x (Andrew Arato & Eike Gebhardt eds., 1982).

law. The possibility lies in the chance that CLS can reflect on its own contradictory methods and projects and, therefore, can build a critique capable of both *understanding* law as part of the larger socio-economic system of liberalism² and *emancipating* law's subjects from the injustice and inequality that both support and are supported by liberal law.

This Article constitutes my attempt to nurture that move from criticism to critique by explaining what I believe are the primary theoretical problems that prevent CLS from achieving its critical ambition and by suggesting a particular solution to those problems. In Part II, I analyze CLS's claim that law is both indeterminate in its reasoning and results and yet ultimately supportive of present social and economic arrangements. I also argue that this dual claim is combined with a theory of legal nondeterminism—the notion that law is not determined in any discernible way by economic forces and relations—in a way that creates almost insoluble difficulty for the CLS attempt at critique. In short, because of postmodernism's influence, CLS oversimplifies Marxist analysis, fails to reconcile its own contradictory claims, invalidates its own epistemological standpoint, and destroys its own ability to make moral claims about law and society.

But those problems need not be fatal to CLS's attempt to build a critique. Indeed, in Parts III and IV, I argue that a reexamination of the origin of the "critical theory" concept itself—the Frankfurt School³—can help CLS overcome its difficulty and achieve its possibility by understanding and opposing the present form of law as part of the dialectical totality of liberalism. In Part III, I review the Frankfurt School roots of critical theory, explaining its distinguishing elements, its dialectical method, and its critique of determinist

2. Throughout this Article, I use the term "liberalism" to refer, in the most general and noncontroversial sense, to a particular arrangement of society with some form of representative government, a dominant "marketplace" ideology (albeit tempered by governmental regulation), a focus on individual merit over community well-being, and a focus on protection of private property rather than collective ownership. For a good sampling of classical liberal, social, and political writings, see THE BLACKWELL DICTIONARY OF TWENTIETH CENTURY SOCIAL THOUGHT 333-36 (William Outhwaite & Tom Bottomore eds., 1993); THE CONCISE OXFORD DICTIONARY OF POLITICS 286-87 (Iain McLean ed., paperback ed. 1996); R. Bruce Douglass, *Liberalism*, in 1 ENCYCLOPEDIA OF GOVERNMENT AND POLITICS 129, 129-138 (Mary Hawkesworthe & Maurice Kogan eds., 1992); KENNETH HOOVER, IDEOLOGY AND POLITICAL LIFE 10-28, 62-79 (1987); ROGER SCRUTON, A DICTIONARY OF POLITICAL THOUGHT 268-70 (paperback ed. 1984); and SOCIAL AND POLITICAL PHILOSOPHY 139-341, 463-99 (John Somerville & Ronald Santoni eds., 1963).

3. The Frankfurt School was a group of leftist intellectuals, including Theodore Adorno, Max Horkheimer, and Herbert Marcuse, who attempted to redefine orthodox Marxism in a nondeterminist yet liberating way. See discussion *infra* Part III. See generally TOM BOTTOMORE, THE FRANKFURT SCHOOL (Routledge 1989) (1984); THE ESSENTIAL FRANKFURT SCHOOL READER, *supra* note 1; RAYMOND GEUSS, THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL (1981); MARTIN JAY, THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH, 1923-1950 (paperback ed. 1996).

Marxism. In Part IV, I contend that previous examinations of the Frankfurt School's implications for CLS have failed to adequately explore the potential of the Frankfurt School's dialectical methodology. I also argue that a reexamination of that methodology can help CLS achieve the status of a true critique because it counsels an approach that sees law's indeterminacy and nondeterminism alongside law's determinate support of dominant socio-economic power relations. Finally, I conclude in Part IV that this reexamination has the potential to create a multidimensional, dynamic approach to law that engages more complex forms of Marxism while still rejecting economic determinism, that resolves CLS's seemingly contradictory claims, that retains its epistemological perspective by attacking the specifically liberal form of law, and that reconnects critical legal theory to the moral demands of those who suffer the brunt of law's injustice.

As many observers have already noted, CLS has covered a lot of theoretical ground during its relatively short existence.⁴ Most notably, CLS has moved from the theory that law is an aspect of liberalism and can be understood through a total social critique to the theory that law cannot be logically, historically, or structurally connected to any particular form of society. Throughout this Article, I will argue that this shift can be attributed to the influence of postmodern theories of law and society,⁵ and that it is precisely this reliance on postmodernism to discredit any connection between law and society that endangers CLS's aspirations to critique. On the other hand, I will argue that a rejection of postmodernism and a return to the critical modernism⁶ of the Frankfurt School can help CLS achieve

4. See generally GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 106-27 (1995) (tracing the development of CLS); Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 641 (David Kairys ed., 3d ed. 1998) (showing how critical legal theory has been used to advance progressive doctrines and policies from the 1960s to the present).

5. While any definition of postmodernism is problematic, I use that term generally to refer to the theories of Foucault, Lacan, Lyotard, Derrida, and others. For a good synopsis of each philosopher's thoughts, see DOUGLAS E. LITOWITZ, *POSTMODERN PHILOSOPHY AND LAW* 12, 16 (1997). These theorists can be united, very generally, in their skepticism toward modern "grand theories" and "structural" explanations of the world and their resistance to the idea of any "real world" or "system" to be discovered. See MINDA, *supra* note 4, at 3. They claim that, contrary to modern ideas of history and progress, "history has no internal logic or laws." *Id.* at 190, and they insist that the "self" is merely an unstable and decentered social, cultural, historical, and linguistic amalgamation, see *id.* at 224-25.

6. Throughout this Article, I use the term "critical modernism" generally to refer to a philosophical position that retains a belief in the Enlightenment tradition of human progress through self-reflective reason, but tempers that belief with a critique of modernism for not living up to its own ideals. See JAMES L. MARSH, *POST-CARTESIAN MEDITATIONS* at xi, 254-57 (1988); John D. Caputo, *Caputo Reads Marsh: In Defense of Ambiguity*, in *MODERNITY AND ITS DISCONTENTS* 1, 1 (James L. Marsh et al. eds., 1992). This position steers a middle course between the foundational modern theories of Descartes, Kant, and

its critical aspiration by providing CLS with a methodology capable of understanding how law can seem both disconnected from society and, yet, ultimately supportive of the way society is presently organized.

Before beginning, however, it might help to explain in general terms the promise that I see in a reexamination of the Frankfurt School. In the introduction to the first and second editions of *The Politics of Law*, David Kairys articulates one of the most precise formulations of CLS's goal: "We seek a theoretical and practical understanding of the law that places its institutions and individual actors in their social and historical contexts, and views the law as part of and intimately connected to a social totality."⁷ However, largely through the influence of postmodernism, CLS has ventured far afield of that goal. In fact, in the most recent edition of *The Politics of Law*, Kairys has even slightly altered the statement of the goal itself.⁸ Rather than viewing the law "as part of and intimately connected to a social totality,"⁹ Kairys now views the law merely "as part of and intimately connected to society."¹⁰ This alteration, while small, is symptomatic of CLS's shift from the understanding of law as an aspect of liberal society to a theory holding that no such totalistic descriptions of law or society are possible.

In the introduction to the 1960 edition of *Reason and Revolution*,¹¹ Herbert Marcuse, one of the preeminent members of the Frankfurt School, articulated one of the most precise formulations of the Frankfurt School's dialectical approach to the study of society:

Dialectical thought starts with the experience that the world is un-free; that is to say, man and nature exist in conditions of alienation, exist as "other than they are." Any mode of thought which excludes this contradiction from its logic is a faulty logic. Thought "corresponds" to reality only as it transforms reality by comprehending its contradictory structure.¹²

The Frankfurt School approach, in other words, seeks to go beyond the seeming contradictions at the surface of societal phenomena. Its basic operating assumption is that societal phenomena, such as law,

Hegel, and the postmodern wholesale rejection of any form of foundationalism and transcendent rationalism. See MARSH, *supra*; Caputo, *supra*.

7. David Kairys, *Introduction to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 1, 8 (David Kairys ed., rev. ed. 1990).

8. David Kairys, *Introduction to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 4, at 1, 16.

9. Kairys, *supra* note 7, at 8 (emphasis added).

10. Kairys, *supra* note 8, at 16 (emphasis added).

11. HERBERT MARCUSE, *REASON AND REVOLUTION: HEGEL AND THE RISE OF SOCIAL THEORY* (3d ed. 1960), *reprinted as A Note on Dialectic*, in *THE ESSENTIAL FRANKFURT SCHOOL READER*, *supra* note 1, at 444.

12. *Id.* at 446.

contain inherent contradictions in their very nature. By delving into the nature of those contradictions, a critical theorist hopes to see beneath the outward form to the underlying societal structure driving the contradictions.

I believe the promise of the Frankfurt School approach for CLS lies precisely in this effort to look beyond the mere appearance of law to its essential reality. In short, Kairys' original formulation states one possible goal of CLS—to understand law as an aspect of the social totality. Marcuse's formulation of the Frankfurt School's methodology provides a means toward that end—a dialectical method capable of understanding social contradictions and thus social totality.

II. THE SUBSTANCE OF THE CLS CRITIQUE

A. Background

The origins of Critical Legal Studies can be traced to the first Conference on Critical Legal Studies at the University of Wisconsin at Madison in 1977, where a group of legal scholars, practitioners, teachers, and students, dissatisfied with the Law and Society Association's empirico-behaviorist focus, met to discuss the formation of a new association.¹³ Many of the participants in that conference were former 1960s-era students or radical lawyers active in the antiwar and civil rights movements.¹⁴ They were drawn to Madison in 1977 by a preference for egalitarian social and economic structures, a dissatisfaction with the traditional law school curriculum, and an impatience with "sterile" forms of legal reason.¹⁵ In contrast to the sterile reason of empirico-behaviorism and mainstream legal doctrine, CLS scholars sought a critique of law that would be capable of both understanding and changing the legal system and the society of which it was a part.¹⁶

The substance of the CLS critique, developed in countless law review articles and books since 1977, can be reduced to two components: the indeterminacy thesis and the ideology thesis. First, the indeterminacy thesis claims that law is internally and exter-

13. See MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 1 (1987); Allan C. Hutchinson, *Introduction to CRITICAL LEGAL STUDIES* 1, 2 (Allan C. Hutchinson ed., 1989); Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 *STAN. L. REV.* 199, 199-201 (1984). See generally Gordon, *supra* note 4, at 641 (discussing the history and motivations of those advancing Critical Legal Theory).

14. See KELMAN, *supra* note 13, at 1; Peter Fitzpatrick & Alan Hunt, *Introduction to CRITICAL LEGAL STUDIES* 1, 1 (Peter Fitzpatrick & Alan Hunt, eds., 1987); Gordon, *supra* note 4, at 641; Hutchinson, *supra* note 13, at 2.

15. See KELMAN, *supra* note 13, at 1.

16. See MINDA, *supra* note 4, at 106; Hutchinson, *supra* note 13, at 3.

nally inconsistent.¹⁷ Second, the ideology thesis claims that law is ideological and partisan rather than neutral and independent.¹⁸

These theses build on the earlier legal realist insight that law can be understood better by analyzing “nontechnical’ or ‘extra-legal’ considerations in legal decision making” rather than the formal development of legal rules.¹⁹ The indeterminacy and ideology theses, how-

17. See ALAN HUNT, *EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW* 156-58 (1993) (arguing that the notion of “fundamental contradiction,” although later renounced by major CLS thinkers, played a major role in CLS’s development and explaining that the CLS indeterminacy thesis is focused on the doctrinal contradictions between subject/object, public/private, state/civil society, and individualism/altruism); KELMAN, *supra* note 13, at 258-60 (summarizing the CLS claim that all legal rules contain deeply embedded structural premises which enable judges to resolve problems in opposite ways); Gunter Frankenberg, *Down By Law: Irony, Seriousness and Reason*, 83 NW. U. L. REV. 360, 391-93 (1989) (discussing three variants of the CLS indeterminacy thesis: “the unruly socio-political world,” “the unruly legal practice,” and “the unruly rule of law”); Hutchinson, *supra* note 13, at 4-5 (explaining the CLS indeterminacy thesis as holding that the convoluted nature of legal doctrine is merely a screen for judicial discretion); Hutchinson & Monahan, *supra* note 13, at 206 (describing the indeterminacy claim, in part, as the notion that legal doctrine is merely a sophisticated vocabulary and repertoire of manipulative techniques); Kairys, *supra* note 8, at 3-4 (“The authors of this book reject the idealized model and the notion that a distinctly legal mode of reasoning or analysis determines legal results. The problem is not that courts deviate from legal reasoning. There is no legal methodology or process for reaching particular, correct results.”).

18. See KELMAN, *supra* note 13, at 7-8 (arguing that the notion of the “rule of law” legitimates liberal social relations); James Boyle, *Introduction* to *CRITICAL LEGAL STUDIES* at i, xvii-xxii (James Boyle ed., 1992) (discussing CLS’s focus on ideology and legal consciousness and its ambivalence to the liberal notion of the “rule of law”); Fitzpatrick & Hunt, *supra* note 14, at 1-2 (discussing CLS’s focus on the inescapability of commitment and the rejection of law’s neutrality); Peter Goodrich et al., *Introduction* to *POLITICS, POSTMODERNITY, AND CRITICAL LEGAL STUDIES: THE LEGALITY OF THE CONTINGENT* 1, 12 (Peter Goodrich et al. eds., 1994) (describing CLS’s task as showing, at the level of structure, the impossibility of the rule of law and the ideological content of all positivist accounts of law); Hutchinson, *supra* note 13, at 3-5 (arguing that the CLS critique begins and ends with the notion of law as ideology); Hutchinson & Monahan, *supra* note 13, at 206 (discussing the CLS arguments that law is not neutral and that law is an exercise in social rationalization); Kairys, *supra* note 8, at 14-15 (discussing law’s legitimation of dominant social and power relations).

Gary Minda has analyzed the development of CLS’s arguments over time and argues that the indeterminacy thesis has now “given way” to the ideology thesis. See MINDA, *supra* note 4, at 202. However, in all fairness, CLS continues to include both theses. See, e.g., Kairys, *supra* note 8, at 3-5.

19. MINDA, *supra* note 4, at 25-33, 106 (describing the Legal Realist movement and linking the CLS project with the insights of “radical legal realists”); accord Kairys, *supra* note 8, at 4 (acknowledging CLS’s intellectual debt to Legal Realism). But see Jeffrey A. Standen, Note, *Critical Legal Studies as an Anti-Positivist Phenomenon*, 72 VA. L. REV. 983, 983 (1986) (“[The CLS] movement is a recurrence of the anti-positivist German critique rather than, as the prevailing wisdom holds, a maturation of the familiar doctrines of legal realism.”).

For examples of Legal Realist scholarship, see Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935), and Karl N. Llewellyn, *A Realistic Jurisprudence: The Next Step*, 30 COLUM. L. REV. 431 (1930).

ever, go well beyond the legal realist project.²⁰ These theses are not simple empirical claims to be tested against the facts of the way law operates. Nor are they mere criticisms designed to leave the deeper structure of law untouched. Rather, CLS offers these claims in the form of a *critique*, designed to both understand and change legal and social reality.²¹

Although earlier versions of the CLS critique are easily traced to Frankfurt School, structuralist, and Marxist sources,²² its present theoretical stance is not so clear. The breadth of the movement defies any totalizing descriptions.²³ Nevertheless, CLS is composed of at least two distinct theoretical schools that can be classified based on the implications drawn from the indeterminacy and ideology theses: the critical modern school and the postmodern school. The critical modern school explores legal indeterminacy and ideology in order to illustrate the failure of the liberal form of economy and society.²⁴ It

20. See MINDA, *supra* note 4, at 106; see also Gary Peller, *The Metaphysics of American Law (Part 1 of 2)*, 73 CAL. L. REV. 1151, 1152 (1985) (describing his own attempt to go beyond the legal realist assertion that "law is politics" by exploring the politics inherent in that assertion).

21. See, e.g., Goodrich et al., *supra* note 18, at 10-12 (describing the history of CLS in terms of the "global critique," the "critique of . . . form," and the critique of text (emphasis added)); Hutchinson, *supra* note 13, at 3 (stating that "[f]or CLS, critique must begin and proceed with the operation of law as ideology" and arguing that the unmasking of law as ideology clears the way for different and transformative ways of thinking which can subvert law's authority (emphasis added)); Kairys, *supra* note 8, at 3-5; see also Hutchinson & Monahan, *supra* note 13, at 200 ("The critical scholars seek to reformulate the ground rules, to revise the criteria for valid legal theory. As is the case with many modern philosophers and sociologists, they are attempting to provide a new touchstone for distinguishing good knowledge from bad.")

22. See Goodrich et al., *supra* note 18, at 9-12 (describing CLS's first two historical stages as Marxist and structuralist); see also HUNT, *supra* note 17, at 159-60 (tracing the CLS critique to Marxism and subjectivist/interpretivist sociology); Gordon, *supra* note 4, at 646-50 (tracing the CLS critique to western Marxism and structuralism); Hutchinson & Monahan, *supra* note 13, at 215 (tracing CLS's social theory to that of Mannheim, Habermas, Gramsci, and Marcuse); Standen, *supra* note 19, at 992-96 (tracing CLS to the Frankfurt School's critique of positivism).

23. See Boyle, *supra* note 18, at xiii (describing CLS scholarship as socialist, structuralist, deconstructionist, feminist, phenomenological, and Hegelian); Frankenberg, *supra* note 17, at 383 (describing CLS as an amalgam of Marxists, Frankfurt School theorists, neorealists, left Weberians, pragmatists, existentialists, structuralists, post-structuralists, and feminists).

24. See, e.g., HUNT, *supra* note 17, at 158-59 (explaining the CLS indeterminacy thesis as a product of the focus on "fundamental contradiction" and noting the ambiguity within CLS as to the source of that contradiction in liberalism specifically or the human condition generally); David S. Caudill, *Freud and Critical Legal Studies: Contours of a Radical Socio-Legal Psychoanalysis*, 66 IND. L.J. 651 (1991) (noting the use of Freudian concepts in CLS and arguing that CLS should further explore the connections between itself and older critics of liberal ideology); Hutchinson, *supra* note 13, at 7 n.12 (explaining that CLS builds, in part, upon the "critical" aspects of the Marxist canon); Hutchinson & Monahan, *supra* note 13, at 221-22 (noting that some CLS scholars are revisionist Marxists, faithful to the notion of material conditions as the engine of history); Jerry Leonard, *The Eleventh Plateau: The Lost Object(ive) of Legal Education*, 4 LAW & CRITIQUE 81, 97-98

draws its theoretical support from Marxism, Freudianism, and the Frankfurt School.²⁵ While this strand of CLS is still alive, its heyday has clearly passed.²⁶ On the other hand, the postmodern school explores legal indeterminacy and ideology to illustrate the failure of all totalizing rational thought and to show that no objectively correct legal or political results are possible.²⁷ It draws its support from the theories of the decentered postmodern subject offered by Michel Foucault, Jacques Lacan, Jean-Francois Lyotard, Jacques Derrida, and others.²⁸ This strand of CLS has been in vogue since at least the mid-1980s and is clearly on the rise.²⁹

B. *Legal Indeterminacy and Nondeterminism*

As noted above, the CLS indeterminacy thesis posits that law is both internally and externally inconsistent.³⁰ CLS writers claim that law is *internally* inconsistent in the sense that legal reasoning is not a distinct method for reaching particular legal results³¹ but is only a

(1993) (arguing for a dialogue within CLS as to whether the liberal subject's relation to the system can be constructed in a transformative way).

25. See discussion *supra* note 3; see also Caudill, *supra* note 24, at 674-77.

26. See MINDA, *supra* note 4, at 106-27 (describing the evolution of critical legal theory from the mid-70s to late-80s); Gordon, *supra* note 4, at 641-51 (describing the evolution of critical legal theory throughout the 1960s and 1970s).

27. See, e.g., Goodrich et al., *supra* note 18, at 12; Hutchinson, *supra* note 13, at 7 (describing CLS's denial of the possibility of a causal link between material conditions and legal superstructure and the possibility of settled laws of historical, social, and economic change); Hutchinson & Monahan, *supra* note 13, at 223-26 (discussing neo-revisionist CLS writers who claim that the outcomes of law have no inherent logic and that legal doctrines are a conflict between opposing and inassimilable world views).

For a detailed discussion of the use of postmodern concepts in law generally and CLS specifically, see LITOWITZ, *supra* note 5, and MINDA, *supra* note 4.

28. See, e.g., DAVID S. CAUDILL, LACAN AND THE SUBJECT OF LAW: TOWARD A PSYCHOANALYTIC CRITICAL LEGAL THEORY (1997); Hutchinson, *supra* note 13, at 7 n.12 (identifying CLS with Foucault and Derrida); Leonard, *supra* note 24, at 82-86 (distinguishing between representationalist and ludic forms of postmodernism); Dragan Milovanovic, *The Postmodernist Turn: Lacan, Psychoanalytic Semiotics, and the Construction of Subjectivity in Law*, 8 EMORY INT'L L. REV. 67, 69 (1994).

29. See LITOWITZ, *supra* note 5, at 1 (discussing the growing interest in postmodernism among legal scholars); MINDA, *supra* note 4, at 116-27 (describing the evolution of critical legal theory from the mid-1980s to roughly the present).

By dividing CLS into "postmodern" and "critical modern" camps, I describe idealized types rather than explicit positions taken up by particular CLS theorists. While many theorists clearly fall on either side of the divide, most exhibit varying tendencies toward one or the other. I do not propose that the distinction is as stark and obvious as it may seem from my description. Nevertheless, as a heuristic device for analyzing the import of the arguments made by various CLS theorists, I believe the distinction is useful and necessary.

30. See *supra* note 17 and accompanying text.

31. See Kairys, *supra* note 8, at 3-5; see also KELMAN, *supra* note 13, at 258-60 (summarizing the CLS claim that all legal rules contain deeply embedded structural premises enabling judges to resolve problems in opposite ways); Hutchinson, *supra* note 13, at 4-5 (noting that CLS's internal attack engages jurists on their own terms by showing their failure to live up to their own standards of doctrinal coherence).

system of manipulative techniques designed to hide the fact that a judge is merely choosing between values.³² CLS writers also contend that law is internally inconsistent because legal doctrines contain contradictions between basic societal values that cannot be reconciled.³³ Finally, CLS writers insist that law is *externally* inconsistent in the sense that it does not actually produce either predictable or objectively correct results.³⁴

These different aspects of the indeterminacy thesis can be illustrated through a discussion of Karl Klare's treatment of the United States Supreme Court's early interpretation of the Wagner Act.³⁵ The Wagner Act laid the foundation for modern labor relations by ensuring workers the right to organize, collectively bargain, and engage in peaceful strikes and picketing.³⁶ It also outlawed various forms of employer coercion and discrimination against union activity and created the National Labor Relations Board to oversee industrial relations.³⁷ The U.S. Supreme Court issued several key opinions interpreting the Act in the late 1930s and early 1940s.³⁸ Klare argues that four things combined to make these early interpretations of the Act

32. See, e.g., Hutchinson & Monahan, *supra* note 13, at 206.

33. See, e.g., HUNT, *supra* note 17, at 156-58 (explaining the early CLS theory of fundamental contradiction); Hutchinson, *supra* note 13, at 4-5 (arguing that CLS's claims of indeterminacy go to the heart of liberal political theory by illustrating that basic liberal dualities cannot logically be made good: subject/object, male/female, public/private, self/other, and individual/community).

34. See, e.g., Frankenberg, *supra* note 17, at 392 (discussing the "unruly rule of law" that is constructed in such a way as to be incapable of producing determinate results because of social forces, inherent logical contradictions, and the "open text" of social life); Hutchinson & Monahan, *supra* note 13, at 206-08 (noting that all CLS scholars unite in denying the rational determinacy of legal reasoning and explaining that denial as the claim that no objectively correct legal results are possible because judges must always choose between competing values); Kairys, *supra* note 8, at 3-5 (summarizing the CLS indeterminacy thesis); David Kairys, *Legal Reasoning, in THE POLITICS OF LAW, A PROGRESSIVE CRITIQUE* 11, 13-17 (David Kairys ed., 1982) (arguing that an analysis of the use of precedent shows law's indeterminacy by demonstrating that ample precedent often supports both sides of a judicial contest such that judges often have wide discretion to choose among possible outcomes).

35. See Karl E. Klare, *Judicial Deradicalization of The Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978), reprinted in *CRITICAL LEGAL STUDIES*, *supra* note 13, at 229.

36. See Wagner-Connery Labor Relations Act, ch. 372, § 7, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 157 (1994)). See generally Archibald Cox et al., *LABOR LAW 76-81* (12th ed., 1996) (outlining the history and basic substance of the Act); 1 THEODORE KHEEL, *LABOR LAW* § 5.01(1) (1964 & Supp. 1998) (same).

37. See Wagner-Connery Labor Relations Act, ch. 372, §§ 3, 8, 49 Stat. 449, 451-52 (1935) (codified as amended at 29 U.S.C. §§ 153, 158 (1994)).

38. See, e.g., *International Ass'n of Machinists v. NLRB*, 311 U.S. 72 (1940); *NLRB v. Waterman Steamship Co.*, 309 U.S. 206 (1940); *NLRB v. Falk Corp.*, 308 U.S. 435 (1940); *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1938); *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *Washington, Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937); *Associated Press v. NLRB*, 301 U.S. 103 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

difficult: (1) an indeterminate text and legal history; (2) the political circumstances surrounding its passage; (3) the complexity and fluidity of working class attitudes; and (4) the hostility and disobedience of the business community.³⁹ Focusing on the first difficulty noted by Klare—indeterminacy of text and legal history—provides a way to analyze the manner in which the CLS indeterminacy thesis plays itself out.

Klare notes that in interpreting the Act, the Supreme Court was faced with the task of selecting one set of principles from among the Act's possible meanings.⁴⁰ In making this selection, "the Court embraced those aims of the Act most consistent with the assumptions of liberal capitalism and foreclosed those potential paths of development most threatening to the established order."⁴¹ Thus, the Court embraced collective bargaining as a therapy for fractured workplace relations, a freedom of choice for workers that was safely cabined within the institutional structure of labor law, and a partial rearrangement rather than an equalization of relative bargaining power between workers and owners.⁴² Stated another way, the Court jettisoned the principles of redistribution of wealth, equality of bargaining power, and workplace democracy.⁴³

In noting that the Court was forced to choose between those core contradictory values, Klare makes an *internal* indeterminacy claim.⁴⁴ In effect, Klare argues that the Court had to make its own political value choice because the legal doctrine underlying the Wagner Act was inherently contradictory. Klare, however, also argues that the Court articulated a "new legal consciousness" regarding labor matters that served to set future boundaries on the way labor issues were framed.⁴⁵ This is also a good example of an internal indeterminacy claim. Instead of a logical process whereby judges neutrally and predictably *apply* the law, Klare unmasks legal reasoning as a system of techniques whereby judges *make* law and then disguise their discretion in seeming neutrality.

Finally, Klare notes that throughout this process of choosing between conflicting principles, the Court could easily have reached one or more alternative results while employing reasoning well within the bounds of legislative history.⁴⁶ This is a good example of an *external* indeterminacy claim.⁴⁷

39. See Klare *supra* note 35, at 234-35.

40. See *id.* at 235.

41. *Id.*

42. See *id.*

43. See *id.* at 235-36.

44. See *supra* text accompanying notes 31-33.

45. Klare, *supra* note 35, at 235.

46. See *id.*

47. See *supra* text accompanying note 34.

As also noted above, the ideology thesis claims that law is ideological and partisan rather than neutral and objective.⁴⁸ However, many CLS writers tend to shy away from associating law with any one particular ideology.⁴⁹ Instead, they tend to speak in terms of law having an ideological character that both reflects and supports many aspects of the dominant culture without being the lackey of any particular viewpoint.⁵⁰ Integral to this notion of law's general rather than specific ideological character is CLS's emphasis on legal nondeterminism. I use the term "legal nondeterminism" to refer to CLS's claim that there is no functional connection between the socio-economic organization of society and the form and substance of legal rules.⁵¹ In contrast to "deep logic" theories like orthodox Marxism and liberalism, which assert that the legal rules of a given society can be

48. See *supra* note 18 and accompanying text.

49. See, e.g., Hutchinson, *supra* note 13, at 5 ("For CLS, there is no position of theoretical innocence or political neutrality. Any act of interpretation or judgment, in both its practical and theoretical performance, has indissociable political and historical dimensions."); Hutchinson & Monahan, *supra* note 13, at 216, 235 (describing the CLS attack on Marxism, liberalism, and all theories that posit a "natural" mode of societal organization and explaining the CLS aspiration "to liberate man from any structure of dominating 'consciousness'").

50. See Gordon, *supra* note 4, at 647-48 (describing CLS's reliance on the Gramscian notion of ideological hegemony that does not brainwash people into thinking "the system" is fair but nevertheless forecloses "imagination of *alternative* orders"); Kairys, *supra* note 8, at 14-15 ("This is the great source of the law's power: It enforces, reflects, constitutes, and legitimizes dominant social and power relations without a need for or the appearance of control from outside."); Peller, *supra* note 20, at 1153 (arguing that law is ideological to the extent that it "excludes (or suppresses) other modes of discourse . . . [and] differentiates itself from 'mere' opinion or will").

51. See KELMAN, *supra* note 13, at 245-46 (describing the CLS argument that it is impossible to match up prevailing legal practices with particular social conditions); Gordon, *Critical Legal Histories*, in *CRITICAL LEGAL STUDIES*, *supra* note 13, at 79, 94-95 [hereinafter, Gordon, *Critical Legal Histories*] (arguing that the causal relationship between changes in social and legal forms is radically underdetermined because comparable social conditions do not produce the same legal responses or effects); Robert W. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 7, at 413, 420-21 [hereinafter Gordon, *New Developments*] (explaining that the logical outcome of CLS's strategy of exposing legal belief structures as historically contingent is the proposition that no set of legal principles is functionally necessary to maintain any particular economic order and that no particular economic order requires any particular legal rules); Gordon, *supra* note 4, at 645 (noting that CLS was born out of a revolt against two forms of instrumentalism—liberalism and Marxism—both of which claim that law responds to certain functional demands of society); Hutchinson, *supra* note 13, at 7 (noting that CLS denies the possibility of settled laws of social and economic change); Hutchinson & Monahan, *supra* note 13, at 219-21 (discussing the controversy in CLS over the nature and origins of legal consciousness with both sides agreeing that there is no satisfactory nexus between material conditions and the legal superstructure of society); Kairys, *supra* note 7, at 6 (disavowing the orthodox Marxist claim "that law is a 'superstructural' phenomena [sic] that is mysteriously governed and determined by an underlying 'base' of economic relations").

deduced from the social and economic relations in that society, CLS writers claim that law is relatively autonomous from society.⁵²

This legal nondeterminist claim is illustrated through Robert Gordon's analysis of the development of the negligence principle.⁵³ A once-familiar argument concerning the development of negligence law was that during the early stages of industrialization, a legal rule making companies strictly liable for all injuries they caused would have smothered the development of infant industries.⁵⁴ According to this determinist position, the negligence principle was adopted by courts to consciously or unconsciously protect budding industries.⁵⁵ The upshot of this argument was that the negligence principle was a direct, functional response to the needs of an industrializing society.

Gordon identifies three problems with this determinist approach. First, many societies industrialized without the aid of a negligence principle.⁵⁶ Second, the existence of the negligence principle alone does not imply any specific consequences for industry because the principle can be ignored or reinterpreted by judges.⁵⁷ Third, even if there were some connection between the negligence principle and the needs of early capitalism, it does not demonstrate that economic factors determined the form of the principle.⁵⁸

Karl Klare's analysis of the Wagner Act⁵⁹ also illustrates CLS's legal nondeterminist claim. The Supreme Court's interpretation of the Wagner Act, according to Klare, involved the imposition of a new form of legal consciousness onto the governance of labor relations.⁶⁰ Contrary to the nondeterminist, the legal determinist would trace this new legal consciousness and its accompanying rules to the inter-

52. See, e.g., Gordon, *Critical Legal Histories*, *supra* note 51, at 85-87 (critiquing three versions of instrumentalist history as only partial understandings of legal history); Gordon, *supra* note 4, at 645-46 (critiquing the "deep logic" theories of both liberalism and Marxism); Hutchinson & Monahan, *supra* note 13, at 216-19 (noting that CLS seeks to "complete the modern rebellion" by arguing that no societal arrangement is inevitable or historically determined, as both liberalism and Marxism claim). *But see* Hutchinson, *supra* note 13, at 7 (arguing that CLS posits that law and society are inseparable).

The "relative autonomy" thesis has been advanced by Marxists to explain the existence of laws beneficial to the working class. Marxists argue that instead of demonstrating that the material base has no effect on the legal superstructure, these laws merely demonstrate that law is "relatively autonomous" from the material base. See HUGH COLLINS, *MARXISM AND LAW* 47-52 (1982). According to these thinkers, however, the law's relative autonomy does not change the essential fact of class domination and actually supports that domination. *See id.*

53. See Gordon, *Critical Legal Histories*, *supra* note 51, at 87-88.

54. See, e.g., Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 368 (1951).

55. *See id.*

56. See Gordon, *Critical Legal Histories*, *supra* note 51, at 87-88.

57. *See id.*

58. *See id.*

59. See *supra* text accompanying notes 35-47.

60. See Klare, *supra* note 35, at 235.

ests of the capitalist ruling class (the Marxist variant), to the interests of the strongest political interest group (the liberal pluralist variant), or to some other dominant interest. Klare argues, however, that even though the new labor rules favored the interests of capitalism, this favoritism only occurred because the Court used its discretion to privilege those interests over others.⁶¹ In other words, the intervening discretion exercised by judges prevented the socio-economic structure from determining any particular result.

The arguments of Gordon and Klare illustrate the heart of CLS's legal nondeterminism claim. It is not just that law is internally and externally indeterminate, but also that no instrumental or functional connections may be drawn between the way society is organized and society's legal rules. Allan Hutchinson put the matter succinctly when he stated, "CLS has no truck with the belief that there is a direct causal and substantive nexus between material conditions and the legal superstructure."⁶²

The split between postmodern and critical modern CLS becomes clearest in the different ways they blend the indeterminacy thesis with legal nondeterminism. On one hand, postmodern CLS seeks to expose law's indeterminacy as a way of refuting the argument that *any* specific form of law could be functionally connected to *any* specific form of socio-economic organization.⁶³ In other words, these theorists attempt to reason from the premise of law's radical indeterminacy to the conclusion that law is also radically underdetermined by socio-economic forces. On the other hand, critical modern CLS claims that law under *liberalism* is both indeterminate and undetermined by material forces, but that liberal law also somehow upholds and strengthens the liberal organization of society.⁶⁴

61. *See id.*

62. Hutchinson, *supra* note 13, at 7.

63. *See, e.g.,* HUNT, *supra* note 17, at 158 (discussing the ambiguity within CLS over the source of the fundamental contradictions of the legal process and the different implications of the indeterminacy thesis that depend on whether the fundamental contradictions are seen as endemic to liberalism or to the human condition); KELMAN, *supra* note 13, at 261-62 (summarizing the CLS claim of structural contradiction as the argument that it is unlikely that law serves any discrete needs for particularly predictable outcomes because such outcomes are unavailable); Gordon, *Critical Legal Histories*, *supra* note 51, at 94-95 (describing the CLS claim that law is not an objective response to objective historical processes and is not a neutral technology adapted to particular social needs); Gordon, *supra* note 4, at 658 (noting that the CLS claim that no connection exists between societal structures and legal rules has caused many of its adherents to abandon the "comforting" hope of socialism as automatic liberation).

64. *See supra* note 24 and accompanying text.

C. *Criticism or Critique?*

In assessing these claims, it should be remembered that CLS's goal is not mere *criticism*, but rather *critique* of law.⁶⁵ Thus, any evaluation of CLS should center on how well it lives up to its self-imposed label. In order to be a critique in the traditional Kantian sense, a theory must analyze both the conditions of possibility (external criticism) and the limits of reason itself (internal criticism).⁶⁶ To the extent that CLS fails in either of those categories, it remains on the level of criticism rather than critique. The rest of this section will argue that CLS encounters difficulty in both areas and thus fails to constitute a true critique.

First, in analyzing the possibilities of knowledge about law, CLS rarely engages other more complex theories of how law is connected to society. When matched against “determinist” or “instrumentalist” theories—chiefly Marxism—CLS seems to have understood the truth about law's connection to society better.⁶⁷ However, that success is largely illusory because CLS engages in the destruction of mere straw men. CLS describes a Marxist approach to law as one that draws a direct, linear, and causal link between society's material base and legal superstructure.⁶⁸ According to this description, Marxism posits that economic forces and relations have a determining impact on legal reasoning and structure.⁶⁹ Through this myopic interpretation, Marxism becomes the foil for many of CLS's apparent insights.

Marxism, however, is not as simple-minded as CLS would like to claim. Marxists have long contended that the forces and relations of production constitute the basic components—the economic base—of any society.⁷⁰ Marxists have also asserted that the economic base has

65. See *supra* notes 16 & 21 and accompanying text.

66. See generally KANT, *supra* note 1; HÖFFE, *supra* note 1.

67. See, e.g., HUNT, *supra* note 17, at 159 (noting that CLS seeks to escape “Marxist reductionism”); Gordon, *Critical Legal Histories*, *supra* note 51, at 86-87 (attacking partial critiques of dominant jurisprudence, like orthodox Marxism, which supposedly argue that law responds directly or at least instrumentally to the needs of dominant social groups); Gordon, *supra* note 4, at 646 (contrasting CLS with “radical instrumentalist” theories, like Marxism, which supposedly claim that law is a determinate response to the needs of the capitalist ruling class); Hutchinson, *supra* note 13, at 7 (noting that CLS rejects orthodox Marxism, which purportedly claims that there is a direct causal nexus between material conditions and the legal superstructure and that there are settled laws of historical, social, and economic change).

68. See *supra* notes 51 & 52 and accompanying text.

69. See *id.*

70. The base-superstructure model was most succinctly summarized by Marx himself: In the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. The sum total of these relations of production constitutes the economic struc-

a determinist relationship to the societal superstructure, including the form and function of laws.⁷¹ However, to characterize Marxism solely in terms of this crude base-superstructure model, and then to take pride in providing a better insight, is not critique but caricature.

The problem is not so much that CLS criticizes the base-superstructure model. In its cruder versions that model richly deserves such criticism. The primary problem is that CLS uses the crudeness of vulgar Marxism as an excuse not to grapple with more complex Marxism. Marxists have written volumes refining, explaining, and revising the base-superstructure model in an effort to understand the complex ways in which economic forces and relations relate to superstructural forces, including law, in a nondeterminist yet determinate manner.⁷² Indeed, some have viewed the ability of Marxism to understand its own failures and to revise itself accordingly as Marxism's most appealing feature.⁷³ One would expect a true

ture of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of social consciousness.

Karl Marx, *Preface to A Contribution to the Critique of Political Economy*, in THE MARX-ENGELS READER 1, 4 (Robert C. Tucker ed., 2d ed. 1978); see also COLLINS, *supra* note 52, at 18-21 (explaining this passage in detail); Friedrich Engels, *Socialism: Utopian and Scientific*, in MARXISM: ESSENTIAL WRITINGS 62, 62-63 (David McLellan ed., 1988) ("The materialist conception of history starts from the proposition that the production of the means to support human life and, next to production, the exchange of things produced, is the basis of all social structure . . .").

71. See sources cited *supra* note 70.

72. See, e.g., COLLINS, *supra* note 52, at 88-90 (describing a cumulative base-superstructure model whereby the connection between the two is "one of ideological derivation and incremental growth"); JAY, *supra* note 3, at 53 (describing Max Horkheimer's attempt to better explain the base-superstructure model: "Both substructure and superstructure interacted at all times, although it was true that under capitalism the economic base had a crucial role in this process. What had to be understood, however, was that this condition was only historical and would change with time."); Friedrich Engels, *Letter to Joseph Bloch*, in THE MARX-ENGELS READER, *supra* note 70, at 760, 762-63 (noting that law, while determined by the economic base of society, also in turn influences and modifies that economic base). See generally MICHAEL ALBERT & ROBIN HAHNEL, UNORTHODOX MARXISM: AN ESSAY ON CAPITALISM, SOCIALISM AND REVOLUTION (1978) (attempting to explain how Marxism can be refined and reformulated while still retaining its liberating kernel).

73. See, e.g., PERRY ANDERSON, IN THE TRACKS OF HISTORICAL MATERIALISM 11 (1984) ("What is distinctive about the kind of criticism that historical materialism in principle represents, is that it includes, indivisibly and unremittingly, *self-criticism*. That is, Marxism is a theory of history that lays claim, at the same stroke, to provide a history of the theory."). In the same vein, Marcuse defended the Marxist method by arguing that the truth of its analysis transcends the provisional nature of its predictions:

If there is any conceivable sense in which it can be said: 'if the facts contradict the theory, the worse for the facts'—here it is. One could imagine Marx looking at the world today and saying: 'I told you so, not in my predictions but in my analysis of your society.' . . .

It must be noted that, in this conception, freedom does not appear as a historical imperative, in the sense that the prevailing conditions 'prescribe' it as the necessary next (or higher) stage of the development. The prevailing conditions are objectively *ambivalent*: they offer the possibility of liberation, and that of streamlined servitude . . .

critique of law—one that aims to understand both the possibilities and limits of knowledge about law—to grapple primarily with these more complex Marxist variations.⁷⁴

This is another place where the split between postmodern and critical modern CLS theories has explanatory power. The postmodernism of Foucault, Lacan, Lyotard, Derrida, and others grew out of dissatisfaction with structuralist theories like Freudianism and Marxism.⁷⁵ But the postmodern alternatives merely transferred the problem onto a different theoretical terrain, from objective to subjective phenomena.⁷⁶ Instead of attempting to answer the question of how the economic base relates to the societal superstructure, postmodern theories merely posit that no such social totalities, such as capitalism and liberalism, exist.⁷⁷ Instead of attempting to answer the question of how the individual is related to the socio-economic structure, postmoderns insist that individuals are constructed by a variety of languages, discourses, and perspectives.⁷⁸

Herbert Marcuse, *Freedom and the Historical Imperative*, in *STUDIES IN CRITICAL PHILOSOPHY* 209, 214 (Joris de Bres trans., 1973).

74. This is not to say that CLS writers have completely ignored more complex Marxist theories. See, e.g., HUNT, *supra* note 17, at 159 (discussing western Marxism and the Frankfurt School as theoretical influences on CLS); Gordon, *supra* note 4, at 646-47 (discussing reformulations of orthodox Marxism through theories of legitimation); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 268 & n.12 (1978), reprinted in *CRITICAL LEGAL STUDIES*, *supra* note 13, at 230 & n.12 (relying on Gramsci's theory of hegemony to argue that the Supreme Court's decisions interpreting the Wagner Act "provided the beginnings of the conceptual integration of the working class by laying the intellectual groundwork upon which were later erected the prevailing political theories of the postwar period"). My point is simply that, more often than not, CLS proclaims the failures of Marxism as a whole by refuting its weaker, determinist variants.

75. See ANDERSON, *supra* note 73, at 33 (describing the argument that post-structuralism constituted an epistemic shift away from Marxism); STEPHEN K. WHITE, *POLITICAL THEORY AND POSTMODERNISM* 3 (1991) (noting that Marxism is just as much a target of postmodern attack as capitalism because of the incompleteness of Marxism's rebellion against modern reason and will).

76. See ANDERSON, *supra* note 73, at 51-55.

77. See LITOWITZ, *supra* note 5, at 16 (describing the postmodern claim that contrary to modern ideas of history and progress, "history has no necessary internal logic or laws"); MINDA, *supra* note 4, at 3, 224 (describing postmodern skepticism toward modern "grand theories" and "structural patterns" and resistance to the idea of a "real world" or "system" to be discovered).

For example, Foucault describes his goal as follows:

[M]y aim is most decidedly not to use the categories of cultural totalities . . . in order to impose on history, despite itself, the forms of structural analysis. The series described, the limits fixed, the comparisons and correlations made are based not on the old philosophies of history, but are intended to question teleologies and totalizations.

MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* 15-16 (1972).

78. See LITOWITZ, *supra* note 5, at 12; MINDA, *supra* note 4, at 190 (citing Peter C. Schanck, *Understanding Postmodern Thought*, 65 S. CAL. L. REV. 2505, 2508-09 (1992), for the proposition that postmodernism sees the self as a social, cultural, historical, and linguistic creation). For example, Lyotard describes the "self" in the following way:

This postmodern emphasis on subjective phenomena and rejection of structural explanations carries over into postmodern CLS's attempts to understand law. Postmodern CLS theorists posit that subjective phenomena—chiefly judicial discretion—are more important than the objective phenomena of social and economic organization.⁷⁹ Postmodern CLS theorists also reject the modern belief in the possibility of systematizing legal knowledge in any comprehensive way⁸⁰ or relating law to a particular economic or social structure.⁸¹ But this merely shifts the terrain of analysis from objective to subjective factors, from structural to nonstructural explanations, without explaining why such a shift is necessary and how such a shift helps us to understand law better. By thus limiting its analysis to subjective and nonstructural factors, postmodern CLS remains at the level of criticism. While perhaps useful in limited ways, such criticism defaults on CLS's promise to produce a true critique of law.

Another way CLS falters in analyzing the possibilities of knowledge about law is by largely failing to reconcile its own contradictory claims regarding the indeterminacy and ideology theses. On one hand, CLS claims that law is radically inconsistent and unpredictable and that law is not determined by any socio-economic forces. On the other hand, CLS claims that law upholds and strengthens existing social and economic arrangements. But these claims, at least on their face, are contradictory.⁸² Without some complex theory of how law can be both determinate and indeterminate, determined and undetermined by social and economic forces, the CLS attempt to achieve the status of a liberating critique is again stymied.

This difficulty can also be traced to the influence of postmodernism. The postmodern focus on subjective discretion and resistance to all totalizing theories produces a theory of law that attempts to re-

A self does not amount to much, but no self is an island; each exists in a fabric of relations that is now more complex and mobile than ever before. Young or old, man or woman, rich or poor, a person is always located at nodal points of specific communication circuits, however tiny these may be. Or better: one is always located at a post through which various kinds of messages pass.

JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* 15 (Geoff Bennington & Brian Massumi trans., 1984).

79. See, e.g., *supra* text accompanying note 57 (reviewing Gordon's point that law is established through the subjective interpretation of judges).

80. See MINDA, *supra* note 4, at 224-25.

81. See *supra* notes 27 & 63.

82. Other scholars have identified this contradiction. See LITOWITZ, *supra* note 5, at 170; Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 323-28 (1989). These scholars offer different resolutions of the contradiction. Professor Litowitz suggests that "[a] more reasonable approach is to acknowledge that the legal system possesses a coherent decision-making process for solving legal disputes, but that this process must be interrogated from a critical, external perspective." LITOWITZ, *supra* note 5, at 170. On the other hand, Professor Kress suggests that "law's predictability is better explained by rich theories of adjudication than by radical indeterminacy and judges' hidden ideology." Kress, *supra*, at 328.

fute law's claim of detached neutrality by arguing that law is partisan.⁸³ But, even without positing a social or economic totality, the accusation of subjective partisanship implies that law favors the interests of some identifiable social group. Absent some complex theory about how law favors those interests, without at the same time being consistent and predictable, and without being determined in some sense by the interest it favors, it is difficult to understand how CLS can claim to achieve a superior understanding of law.

In analyzing the limits of its own understanding of law, CLS runs into two other problems, one epistemological and the other moral. The epistemological problem is this: if there is no logical connection between law and society, or between legal decisions themselves, then CLS's claim to understand the nature of law must be false. In other words, if law's indeterminacy is seen in such a way that law has no consistent and predictable effects on society, and law's ideological function is seen in such a way that society has no consistent and predictable effects on law, then the most one can assert is that law acts autonomously, following its own rules. But, according to the indeterminacy thesis, one can never know precisely what those rules are because they are inconsistent and incoherent. Thus, taking CLS's claims of legal indeterminacy and legal nondeterminism at face value, one can deduce that CLS has discovered nothing about law but the fact that nothing can be discovered.

This forces CLS into a position of radical skepticism toward all theories that attempt to understand and change society through law.⁸⁴ Yet, CLS itself is such a theory.⁸⁵ Thus, by positing that what we *know* about law can never be rationally connected to what we *do* in society, CLS invalidates its own premise.⁸⁶

CLS writers give two reasons why a position of epistemological skepticism is desirable. Some seek a legal system that merely recog-

83. See *supra* notes 18 & 49-50 and accompanying text.

84. See LITOWITZ, *supra* note 5, at 170 (describing postmodern CLS's radical skepticism and arguing that it "cannot give rise to any platform for changing the legal system"); MINDA, *supra* note 4, at 224-25 (describing postmodern CLS's skepticism toward modern attempts to understand and bring order to society through the construction of meta-theories).

85. See, e.g., Goodrich et al., *supra* note 18, at 12-14 (summarizing the third historical phase of CLS as an adaptation of political goals to more modest institutional change and alliance with a diverse group of disaffected minorities); Gordon, *supra* note 4, at 658 (arguing that while CLS must abandon the comforting hopes of socialism, it should still work toward similar goals); Hutchinson, *supra* note 13, at 2 (summarizing the central thrust of CLS as following through and going beyond legal realism by allying CLS to a program of "left" politics); Hutchinson & Monahan, *supra* note 13, at 229 (arguing that CLS can help transform society by putting people in the right frame of mind for political action).

86. See LITOWITZ, *supra* note 5, at 173-76 (arguing that postmodern legal theory's anti-foundationalism eliminates any "foundation remaining upon which to build a viable postmodern jurisprudence").

nizes the fact of its own indeterminacy.⁸⁷ In contrast to the present legal ideology that attempts to hide law's indeterminacy with myths of neutrality and objectivity, these writers seek to demystify law by showing that it is merely politics by other means. In general, this position corresponds to the postmodern school of CLS, which is skeptical toward any totalizing rationality.⁸⁸ For these writers, the indeterminacy and ideology theses point out a truth about law that is inherent in both liberalism and the Enlightenment project itself. This position winds up in an insoluble epistemological difficulty, however, because it must accept the indeterminacy of its own findings about law along with that of law itself. From such a limited perspective, CLS cannot hope to do anything more than criticize the form and outcome of legal rules on an ad hoc basis.

A second, less prominent, reason CLS writers offer for the position of radical skepticism is that the demystification of law is necessary to prepare the way for a radical change in society.⁸⁹ Accordingly, CLS's effort to show that liberal law is indeterminate is an attempt to create the necessary conditions for liberalism to be transcended. This position roughly corresponds to the critical modern school of CLS, which sometimes defers to the Frankfurt School for theoretical support.⁹⁰ This position is more promising than the first because it confines its criticism of legal indeterminacy and ideology to liberal forms of law and thus retains its critical epistemological platform. In other words, by locating the defect of law within liberalism specifically, instead of modernism generally, CLS can still claim to have discovered

87. See generally HUNT, *supra* note 17, at 158 (discussing the disagreement within CLS as to the source of fundamental contradiction, with one side arguing that such contradictions are inherent in all human action); Gordon, *Critical Legal Histories*, *supra* note 51, at 94 (arguing that "[l]egal forms and practices are political products that arise from the struggles of conflicting social groups"); Gordon, *New Developments*, *supra* note 51, at 420 (arguing that one of CLS's most promising strategies is the exposure of legal belief systems as historically contingent human constructs); Hutchinson, *supra* note 13, at 2-3 (noting that CLS has followed through on the Legal Realist attack on formalism by demonstrating that no objectively correct results are possible and that legal choices are always political); Hutchinson & Monahan, *supra* note 13, at 216-17 (noting that CLS seeks "to complete the modern rebellion against the view that social arrangements are natural or inevitable" by identifying the specific role law plays in concealing the disorder behind the legal order); Kairys, *supra* note 8, at 11, 14-15 (noting that CLS unmasks law's neutrality and objectivity in order to show how law is actually discretionary and subjective).

88. See *supra* notes 27-29 and accompanying text.

89. See, e.g., Hutchinson, *supra* note 13, at 8 ("One must step outside the liberal paradigm, into a realm where truth may be experiential, where knowledge resides in worldviews that are themselves situated in history, where power and ideas do not exist separately." (quoting Alan Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1237 (1981))); Hutchinson & Monahan, *supra* note 13, at 228 ("For the CLSers, criticism is an antidote to the social paralysis induced and sustained by the existing hierarchical nature of society. By reassuring people that things need not always be as they now are, the CLS movement can inspire the confidence necessary to reject prevailing arrangements.").

90. See *supra* notes 24-26.

a provisional truth about law without, at the same time, invalidating its ability to discover any truth at all. Unlike postmodern CLS, this strand of CLS can perhaps make good on its ambition to achieve a critique that both understands law and is capable of liberating law from liberal ideology.

The second problem CLS encounters in analyzing the limits of its own understanding about law is a moral one. Put simply, if the relationship between society and law is congenitally nondeterminist, law cannot be seen as right or wrong. In positing the divorce of law from society—where values arise—CLS must also accept the divorce of law from all normative judgments. What makes this problem particularly acute is that it contradicts CLS's desire for alliance with political and social groups that seek to alter society, in part, through moral arguments.⁹¹ For example, if CLS cannot make any moral judgments about law, it would seem difficult for it to ally itself with social groups victimized by law, such as racial minorities, women, and the poor. Without these alliances, which are necessary for any attempt to oppose the amassed power of liberal elites, CLS is relegated to toothless criticism instead of liberating critique.

Again, the postmodern wing of CLS is most affected by this problem because it rejects all attempts to locate law within a larger societal structure or system.⁹² The critical modern wing, on the other hand, has a potentially easier time with moral claims because it attacks the specifically liberal form of law and thus preserves for itself an external position from which to make moral judgments.⁹³

Therefore, in order to move beyond mere criticism of law and build a true critique of law, CLS must do the following: (1) engage complex Marxism more fully; (2) resolve the contradiction between its claim that law is indeterminate and nondeterminist and its claim that law supports dominant power relations; (3) find an epistemology capable of discrediting liberal law and society without invalidating CLS's own insights; and (4) reconnect law with the moral demands of society by achieving a more complex theory of the interaction between law and society. In the next two sections, I will reexamine the Frankfurt School roots of critical theory and argue that a return to those roots can help CLS accomplish all those things.

91. See Goodrich et al., *supra* note 18, at 13 (noting CLS's desire to affiliate itself with a diverse group of disaffected minorities); Hutchinson, *supra* note 13, at 2 (noting CLS's desire to go beyond Realism by allying it to a program of leftist politics).

92. See *supra* notes 27 & 63 and accompanying text.

93. See *supra* notes 24-26 and accompanying text.

III. THE FRANKFURT SCHOOL: ROOTS OF CRITICAL THEORY

A. Background

The Frankfurt School is the name generally given to a group of leftist intellectuals who were affiliated with the Institute of Social Research in Frankfurt, Germany, beginning in 1923.⁹⁴ These thinkers included Theodore Adorno, Walter Benjamin, Erich Fromm, Max Horkheimer, and Herbert Marcuse.⁹⁵ Although they never put forth a unified theory of society, much less a theory of law,⁹⁶ it is possible to trace the idea of a critical theory of society to the ideas of the Frankfurt School.⁹⁷

The Frankfurt School's goal was a methodical study and critique of modern society that combined Kantian critical philosophy and Marxist ideology critique.⁹⁸ Central to this project was an explanation of the Hegelian roots of Marxism through a study of Marx's *Economic and Philosophical Manuscripts of 1844*,⁹⁹ which focused on the

94. See BOTTOMORE, *supra* note 3, at 11; JAY, *supra* note 3, at 20-25; Piccone, *supra* note 1, at ix.

95. See BOTTOMORE, *supra* note 3, at 86-88 (offering biographical notes on Adorno, Horkheimer, and Marcuse); Piccone, *supra* note 1, at ix. One must also include Jürgen Habermas in any list of Frankfurt School theorists. See BOTTOMORE, *supra* note 3, at 55-67. However, a discussion of the different directions Habermas has taken critical theory is beyond the scope of this Article. For a good sampling of Habermas's work, see JÜRGEN HABERMAS, *ON SOCIETY AND POLITICS, A READER* (Steven Seidman ed., 1989). For his most recent work specifically applying his version of critical theory to legal phenomena, see JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996).

96. Two members of the Frankfurt School were, in fact, lawyers: Franz Neumann and Otto Kirchheimer. See JAY, *supra* note 3, at 144, 148; WILLIAM E. SCHEUERMAN, *BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW 4-5* (1994). Neumann and Kirchheimer analyzed legal phenomena in some depth. See, e.g., OTTO KIRCHHEIMER & FRANZ NEUMANN, *SOCIAL DEMOCRACY AND THE RULE OF LAW* (Keith Tribe ed., Leena Tanner & Keith Tribe trans., 1987); FRANZ NEUMANN, *THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM IN MODERN SOCIETY* (1986); *POLITICS, LAW, AND SOCIAL CHANGE: SELECTED ESSAYS OF OTTO KIRCHHEIMER* (F. Burin & Kurt Schell eds., 1969). However, Neumann and Kirchheimer's theories do not necessarily represent an application of the larger Frankfurt School approach to critical theory, see SCHEUERMAN, *supra*, at 7, and are thus beyond the scope of this Article. For a full discussion of the ideas of both theorists, see SCHEUERMAN, *supra*.

97. See BOTTOMORE, *supra* note 3, at 11; Piccone, *supra* note 1, at ix. For a detailed discussion of the philosophical method and structure of Frankfurt School critical theory, see GEUSS, *supra* note 3.

98. See Piccone, *supra* note 1, at ix. At root, Kantian critical philosophy consists of the notion that reason, through a critical examination of its own powers, can distinguish justifiable from unjustifiable metaphysical claims. *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY* 398 (Robert Audi ed., 1995); *SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY* 205-06 (1994); see also Piccone, *supra* note 1, at ix. As appropriated by the philosophical forebears of the Frankfurt School, history, culture, and society replaced metaphysics as the primary theme of reason's self-reflection. See Piccone, *supra* note 1, at x.

99. Karl Marx, *Economic and Philosophical Manuscripts of 1844*, in *THE MARX-ENGELS READER*, *supra* note 70, at 66.

philosophy of human nature underlying Marx's economic theory.¹⁰⁰ In practical terms, the Frankfurt School attempted to create interdisciplinary dialogue with other schools of thought concerning the possibilities and limits of both liberalism and Marxism.¹⁰¹ Central to this project was an effort to revise and extend Marx's method and theory in a new historical situation—World War II and its aftermath—where radical change seemed less and less possible.¹⁰²

B. *Critical Theory's Distinguishing Elements*

Any discussion of the substantive elements of Frankfurt School critical theory must begin with an analysis of what makes "critical theory" distinct from traditional theory. Max Horkheimer, the early leader of the Frankfurt School, answered that question in a 1937 article entitled *Traditional and Critical Theory*.¹⁰³ According to Horkheimer, there are many elements distinguishing critical from traditional theory. First, critical theory refuses to exalt knowledge of the world over action in the world.¹⁰⁴ Unlike empiricism, which maintains the possibility of pure objective knowledge, critical theory stresses that the thinker is always part of the society she studies.¹⁰⁵ Because liberal society is, at root, unfree—it is not the product of "free, rational human choice"—those seeking to *understand* society can only do so in a limited way until society is freed through social action.¹⁰⁶ At the same time, however, one who seeks to understand society must not only study the objective (positive) facts of society because to do so actually constitutes action on behalf of the status quo.¹⁰⁷ Rather, because knowledge and action are inseparable, one who seeks to understand society must also study the negative forces and tendencies in society that point toward another, freer society.¹⁰⁸

100. See JAY, *supra* note 3, at 42. See generally HERBERT MARCUSE, REASON AND REVOLUTION: HEGEL AND THE RISE OF SOCIAL THEORY 273-322 (2d ed., paperback ed. 1983) [hereinafter MARCUSE, REASON AND REVOLUTION] (explaining the Hegelian roots of Marx's dialectical understanding of society); Herbert Marcuse, *The Foundation of Historical Materialism*, in STUDIES IN CRITICAL PHILOSOPHY, *supra* note 73, at 1, 3-48 (explaining Marx's economic theory in Hegelian terms).

101. See JAY, *supra* note 3, at 4-5; Jürgen Habermas, *The Tasks of a Critical Theory of Society*, in ON SOCIETY AND POLITICS, A READER, *supra* note 95, at 77, 77-80; Piccone, *supra* note 1, at xii.

102. See JAY, *supra* note 3, at 44.

103. Max Horkheimer, *Traditional and Critical Theory*, in CRITICAL THEORY: SELECTED ESSAYS 188 (Matthew J. O'Connell et al. trans., 1982); see also JAY, *supra* note 3, at 80.

104. See Horkheimer, *supra* note 103, at 208-10.

105. See *id.*

106. JAY, *supra* note 3, at 80-81; see also BOTTOMORE, *supra* note 3, at 29; Horkheimer, *supra* note 103, at 207-08.

107. See Horkheimer, *supra* note 103, at 208.

108. See *id.* at 208-10; see also BOTTOMORE, *supra* note 3, at 29; JAY, *supra* note 3, at 81-82.

Second, critical theory rejects traditional theory's reliance on truth-seeking through the study of general principles and verifying and falsifying examples.¹⁰⁹ Instead, critical theory posits a dynamic type of verification where truth consists of the recognition of the possibilities and limits of social change inherent in any historical situation.¹¹⁰ In this sense, critical theory is an attempt to see society as a logical, historical, and structural totality that is multidimensional and contains both positive and negative tendencies.

Third, underlying both of the first two elements, critical theory's goal is not just understanding, but social change.¹¹¹ The notion of unifying research with practice, however, does not reduce itself to the pragmatist notion that whatever is effective is also true. Rather, for critical theory, truth is an *understanding* of society as a totality—both its facts and its possibilities—that also contributes to the *overcoming* of that totality.¹¹² This explains why the Frankfurt School continued to radically critique society even when Marxism appeared to be refuted by history. The Frankfurt School did not see history as a prophecy to be fulfilled, but rather as a world to be won through understanding and action.

C. *The Dialectical Method*

The dialectical method was the driving force of all three elements and of each study the Frankfurt School undertook.¹¹³ Modern dialectical thought has its origins in Hegel's account of societal progress as reason—conceived of as pure thought or spirit—working out its own contradictions.¹¹⁴ Marx appropriated this idea of societal progression through contradiction but argued that it was driven instead by a ma-

109. See Horkheimer, *supra* note 103, at 216-18.

110. See *id.* at 217-18; see also BOTTOMORE, *supra* note 3, at 29-30; GEUSS, *supra* note 3, at 55-56; JAY, *supra* note 3, at 82; Marcuse, *supra* note 73, at 214-15 (discussing Marxism as an understanding of the possibility of radical change rooted in the possibilities of the historical situation).

111. Horkheimer, *supra* note 103, at 221-24; see also BOTTOMORE, *supra* note 3, at 29-30; JAY, *supra* note 3, at 82.

112. See Horkheimer, *supra* note 103, at 229.

A consciously critical attitude . . . is part of the development of society: the construing of the course of history as the necessary product of an economic mechanism simultaneously contains both a protest against this order of things, a protest generated by the order itself, and the idea of self-determination for the human race, that is the idea of a state of affairs in which man's actions no longer flow from a mechanism but from his own decision. . . . Every part of the theory presupposes the critique of the existing order and the struggle against it along lines determined by the theory itself.

Id.; accord JAY, *supra* note 3, at 82-84.

113. See Eike Gebhardt, *Introduction to A Critique of Methodology*, in THE ESSENTIAL FRANKFURT SCHOOL READER, *supra* note 1, at 371, 396; see also JAY, *supra* note 3, at 54 (noting that for Horkheimer, true materialism was dialectical, involving an ongoing process of interaction between subject and object).

114. See MARCUSE, REASON AND REVOLUTION, *supra* note 100, at 10-11.

terial dynamic—the forces and relations of economic production.¹¹⁵ As appropriated and refined by the Frankfurt School, dialectical reasoning is a mode of social analysis seeking to mirror the process of natural evolution through the transcendence of contradiction.¹¹⁶

Dialectical thought begins with the premise that everything exists in a state of contradiction or conflict with its opposite—its negation.¹¹⁷ From that premise, dialectical thought extrapolates that the only way to truly understand something is to see both sides of its contradiction—a dialectical totality—at once.¹¹⁸

To use an example from nature, a seed exists in dialectical tension or contradiction with the earth in which it lies. It is not the same as the earth that surrounds it, but something else entirely. But that “something else” can only be seen by comprehending both seed and “not-seed” at the same time. Without the reality of the “not-seed” earth surrounding the seed, the seed itself cannot be understood. When the seed begins to sprout and grow, it becomes something else again. It is no longer the seed, nor is it the earth surrounding the seed (nor the oxygen, the water, etc.), but rather an identity including and also transcending all those things. Thus, in understanding a plant’s development and nature, we must understand its positive and negative attributes (plant and not-plant); we must understand the contradictions—the totality—out of which the plant arises and through which the plant exists.¹¹⁹

115. See Karl Marx, *Economic and Philosophic Manuscripts of 1844*, in THE MARX-ENGELS READER, *supra* note 70, at 66, 106-25.

116. See BOTTOMORE, *supra* note 3, at 16 (describing Horkheimer’s contrast of positivism and dialectical theory); see also MARCUSE, *supra* note 11, at 444-451 (describing the essentials of dialectical logic); Gebhardt, *supra* note 113, at 396-404 (describing the Frankfurt School’s dialectical method).

117. See Max Horkheimer, *On the Problem of Truth*, in THE ESSENTIAL FRANKFURT SCHOOL READER, *supra* note 1, at 407, 414 (describing dialectical thought as the progressive recognition of partial truths through “determinate negation”); see also MARCUSE, *supra* note 11, at 445-46 (noting that the power of negative thinking is the “driving power” of the dialectic because “identity” is the “continuous negation of inadequate existence, the subject maintaining itself in being other than itself”).

118. Horkheimer, *supra* note 117, at 432-33. Horkheimer stated:

Instead of ranging attributes alongside one another, [dialectical thought] seeks to show, by analysis of each general characteristic in respect to the particular object, that this generalization taken by itself simultaneously contradicts the object, and that in order to be properly comprehended it must be related to the contrary property and finally to the whole system of knowledge.

Id.; accord BOTTOMORE, *supra* note 3, at 16 (quoting Horkheimer’s statement that the dialectical method “seeks to reflect reality in its totality”).

119. For a discussion of dialectical thought applied to nature, see Mao Tse-Tung’s classic essay *On Contradiction*.

As opposed to the metaphysical world outlook, the world outlook of materialist dialectics holds that in order to understand the development of a thing we should study it internally and in its relations with other things; in other words, the development of things should be seen as their internal and necessary self-movement, while each thing in its movement is interrelated with and interacts on the things around it. The fundamental cause of the development of a

Dialectical logic, as applied by the Frankfurt School, is a method of understanding society in that same way: by examining what it is and what it is not; what it is and what it has been; what it is and what it can become. According to Horkheimer, there are three principles of dialectical thought as applied to society. First, dialectical thought “relativizes every . . . isolated definition,”¹²⁰ which means that each general definition of an aspect of society must be related to that aspect’s negation and to the social totality in order for it to be understood.¹²¹ For example, when one examines the short-term indeterminacy of law, one must also examine the long-term determinacy with which the law supports the established socio-economic organization of liberal society.

The second principle Horkheimer ascribes to dialectical thought is that “every insight is to be regarded as true only in connection with the whole body of theory.”¹²² By this he means that a theory of society should be constructed in such a way that each insight depends for its significance on the insights both preceding and following it. In other words, dialectical thought entails not just piecemeal and isolated insights accumulated to create a larger theory, but rather a total critique with each individual insight serving a particular role. For example, CLS’s insight into the nondeterminist relationship between society and law¹²³ is, by itself, undialectical because it is not connected to a larger theory of why and how law operates autonomously from society while simultaneously supporting dominant power relations.

Third, according to Horkheimer, dialectical thought has a “style of presentation [characterized more] by ‘as well as’ than ‘either-or’ [explanations].”¹²⁴ By this he means that dialectical thought does not seek a mere one- or two-dimensional understanding of the features of society in which contradiction is an obstacle. Rather, it seeks an understanding of all dimensions of society and how each dimension relates to others in such a way as to breed contradiction in their very nature. For example, instead of feeling forced to choose between an understanding of law as *either* determinist *or* indeterminate, deter-

thing is not external but internal; it lies in the contradictoriness within the thing. There is internal contradiction in every single thing, hence its motion and development. Contradictoriness within a thing is the fundamental cause of its development, while its interrelations and interactions with other things are secondary causes Simple growth in plants and animals, their quantitative development, is likewise chiefly the result of their internal contradictions.

MAO TSE-TUNG, *On Contradiction*, in 1 SELECTED WORKS OF MAO TSE-TUNG 311, 313 (2d ed. 1975).

120. Horkheimer, *supra* note 117, at 432.

121. *See id.*

122. *Id.* at 433.

123. *See supra* text accompanying notes 51-62.

124. Horkheimer, *supra* note 117, at 433.

minist or nondeterminist, dialectical reason would seek to understand why law appears to be both at the same time.

Above all, the Frankfurt School sought a dialectical method that would, as closely as possible, mirror the society being critiqued.¹²⁵ The prime example of this type of total dialectical logic is Marx's critique of capitalism. According to Horkheimer, Marx's critique was powerful not because of its ability to predict the future, but because of Marx's ability to critique the present with the very form of its own logic.¹²⁶ Marx used the general concept of commodity to derive and deduce other concepts and categories in a closed intellectual system.¹²⁷ From those concepts and categories, he derived the historical tendencies of capitalism, such as the concentration of capital, falling profit rates, and unemployment.¹²⁸ The dialectical element of this critique, according to Horkheimer, is the way each successive concept and insight is necessarily deduced from the others.¹²⁹ This logical structure is dialectical primarily because it corresponds to the way human lives are compulsively ordered by a capitalist society.¹³⁰ According to Horkheimer:

That men cannot shape their labor according to their common will but, under a principle which sets them against one another individually and in groups, produce with their labor not security and freedom but general insecurity and dependence; that they fall into misery, war and destruction instead of using the immeasurably increased social wealth for their happiness, and are the slaves instead of the masters of their fate—this finds expression in the form of logical necessity, proper to the true theory of contemporary society.¹³¹

Finally, according to the Frankfurt School, the catalyst of dialectical reasoning, and also that which makes critical theory *critical*, is the power of negative thinking.¹³² However, care must be taken in de-

125. See, e.g., BOTTOMORE, *supra* note 3, at 16; Horkheimer, *supra* note 117, at 433.

126. See Horkheimer, *supra* note 117, at 433-34.

127. See *id.* at 433. See generally 1 KARL MARX, CAPITAL 35-145 (Frederick Engels ed., New World Paperback ed. 1967) (defining the concept of "commodity," defining "labor" as an aspect of commodity, and discussing his concept of "value") [hereinafter MARX, CAPITAL]; Karl Marx, *Wage Labour and Capital*, in THE MARX-ENGELS READER, *supra* note 70, at 203, 204-10 (explaining "labor power" as a commodity measured by its exchange-value and defining "capital" as the accumulation of labor).

128. See Horkheimer, *supra* note 117, at 433. See generally 3 MARX, CAPITAL, *supra* note 127, at 25-266 (explaining the process of capitalist production and arguing that it tends to create wealth concentration, decreased profits, and increasing unemployment); 1 Marx, CAPITAL, *supra* note 127, at 210-17 (explaining the relationship between capital and wages and arguing that capital concentration tends to produce decreased wages).

129. See Horkheimer, *supra* note 117, at 433.

130. See *id.* at 433-34.

131. *Id.* at 434.

132. See MARCUSE, *supra* note 11, at 445; see also JAY, *supra* note 3, at 276 (discussing the later Frankfurt School notion that the only course open to those who wanted to escape

fining the sense in which negative thinking is related to critical theory. According to Marcuse, dialectical thought is negative primarily because it rejects the surface reality of the society it critiques.¹³³ This rejection is necessary because the established state of affairs maintains (or affirms) itself by denying its own inherent potential toward human social and economic freedom.¹³⁴ Thus, to analyze society based on the facts as they immediately appear is not only to fundamentally misunderstand society, but also to affirm the unfreedom of the status quo.¹³⁵

But this negativity is not to be understood as mere knee-jerk criticism of establishment values. Rather, dialectical negation seeks to refer “the established state of affairs to the basic factors and forces which make for its destructiveness, as well as for the possible alternatives beyond the status quo.”¹³⁶ In other words, negative thinking is the ability to see society as a totality instead of as a series of isolated occurrences. In relating every aspect of society to its corresponding opposite and to its potential, dialectical thought negates the false appearance of rationality in society and simultaneously pushes society toward true rationality by demanding that society live up to its own ideals. Hence, negative thinking is actually a positive political act because it serves to the following:

break down the self-assurance and self-contentment of common sense, to undermine the sinister confidence in the power and language of facts, to demonstrate that unfreedom is so much at the core of things that the development of their internal contradictions leads necessarily to qualitative change: the explosion and catastrophe of the established state of affairs.¹³⁷

D. The Critique of Determinist Marxism

The final aspect of Frankfurt School critical theory relevant to the purposes of this Article is the manner in which the Frankfurt School grappled with orthodox Marxism. The refinement and reformulation

from the “numbing power of the culture industry was to preserve and cultivate the vestiges of negation that still remained”).

133. See MARCUSE, *supra* note 11, at 446 (“For to comprehend reality means to comprehend what things really are, and this in turn means rejecting their mere factuality.”); see also HERBERT MARCUSE, *ONE-DIMENSIONAL MAN* 141 (1964) (“The object of dialectical logic is neither the abstract, general form of objectivity, nor the abstract, general form of thought—nor the data of immediate experience. Dialectical logic undoes the abstractions of formal logic and of transcendental philosophy, but it also denies the concreteness of immediate experience.”).

134. See MARCUSE, *supra* note 11, at 447.

135. See *id.* at 450-51.

136. *Id.* at 449.

137. *Id.* at 447.

of Marxism was among the central tasks the School set for itself.¹³⁸ But this did not entail the acceptance and application of orthodox Marxism whereby the economic base of society was alleged to determine, in a direct, linear way, the political and legal superstructure.¹³⁹ Rather, consistent with its dialectical method, the Frankfurt School rejected all forms of determinism.¹⁴⁰

Any theory of determinism is antithetical to critical theory in at least two distinct ways. First, determinism contradicts the imperative that society be understood as a totality whose positive and negative tendencies form a dialectical whole.¹⁴¹ Determinism is always one-dimensional because it isolates cause and effect from each other and ignores other tendencies that negate a causal relationship.

For example, the Frankfurt School rejected the orthodox Marxist prediction that analysis of the internal laws of capitalism would show that socialism was the necessary next historical stage. Instead, the Frankfurt School interpreted capitalism dialectically, showing that it contained tendencies toward continued and increased class domination as well as tendencies toward human liberation through revolutionary action.¹⁴² In Marcuse's words:

The Subject emerges as the decisive factor: the historical imperatives are in the last analysis given by *men*. For the objective conditions which define these imperatives are never 'unilateral', unambiguous: they always offer, not one, but several alternatives. The

138. See *supra* note 102 and accompanying text.

139. See *supra* note 70.

140. See JAY, *supra* note 3, at 42, 53-55 (explaining how the recovery of the Hegelian roots of Marxism entailed a rejection of "vulgar Marxism" and discussing Horkheimer's reformulation of the base-superstructure model as a theory of one historical stage of capitalism); Andrew Arato, *Introduction to Political Sociology and Critique of Politics*, in THE ESSENTIAL FRANKFURT SCHOOL READER, *supra* note 1, at 3, 6-8 (giving a general comparison of Horkheimer's Marxism to that of Lukács and contrasting both with traditional Marxist determinism); Horkheimer, *supra* note 117, at 421 (arguing that there is no "eternal riddle of the world" and that dialectical thought must reject self-contained deterministic theories because they ignore the element of human change and the "insurmountable tension" between concept and reality); Herbert Marcuse, *Philosophy and Critical Theory*, in NEGATIONS 134, 144-45 (Jeremy J. Shapiro trans., Free Ass'n ed. 1988) (arguing that the transformation of society, which critical theory intends to nurture, abolishes the original relation between base and superstructure).

141. See JAY, *supra* note 3, at 54-55 (discussing the Frankfurt School's notion that the relationship between the material base and the societal superstructure was multidimensional and should be seen as mediated through a totality); Horkheimer, *supra* note 117, at 433 ("A basic principle [of dialectical thought] is the inseparability of the regressive and progressive impulses, the preserving and decomposing, the good and bad sides of particular situations in nature and human history."); Marcuse, *supra* note 73, at 214 (arguing that historical and material conditions are objectively ambivalent).

142. See JAY, *supra* note 3, at 55 (discussing the Frankfurt School's criticism of orthodox Marxism's "fetishization" of the material base); Marcuse, *supra* note 73, at 214-15 (arguing that material conditions under capitalism offer both the possibility of liberation and increased servitude, depending on political consciousness).

historical *choice*: socialism or barbarism, each of the two in different forms.¹⁴³

Second, determinism contradicts critical theory's focus on the emancipatory potential of human *praxis*.¹⁴⁴ Running through Frankfurt School critical theory is an emphasis on the possibility of a theoretical understanding that also creates the possibility of radical change.¹⁴⁵ The three elements distinguishing critical from traditional theory presuppose a critique that recognizes and encourages social action as a partner *with* and effect *of* true understanding.¹⁴⁶ The dialectical method's perception of society as a totality composed of dynamic contradictions implies that liberating and oppressive tendencies coexist, even if oppressive ones dominate.¹⁴⁷ Finally, the negative thinking that drives the dialectical method is a way to understand totality and thereby break the hold of one-dimensional status quo logic.¹⁴⁸

The Frankfurt School's critique of Marxist determinism was part of its quest to reformulate the liberating elements of the Marxist critique in a new historical situation where radical protest and action seemed futile.¹⁴⁹ For example, Horkheimer consistently stressed that critical theory is not a closed system where reality is conclusively defined and the "eternal riddle" of the world solved.¹⁵⁰ Rather, the "union of thought and its object," according to Horkheimer, can only be brought about by "human activity within the framework of the given

143. Marcuse, *supra* note 73, at 215-16.

144. The Frankfurt School relied on the Marxist notion of "praxis" as "a kind of self-creating action, which differ[s] from the externally motivated behavior produced by forces outside man's control." JAY, *supra* note 3, at 4. This definition diverges from the traditional Aristotelian notion of praxis as a goal-directed activity or an action that applies theory to facts. See, e.g., SIMON BLACKBURN, *THE OXFORD DICTIONARY OF PHILOSOPHY* 298 (1994). The distinguishing quality of the Frankfurt School's Marx-inspired concept of praxis is that it assumes a dialectical relationship between theory and practice. See JAY, *supra* note 3, at 4.

145. BOTTOMORE, *supra* note 3, at 30. Bottomore stated:

Horkheimer expressed this idea by saying that the real social function of the critical theorist emerges when he and his work "are seen as forming a dynamic unity with the oppressed class, so that his presentation of societal contradictions is not merely an expression of the concrete historical situation but also a force within it to stimulate change."

Id. (quoting Horkheimer, *supra* note 103, at 215).

146. See *supra* Part III.B.

147. See Horkheimer, *supra* note 117, at 432-33.

148. See *supra* text accompanying notes 132-37.

149. See JAY, *supra* note 3, at 43-44 (discussing Frankfurt School critical theory as a return to the Hegelian roots of Marxism in an attempt to understand the new historical situation produced by the reduction of revolutionary hopes); Arato, *supra* note 140, at 5-6 (discussing Frankfurt School critical theory as an aspect of "western Marxism," which confronted a "crisis of revolutionary subjectivity" and attempted to reformulate orthodox Marxism with a more flexible social theory).

150. Horkheimer, *supra* note 117, at 418-21.

social period."¹⁵¹ This human activity anticipated by dialectical reason is conceived of not merely as external political and social action. Rather, it is primarily conceived of as the work of people who have first critically understood the society in which they live.¹⁵²

Likewise, Marcuse consistently sought to redefine Marxism by refuting determinist theories and replacing them with a dialectical understanding of the possibilities of human emancipatory action.¹⁵³ For example, contrary to traditional Marxism, which insisted that the transition from capitalism to socialism was inevitable and could be scientifically predicted, Marcuse emphasized the need for people to critically understand late capitalism so they could struggle against it:

‘To comprehend the world in order to change it’: this formulation of the revolutionary imperative is an empirical postulate, derived from the very banal (and quite ‘unscientific’) experience of unnecessary suffering Since there is no scientific logic according to which this imperative can be validated, it is indeed a *moral* imperative. There has always been a dual morality in history: that of the status quo, and that of its subversion: affirmation and negation—not for the sake of negation, but of ‘saving’ human values invalidated by the affirmation.¹⁵⁴

Even in the face of the apparent failure of mass movements to produce radical change, Marcuse maintained that this emphasis on human understanding and action, as opposed to historical determinism, was at the core of critical theory.¹⁵⁵ In fact, one of the most striking ways in which Marcuse’s interpretation of Marxism diverged from orthodoxy was his reevaluation, even disposal, of the idea that the proletariat alone was the revolutionary subject of history.¹⁵⁶

151. *Id.* at 419.

152. *See id.* at 418-21.

153. *See, e.g.,* MARCUSE, *supra* note 11, at 450 (“Since the adjustment of Reason to oppressive social institutions perpetuated unfreedom, progress in freedom depends on thought becoming political, in the shape of a theory which demonstrates negation as a political alternative implicit in the historical situation.”).

154. Marcuse, *supra* note 73, at 216.

155. *See* MARCUSE, ONE-DIMENSIONAL MAN, *supra* note 133, at 257. Marcuse stated:

[T]he second period of barbarism may well be the continued empire of civilization itself. But the chance is that, in this period, the historical extremes may meet again: the most advanced consciousness of humanity, and its most exploited force. It is nothing but a chance. The critical theory of society possesses no concepts which could bridge the gap between the present and its future; holding no promise and showing no success, it remains negative. Thus it wants to remain loyal to those who, without hope, have given and give their life to the Great Refusal.

Id.

156. *See* HERBERT MARCUSE, AN ESSAY ON LIBERATION 52 (1969). Marcuse wrote: [T]he displacement of the negating forces from their traditional base among the underlying population, rather than being a sign of the weakness of the opposition against the integrating power of advanced capitalism, may well be the slow

Marcuse argued that there were two essential things that distinguished the Frankfurt School's theory of historical change through human understanding from traditional Marxism's unilateral, linear theory of historical change. First, critical theory concerned itself not just with an objectively correct understanding of society, but also with an understanding of society in terms of "human happiness."¹⁵⁷ Second, while critical theory agreed with materialism that human happiness could only be obtained "through a transformation of the material conditions of existence," it also held that that transformation could only take place "as the free creation of . . . liberated individuals."¹⁵⁸ Thus, for the Frankfurt School, the primary problem with any determinist theory of society was that it discounted the possibility of human praxis as a possible counter-force to material conditions and thus remained one-dimensional and undialectical.

IV. REEXAMINING THE IMPLICATIONS OF THE FRANKFURT SCHOOL FOR CLS

To the extent that critical modern CLS is committed to critiquing law by understanding the connections between legal propositions, and between society and law, the study and use of Frankfurt School critical theory can aid CLS in achieving its goal. Moreover, the similar aims of the Frankfurt School and critical modern CLS—a radical critique aimed at clearing the way for social transformation—implies that a renewed alliance between the two might be fruitful. Before sketching out some preliminary visions of such an alliance, however, it will be necessary to analyze the connections others have drawn between CLS and the Frankfurt School.

A. *Previous Connections Between CLS and the Frankfurt School*

Other writers acknowledge the importance of Frankfurt School critical theory to the intellectual growth of CLS. For example, Alan Hunt describes CLS's early theoretical influences as a combination of "the more Marxian elements of critical theory and . . . subjectivist or interpretive sociology."¹⁵⁹ He discusses Frankfurt School critical theory alongside other western Marxists, such as Georg Lukács and Antonio Gramsci, as a strand of thought "concern[ed] with the analysis of the connection between the processes of economic and class rela-

formation of a new base, bringing to the fore the new historical Subject of change

Id.

157. Marcuse, *supra* note 140, at 135.

158. *Id.*

159. HUNT, *supra* note 17, at 159.

tions and the processes of human consciousness and action.”¹⁶⁰ Others, including Allan Hutchinson and Gary Minda, have pointed to the Frankfurt School’s analyses of ideology and legitimation as the precursor to early CLS notions of law’s ideological function in society.¹⁶¹ Still others have traced CLS’s antipathy toward the given facts of the legal world to an anti-positivist epistemology borrowed from the Frankfurt School.¹⁶² However, these passing biographical references do not engage the substantive elements of Frankfurt School critical theory in any depth.

Perhaps the most sustained treatment of Frankfurt School critical theory in the CLS canon can be found in David Kennedy’s article, *Critical Theory, Structuralism and Contemporary Legal Scholarship*.¹⁶³ Kennedy discusses the Frankfurt School at some length, describing its reading of Hegel and Marx, its attempt to build a dialectical theory, its rejection of both positivism and naturalism, and its aspiration to build a liberating theory of society that also had cognitive content.¹⁶⁴

Kennedy then describes some of the implications that Frankfurt School critical theory has had for critical legal scholarship. He notes that “two potential avenues of legal criticism seem to have been encouraged by the Frankfurt School tradition”: criticism of legal texts as indeterminate (the indeterminacy thesis) and criticism of the development of legal doctrines as mere struggles to displace one legal consciousness with another (the ideology thesis).¹⁶⁵ He also notes that CLS scholars have reflected the Frankfurt School idea that the truth of critical theory can only be judged by whether it stimulates liberating activity in two ways: a belief that the “right” method of analyzing law will “shake the grip of legal consciousness” and an uneasy relationship between critical legal scholars and actual legal advocacy.¹⁶⁶

Throughout his discussion of the Frankfurt School and its influence on CLS, Kennedy uses the postmodern method of focusing on

160. *Id.*

161. See MINDA, *supra* note 4, at 115; Hutchinson, *supra* note 13, at 7 n.12.

162. See Standen, *supra* note 19, at 992-96 (noting that CLS builds on the anti-positivism of the Frankfurt School); Alan Thomson, *Critical Legal Education in Britain*, in CRITICAL LEGAL STUDIES, *supra* note 13, at 183, 188 (discussing the influence of anti-positivist Marxism, as mediated by the Frankfurt School, on CLS’s rejection of the notion that legal ideology can be reduced to the social relations of production).

163. David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 N. ENG. L. REV. 209 (1985-86). Kennedy’s article also deals with the general implications of structuralism for CLS. However, a discussion of that larger theoretical tradition is beyond the scope of this Article. For a general description and discussion of structuralism, see TERENCE HAWKES, STRUCTURALISM AND SEMIOTICS (1977).

164. See Kennedy, *supra* note 163, at 217-35.

165. *Id.* at 246.

166. *Id.* at 246-47.

the “marginal dependencies” of Frankfurt School critical theory and questioning the privilege accorded by the Frankfurt School to dialectics.¹⁶⁷ More specifically, Kennedy seeks to show that Frankfurt School critical theory merely displaces the questions it seeks to answer. Rather than dealing directly with the details of the relationship between Hegel and Marx’s theories, Kennedy argues that the Frankfurt School focused more generally on the diachronic relationship between the two.¹⁶⁸ Rather than dealing directly with the particulars of how to connect liberating theory to liberating action in society, Kennedy notes that the Frankfurt School pursued a “strategy of dialectics.”¹⁶⁹

Because of that strategy of using dialectical reasoning to avoid the details of the particular theories and issues studied, Kennedy contends that Frankfurt School critical theory cannot deliver on its promise of providing intellectual access to the social totality.¹⁷⁰ Instead, Kennedy claims that the Frankfurt School legacy merely provides the critical legal scholar with a “residue of enabling metaphors,” such as “legitimizing ideology” and “liberating criticism.”¹⁷¹ However these metaphors are not accurate descriptions of how the social totality of liberalism works, but only clever distractions which momentarily make us feel that we have achieved that description.¹⁷² Ultimately, according to Kennedy, these distractions do not get the critical theorist any further toward answering the question, for example, of why the historical agent of Marxist revolution—the working class—fails to perceive its “true” interests in emancipation from capitalism. To say that ideology intervenes to legitimate the status quo or that the proper dialectical theory has not been developed merely displaces the question to another level. When that other level—“legitimizing ideology” or “liberating criticism”—itself becomes an object of inquiry, the problem of historical agency merely resurfaces without being solved.¹⁷³

In contrast to the Frankfurt School’s use of dialectical theory to displace and set aside the issue of how the social totality “really” operates or how law really works, Kennedy urges CLS to adopt the postmodern strategy of remaining “agnostic about these issues.”¹⁷⁴ Kennedy argues that “it was precisely the determination to ‘get it right’ which led the critical theorist” to displace and set aside the

167. *Id.* at 280.

168. *See id.* at 273.

169. *Id.* at 273-74.

170. *See id.* at 275.

171. *Id.*

172. *See id.* at 276.

173. *See id.*

174. *Id.* at 278-79.

problems of Marxism to another conceptual level.¹⁷⁵ Rather than resisting the urge to displace or set aside the problem of how law interacts with other societal forces, Kennedy encourages the legal theorist to merely give in to that urge.¹⁷⁶ Freed from the modern struggle to get the answer “right,” Kennedy argues that postmodernism can better explicate and destabilize any text, including legal text, which operates according to hierarchical reasoning.¹⁷⁷ Accordingly, Kennedy concludes that postmodern theory, while failing to escape or reject hierarchical reasoning, can nevertheless “mark” such reasoning as an act of social power.¹⁷⁸

Kennedy’s analysis seriously overvalues the postmodern strategy of agnosticism and seriously undervalues the dialectical method. I will assume for the sake of argument that Kennedy is correct that the Frankfurt School’s actual use of the dialectical method displaced the problems of historical determinism and the potential for human emancipation to a different conceptual level. However, Kennedy fails to demonstrate why that displacement warrants the abandonment of the dialectical method. He and other postmodern legal theorists appear to assume that because the Frankfurt School’s ultimate goal is an emancipatory understanding of society and because the Frankfurt School’s actual use of dialectical reasoning only partially contributed to that understanding by reformulating the Marxist problematic in a different way, any further attempt to use dialectical reasoning to achieve such understanding will similarly fall short. Perhaps that is true, but Kennedy never explains why the achievement of partial understanding is a failure.

Certainly such partial understanding is a failure if, as Kennedy maintains, the objective of critical theory is to “get it right,”¹⁷⁹ by providing “definitive or totalizing security.”¹⁸⁰ However, as discussed above, critical theory recognizes that all human understanding is partial and incomplete until society is freed through social action.¹⁸¹ That is why the Frankfurt School sought to move beyond determinist Marxism in the first place—because the latter posited that history was predictable and human emancipation inevitable.¹⁸² In contrast, the Frankfurt School relied on the dialectical method not because, like some magical talisman, it could produce a correct and total understanding. Instead, the Frankfurt School chose dialectical reasoning because it followed the contingent and incomplete process of

175. *Id.*

176. *See id.*

177. *See id.* at 279-81.

178. *See id.* at 286.

179. *Id.* at 278.

180. *Id.* at 287.

181. *See supra* text accompanying note 106.

182. *See supra* text accompanying notes 138-58.

natural development and thus grasped, like no other method, the dynamic of historical change.¹⁸³

Seen from that perspective, Kennedy and the postmodernists may be right that dialectical thought works by displacing the problem under analysis to a new conceptual level for refreshed consideration. However, dialectical reasoning offers the audacious possibility that the new conceptual level might actually be an advancement over previous levels. But, it is only a possibility. The “displacement” might just as well be regression. It can only be called advancement or regression after the possibilities and limits of the concepts at that level have been analyzed and exhausted. Thus, the observation that dialectical reasoning moves a theoretical problem from one conceptual plane to another is not an indictment of the method but, rather, the token of its truth.¹⁸⁴

Kennedy’s and postmodern CLS’s preference for intellectual agnosticism over dialectical reasoning does not stem from a reasoned choice. Kennedy has not rejected the dialectic because it fails as a methodology for understanding social totality. Rather, Kennedy has rejected the dialectic because he, along with other postmodern theorists, wants to broaden the leftist attack on the established order. Instead of seeking to overcome only the liberal form of law and society, Kennedy and other postmodern CLS theorists seek to renounce *all* forms of social hierarchy.¹⁸⁵

But in broadening the attack, Kennedy also lowers his standards. While Kennedy promises that postmodern agnosticism will allow CLS to achieve more critical distance from the law and thus be more rigorous in its analysis, he also expresses the comforting hope that such analysis will “reawaken the scholar’s sense of law’s participation in a broader culture without forcing him to produce a particular account of the relationship between law and society.”¹⁸⁶ But postmodern agnosticism toward the possibility of understanding the social totality allows the scholar to better analyze the admittedly marginal aspects of law only because it first allows her to walk away from the question at the center of any critical legal enterprise: the nature of law’s relationship to society. Such a thorough shift, while jettisoning the difficulty of having to consider the tough questions plaguing critical modern legal scholars, nevertheless creates its own internal and

183. See *supra* text accompanying notes 113-31.

184. See MARCUSE, *ONE-DIMENSIONAL MAN* 257 (1964) (arguing that the transcendence of the given facts is the “very token” of dialectical reasoning’s truth).

185. See Kennedy, *supra* note 163, at 280-81; see also Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 4, at 54 (attacking legal education for reproducing hierarchical social relations).

186. Kennedy, *supra* note 163, at 288.

external difficulties and places its status as a true “critique” in jeopardy.¹⁸⁷

To enable a more reasoned choice than Kennedy presents between the method of dialectical reasoning and the strategy of postmodern agnosticism, I will now consider some ideas as to how a reexamination of Frankfurt School critical theory can help CLS overcome those difficulties and build a true critique of law.

B. Liberal Law and Liberal Society as a Dialectical Totality

In sum, application of Frankfurt School critical theory would suggest an understanding of liberal law and liberal society as a dialectical totality. This would entail an analysis of society’s effect on law *and* law’s effect on society. Such an analysis would attempt to show how law both constitutes and is constituted by the material base of society, *as well as* how law simultaneously maintains its separate identity. From this vantage point, CLS would not be forced to choose between determinist instrumental theories, which see law as the tool of one powerful group or another, and radical indeterminacy and nondeterminism, which totally sever law from material influences. Such a dialectical understanding could change the CLS critique in three distinct ways.

First, an understanding of liberal law and society as a dialectical totality would include the CLS indeterminacy thesis, but only as one side of a dialectical contradiction. The other side of the contradiction is the way that law, despite its internal and external inconsistency, determinately and consistently supports the liberal regime. In other words, while the indeterminacy thesis properly unmasks legal reasoning as the exercise of judicial discretion, dialectical critical theory would simultaneously focus on how the notion of the “rule of law” consistently supports the liberal form of economy and society.

Karl Klare’s analysis of the Supreme Court’s early interpretation of the Wagner Act¹⁸⁸ is a good example of this type of dialectical combination of logical indeterminacy and ideological determinacy. Klare examines one aspect of the Wagner Act—the indeterminacy of its text and legal history¹⁸⁹—and then relates that aspect to its negation—the way in which that indeterminacy allowed the Court to embrace “those aims of the Act most consistent with the assumptions of liberal capitalism and [to foreclose] those potential paths of development most threatening to the established order.”¹⁹⁰ By thus positing that law’s *inconsistency* actually allows for systemic *consistency*, CLS

187. See *supra* Part II.C.

188. See *supra* text accompanying notes 35-47.

189. See Klare, *supra* note 35, at 235.

190. *Id.*

can perhaps better understand liberal law's power and how to overcome it.

Second, in general, a dialectical interpretation of law would include CLS's theory of legal nondeterminism but, again, as only one side of a dialectical totality. Postmodern CLS has opted for an "either-or" explanation of the relationship between law and society: *either* economic, social, and political forces determine legal rules *or* law is radically disconnected from such forces.¹⁹¹ By contrast, Frankfurt School critical theory would counsel an approach characterized by "as well as" explanations:¹⁹² that economic, social, and political forces set the general boundaries within which law operates *as well as* that those forces leave law relatively free to pick particular legal rules within the boundaries.

The advances of such an approach over the "either-or" thinking of most postmodern CLS can be shown by revisiting Robert Gordon's criticisms of the argument that the negligence principle developed out of the early industrial need to protect infant industries from strict liability.¹⁹³ As seen above, Gordon argues that many societies have industrialized without the aid of such a principle, that the existence of the principle does not imply a specific outcome for infant industries, and that even if there is some historical connection it is not a determinist one.¹⁹⁴ A dialectical interpretation of legal history avoids all three of Gordon's criticisms by showing how they are based on one-dimensional, "either-or" thinking.

Gordon's argument that many societies have industrialized without the aid of a negligence principle implies merely that a negligence principle is not necessary in every attempt to industrialize. It does not, however, refute the claim that such a principle was necessary in American society. Moreover, even if CLS proves that American industry could have developed without a negligence principle, this does not refute the claim that the negligence principle was, in fact, responsive to the needs of infant industries. Nor does it refute the claim that more lenient tort principles protect infant industries and aid industrialization, even if these more lenient principles exist in a variety of forms.

Gordon's argument that legal principles may be ignored or reinterpreted only adds a new dimension to the connection between law and socio-economic forces. It is certainly possible that judges in industrializing America *could* have ignored or reinterpreted the negligence principle in a way to restrict industry. But this in no way refutes the claim that the negligence principle gave pro-industry judges

191. See *supra* text accompanying notes 51-62.

192. See *supra* text accompanying note 124.

193. See *supra* text accompanying notes 53-58.

194. See Gordon, *Critical Legal Histories*, *supra* note 51, at 79, 87-88.

a way to release infant industries from liability within the bounds of legal respectability. The added dimension of human decision adds another link to the chain of reasoning whereby socio-economic forces are seen to influence the specific form of legal principles. That added link means that those forces may not directly determine the specific form of legal rules. But it does not refute the dialectical claim that socio-economic forces nevertheless determine a judge's range of discretion to apply the law in a way helpful or inhibiting to industry.

Finally, Gordon correctly notes that the connection between the negligence principle and the needs of early capitalism does not demonstrate that economic factors determined the form of the legal rule. But that is true only because, as dialectical theory posits, historical change does not operate in a one-dimensional determinist fashion. By encouraging simultaneous examination of how specific legal principles operate autonomously from socio-economic change *and* how the general direction of law is influenced by that change, a dialectical interpretation of law promises a multidimensional, dynamic critique capable of understanding the complexity of the liberal legal totality.

Third, and more specifically, a Frankfurt School approach would also include CLS's rejection of the orthodox Marxist claim that a determinist relationship exists between the economic base and the legal superstructure of society. Like CLS, the Frankfurt School rejected orthodox Marxism's efforts to draw a direct causal line between economy and society.¹⁹⁵ But, unlike postmodern CLS, the Frankfurt School also rejected the opposite conclusion that *no* rational connection exists between those two things.¹⁹⁶ Instead, Frankfurt School critical theory posited that economy and society are connected in a dialectical totality, and that the relationship between the two is multidimensional and dynamic.

The relationship is *multidimensional* because law is both influenced by, and autonomous of, economics, politics, and culture. This is a contradiction, but dialectical theory posits that it is a contradiction which drives liberalism and gives it shape. By understanding only one side of this contradiction—law's autonomy—CLS succumbs to one-dimensional thinking. By understanding both sides of the contradiction as simultaneously true, Frankfurt School critical theory can move CLS in the direction of a more complex understanding of the structure of liberal law.

For example, a dialectical analysis would focus on the multidimensional way in which the needs of business and industry influence judicial decisions—whether through the social background and associations of judges or through business-friendly cultural ideals. A

195. See *supra* Part III.D.

196. See *id.*

dialectical analysis would also focus on the human actions that intermediate between the needs of industry and judicial decisions—whether the education and arguments of corporate attorneys or the predilections of individual judges.

A dialectical critique of the relationship between law and the economic base of society also shows that the relationship is *dynamic*. In other words, whether the base is seen to determine or merely influence the superstructure, the relationship is not static in which economic forces mechanically dictate the form of legal rules. Rather, all along the way, human actors have the opportunity, however fleeting, to change both the legal and societal aspects of the relationship. By pointing out those opportunities, a dialectical critique of law can prepare and encourage that change.

For example, CLS might use its indeterminacy thesis to show how judicial discretion, textual ambiguity, and legal advocacy allow law to move in directions that challenge the established economic organization of society. Such a critique might exploit law's structural indeterminacy and nondeterminism by fostering political, social, and judicial action against legal rules that support the institutions of capitalism, racism, and patriarchy, and in favor of legal rules supporting economic democracy and racial and sexual equality. While such laws alone have almost no chance of altering the underlying socioeconomic organization of society, they might go a long way toward creating a legal and political climate in which more radical change seems feasible.

C. *From Criticism to Critique*

The above reflections on the possibilities of a dialectical analysis of the law-society relationship rest on two critical assumptions concerning the capacity of the critic to understand and change both law and society. First, such analysis assumes the capacity of the critic to understand both sides of the contradiction between nondeterminist causation and determinate results, and thus to comprehend the liberal form of the law-society totality. Second, such analysis assumes the ability of the critic, once such understanding is achieved, to use that understanding to inform and encourage radical social change.

I have argued throughout this Article that postmodern and critical modern CLS are divided primarily by their acceptance or denial of those two assumptions. The logical outcome of postmodern CLS is the abandonment of any attempt to understand society as a dialectical totality and any attempt to connect societal understanding to radical change. Instead, because contradictions and inconsistencies are inherent in all human effort, the postmodern critic's goal is merely to point out the facts of indeterminacy and nondeterminism and to oppose all forms of thought that obscure them. On the other

hand, the logical outcome of critical modern CLS is an attempt to understand the contradictions and inconsistencies of the liberal legal totality in order to inform and encourage social and political action to oppose and transcend the liberal organization of economy and society.

There is thus a logical fit between critical modern CLS and Frankfurt School critical theory: critical modern CLS seeks a critique of law capable of both understanding and emancipation, and Frankfurt School critical theory provides a method—dialectical reasoning—by which those aims can be achieved. I believe the reexamination of Frankfurt School critical theory sketched above¹⁹⁷ can help critical modern CLS overcome the problems that prevent CLS from achieving a true critique of law.

First, a reexamination of Frankfurt School critical theory would mean an engagement not with straw men but with a complex theory of Marxism. Instead of dealing primarily with determinist Marxist theories, critical modern CLS could engage the Frankfurt School as an example of a nontraditional, nondeterminist version of Marxism. Perhaps, after such engagement, CLS will reject the Frankfurt School's actual substantive positions as partial and flawed attempts to understand the law-society totality. However, by applying the dialectical method, perhaps CLS can build upon the Frankfurt School's successes and failures in an effort to construct a more complete and emancipatory theory of law.

Second, a reexamination of Frankfurt School critical theory might help CLS to reconcile its seemingly contradictory claims about law. With the aid of the dialectical method, CLS could work toward an understanding of how law's indeterminacy and nondeterminism are part and parcel to law's determinate support for the present economic and social arrangement of society. That understanding might also allow CLS to more accurately locate the areas of law where such determinate support are weakest in order to make the critical strategic decisions necessary to oppose and defeat liberalism.

Third, by locating the defect of law within the liberal form of society, Frankfurt School critical theory can help CLS retain an epistemological vantage point from which to critique law. Dialectical theory's focus on negation can help the legal critic, while still operating within liberal society, to see beyond liberalism to another, more just, society. In contrast to postmodern CLS, this would have the advantage of retaining the legal critic's epistemological distance. Instead of positing a defect inherent in the process of modern reason itself, critical modern CLS could posit a defect in the specifically liberal arrangement of society.

197. See *supra* Part III.

This advancement assumes that critical modern CLS can make the connection between theory and practice and use its understanding of law to contribute to social transformation. Frankfurt School critical theory offers a method—dialectical logic—which cannot promise that transformation but can at least preserve its possibility. In short, dialectical logic can allow critical modern CLS to translate understanding into social action because it counsels a total critique of society where every aspect is related to its determinate negation and both sides of societal contradictions are understood. That process of probing beneath the appearance of societal contradictions to the underlying essence of ideological unity constitutes a refusal to accept the rules of the liberal game, at least at the theoretical level. Although it remains an open question whether that refusal can grow into liberating political and social action, the dialectical notion of change through understanding can at least help CLS defend its epistemological skepticism without retreating into postmodern agnosticism.

Fourth, and finally, in seeking to understand law within the totality of liberal society, the dialectical method urges a process of thought in which the utter moral injustice of liberal law is exposed. That injustice is masked by the simultaneous indeterminacy and determinacy, nondeterminism and determinism, of law. The process of unmasking this injustice in a dialectical way would allow CLS to both explore the partial disconnection of law from liberal society and still make moral claims on the law, because it would not sever law from the societal source of moral judgments. Accordingly, CLS could more easily and successfully ally itself with social groups that have borne the brunt of liberal injustice and inequality. Such a critique would entail backing off the postmodern CLS claims of law's radical indeterminacy and disconnection from society. This partial retreat, however, would add to CLS's complexity and might fulfill CLS's long-frustrated desire to unify theory and practice by becoming the catalyst for a sweeping, revolutionary transformation of both law and society.

V. CONCLUSION

In claiming that law is indeterminate and undetermined by social and economic forces, the Critical Legal Studies movement has pursued two often contradictory goals. It has pursued the goal, informed by postmodern theory, of exposing the incoherence and inconsistency of law as an aspect of the incoherent and inconsistent process of modern reason itself. It has also pursued the goal, informed by critical theory, of exposing the incoherence and inconsistency of law in support of liberalism. In pursuing that first goal, CLS has placed its status as a true critique in jeopardy by eliminating its own critical

distance and making the understanding and change it seeks impossible. In pursuing the more limited, but also more focused, second goal with the aid of Frankfurt School critical theory, CLS can retain its critical distance and thus leave open the possibility of understanding liberal law in such a way as to overcome it.

In this Article, I have made a preliminary effort to sketch out some possible directions in which a reexamination of Frankfurt School critical theory might lead CLS. These insights could be overly optimistic. It is perhaps just as likely that CLS will continue to locate the source of contradiction and incoherence in the Enlightenment project of critical thought itself. It is also perhaps likely that liberalism will continue to produce more sophisticated forms of disguised domination through seemingly neutral laws and policies. The promise of critical theory, however, is not that law and society, once correctly understood, will automatically be transformed. Rather, critical theory offers the slight chance that the totality of the problem may at last be grasped. If that occurs, there is yet another slight chance that those who grasp the problem will be able to overcome it in a truly liberating way. In Marcuse's words, "it is nothing but a chance."¹⁹⁸

The prognosis for that chance becoming actualized depends, in the final analysis, not on the external conditions, but on the willingness of law's subjects to act on their hard-won understanding:

[T]he facts are all there which validate the critical theory of this society and of its fatal development: the increasing irrationality of the whole; waste and restriction of productivity; the need for aggressive expansion; the constant threat of war; intensified exploitation; dehumanization. And they all point to the historical alternative: the planned utilization of resources for the satisfaction of vital needs with a minimum of toil, the transformation of leisure into free time, the pacification of the struggle for existence . . . To be sure, the dialectical concept, in comprehending the given facts, transcends the given facts. This is the very token of its truth. It defines the historical possibilities, even necessities; but their realization can only be in the practice which responds to the theory . . .¹⁹⁹

198. MARCUSE, ONE-DIMENSIONAL MAN 257 (1964).

199. *Id.* at 252-53.