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The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation

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THE INDETERMINACY OF THE LAW: CRITICAL LEGAL STUDIES AND THE PROBLEM OF LEGAL EXPLANATION

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A central assertion of the Critical Legal Studies theorists is that the law—or more specifically, the relationship between authoritative doctrinal materials (like statutes, cases, etc.) and the actions of legal decisionmakers—is loose or "indeterminate."[1] They reject the notion that legal doctrine can ever compel determinate results, in a deductive sense, in concrete cases.[2] In so doing, Critical theorists seek to associate legal indeterminacy with the feeling, familiar to most law students and practicing lawyers, that doctrine can be utilized to argue any side of any legal issue.[3]

This claim will strike a responsive chord in many practicing lawyers, particularly litigators, who are used to approaching doctrinal materials, not as a coherent guide to permissible conduct, but as an arsenal of weapons that can be used to justify virtually any position a

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1 See, e.g., Gordon, Critical Legal Histories, 36 Stan. L. Rev. 57, 101 (1984); Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563, 580–81 (1982) [hereinafter cited as Kennedy, Paternalist Motives]; Tushnet, Post-Realist Scholarship, 15 J. Soc'y Pub. Tchrs. L. 20, 21 (1980); Unger, The Critical Legal Studies Movement, 96 Harv. L. Rev. 561, 570–72 (1983).

2 See, e.g., Hutchinson & Monahan, Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought, 36 Stan. L. Rev. 199, 206 (1984) ("Legal doctrine not only does not, but also cannot, generate determinant results in concrete cases."); Kennedy, Paternalist Motives, supra note 1, at 581; see also Heller, Structuralism and Critique, 36 Stan. L. Rev. 127, 191 (1984) (the contradictory strands of legal theory have only an analogical and indeterminate bearing on legal practice).

3 For example, Roberto Unger observes:

> It will always be possible to find, retrospectively, more or less convincing ways to make a set of distinctions, or failures to distinguish, look credible. A common experience testifies to this possibility; every thoughtful law student or lawyer has had the disquieting sense of being able to argue too well or too easily for too many conflicting solutions.

Unger, supra note 1, at 570. See also Gordon, supra note 1, at 116 (observing that lawyers and judges lay bare the contradictions of the legal system in their adversary arguments and dissents).

client wishes to maintain.[4] The experienced advocate knows that the doctrinal regime is sufficiently complex that there will always be some set of authoritative materials which, through skillful manipulation of the level of specificity and characterization of the facts, he can declare to be "controlling" of the case at bar. Similarly, he can be confident that no matter what authorities his opponent puts forward as equally dispositive, he will be able to find a basis for distinguishing them. This is not to imply that by skillfully manipulating doctrine, the advocate feels he is acting in bad faith or distorting the "true" meaning of the case. On the contrary, there is sufficient identification between lawyer and client, and sufficient indeterminacy in the meaning of the doctrinal materials, that most advocates, by the time they finish writing their briefs, are convinced of the correctness of their clients' positions.[5]

However, this perception—that every case can be argued both ways within the doctrinal system—appears to be inconsistent with another equally familiar phenomenon. Lawyers can, and often do, "determine," in the sense of "predict," the results of concrete cases, and they do so largely through an analysis and application of doctrinal principles. Every time a lawyer advises a client that one course of action entails less legal risk than another, or tells one client she has a case while advising another he doesn't, that lawyer is predicting, often with a high degree of success, the probable result of a concrete case. Indeed, much of what lawyers sell is their ability to predict the responses of legal institutions based (at least in part) on their ability to analyze doctrinal materials.[6]

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[4] See Heller, supra note 2, at 186 n.97 (litigation's role in upsetting settled legal practice may explain why litigators have been subject to a "certain ostracism . . . within the profession").

[5] See J. Freund, Lawyering 214–15 (1979). As Freund explains:

> [The] hallmark of the effective advocate is his belief in the rightness of his cause. . . .
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> . . . And before he can set out to persuade others to agree, the first person to convince is himself. However skeptically the litigator begins, by the time he's arguing the case in court, his belief is total and absolutely sincere.

Id. This identification by the advocate with the cause being advocated sometimes resonates with religiosity. See, e.g., S. Quindry, Practicing Law 240–41 (1938) (complete fidelity to a client's cause and a genuine desire for justice are essential parts of a lawyer's creed, which "cause the lawyer to submerge self and exalt the cause he represents"); L.P. Stryker, The Art of Advocacy 272 (1954) ("With all my heart I believed that my client had not sinned, but if he had, I knew he had a far, far better advocate than I. If such an advocate would plead for him, who was I to decline?").

[6] A substantial body of scholarly literature on "bargaining in the shadow of the law" suggests that lawyers and clients consider legal results sufficiently predictable to enable an *ex ante* calculation of the value of claims, thereby fostering an informal settlement. See, e.g., H. Ross, Settled Out of Court: The Social Process of Insurance Claims Adjustments 220–22

Thus, any coherent analysis of what it means for the law to be indeterminate must take into account both the practicing lawyer's intuition that every case can be argued both ways and the seemingly contradictory intuition that legal results are predictable or, as expressed by Cardozo, that in 90% of all cases judicial results can be anticipated by "right-minded men."[7]

The obvious compromise position, which many mainstream scholars adopt, is to postulate a core of "easy cases" that are "predictable," surrounded by a penumbra of "hard cases" where doctrine is indeed indeterminate and outcomes are therefore unpredictable.[8] Such a position reduces the claim of legal indeterminacy to a quasi-empirical matter of degree. Moreover, it does not capture the sense, which lawyers often have, that the same case may be both indeterminate and predictable at the same time. It is generally quite easy for lawyers to generate an argument that makes perfect "sense" within the existing doctrinal structure, but which one can predict, with virtual certainty, will not be adopted by any real judge.[9]

The Critical claim that the law is indeterminate need not, and should not be viewed merely as a dispute about the extent to which law is predictable. Indeed, such a claim need not at all deny the existence of predictive, or even causal relationships between legal doctrine and concrete legal results. Rather, the Critical claim of legal indeterminacy may be understood as a declaration that doctrine can never be

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(1970); Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4, 32 (1983) (The small fraction of all disputes adjudicated "provides a background of norms and procedures against which negotiation . . . takes place."); Mnookin & Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950, 968–69 (1979) (suggesting that the legal rules of family law "give each parent certain claims based on what each would get if the case went to trial").

[7] Cardozo's actual point is slightly different as he sought to identify the basis for judge-made law in the absence of binding precedent. The full quotation is: "The feeling is that nine times out of ten, if not oftener, the conduct of right-minded men would not have been different if the rule embodied in the [judge's] decision had been announced by statute in advance." B. Cardozo, The Nature of the Judicial Process 143 (1921). Although implicit in this statement is an assumption about the predictability of judicial decisions, it is worth noting that it derives from the intuitions of "right-minded men" and not doctrinal rules.

[8] See Dworkin, Hard Cases, 88 Harv. L. Rev. 1057, 1060 (1975) ("But if the case at hand is a hard case, when no settled rule dictates a decision either way, then it might seem that a proper decision could be generated by either policy or principle."). But see Heller, supra note 2, at 173–74 n.81.

[9] See Deutsch, Perlman v. Feldmann: A Case Study in Contemporary Corporate Legal History, 8 U. Mich. J.L. Ref. 1 (1974) (distinguishing Perlman v. Feldmann from Vietnam-era corporate law cases on the basis of the distinction between justifiable and nonjustifiable wars); see also Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1, 22–23 (1984) (setting forth an argument that the fourteenth amendment requires socialism).

an adequate *explanation* of legal results—a claim with profound implications, particularly with respect to legal scholarship.

This Article suggests that the problem of legal explanation revealed by the Critical theorists can be understood as a particular manifestation of the general problem of historical explanation and that work by philosophers of history can be useful in analyzing this problem. It argues that the inadequacy of doctrinal explanation leads to the emphasis in Critical theory on the motivations of decisionmakers and the explanation of legal results in terms of underlying social and political structures. Moreover, these Critical assertions about legal explanation are generally not subject to proof or refutation in an empirical sense, but are established to the extent that they have altered the questions legal scholars feel compelled to answer about the law.

This Article sets forth and defends the preceding claims through a philosophical account of the Critical concept of legal indeterminacy. It does not seek to analyze or review the written work of any particular theorist, far less, to give a coherent and exhaustive picture of something called "Critical Legal Theory." The impossibility of providing such an account has already been noted by people more capable of accomplishing that task.[10] Rather, by focusing on and analyzing the concepts of indeterminacy, causation, and explanation, this Article tries to make explicit what I believe is implicit in much of the writing of Critical theorists. Its goal, then, is to set forth a philosophically defensible account of what it means for the law to be indeterminate which comports with some, but certainly not all, of the main aspects of Critical theory.[11]

Part I of this Article makes some preliminary distinctions between prediction and causation and seeks to show how the law can be indeterminate and predictable at the same time. Part II analyzes the problem of legal explanation as a subset of historical explanation and sets forth what I take to be the Critical position that doctrinal explanations of law are never adequate. Part III shows how the Critical

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[10] See Unger, supra note 1, at 563–64 n.1; see also Heller, supra note 2, at 128 n.4 (suggesting a structuralist explanation for the Critical scholars' denial of a group ideology because "the privilege of ideological coherence is . . . ironically conferred in the gaze of others").

[11] The subject of this Article is the indeterminacy critique, not the Critical Legal Studies movement itself. It does not deal, except in tangential ways, with transformative politics or the relationship of that critique with the development of a left political agenda—issues which may be of central importance to the Critical Legal Studies movement. See, e.g., Hutchinson & Monahan, supra note 2, at 213. Moreover, this Article is unapologetically "rationalist" in that it presumes the value of rational discourse and clarity of terms in achieving common understanding, although the concept of rationality has been criticized by some as part of the "rationalist, formulaic, positivist, yuk program." Gabel & Kennedy, Roll Over Beethoven, 36 Stan. L. Rev. 1, 4–5 (1984).

concern with legal explanation leads to concerns about motivation and explanation through social and political structures of thought. Part IV looks at the epistemological status of the Critical claim that the law is indeterminate and demonstrates that, while it is not subject to empirical verification, that claim is, in a sense, already established.

I. Determinacy, Prediction, and Causation

A. *Determinacy as Prediction*

The existence, in some cases, of doctrinally predictable results does not imply the existence of any causal or necessary relationship between legal doctrine and concrete results. The existence of X may be a valid predictor of the existence of Y, yet this does not imply that X is a necessary condition of Y in either a logical or empirical sense.[12] For example, it is likely that the total rainfall for the United States does not vary much from year to year. If so, the total rainfall for 1984 can be used to predict the amount of rain that will fall in 1985. Yet it would be absurd to claim that the 1984 total caused the 1985 rainfall or that the 1984 total was a necessary condition for the amount that fell in 1985.

Similarly, Critical theorists might argue it would be quite surprising if doctrinal materials (which consist, after all, largely of results reached by legal decisionmakers in prior disputes) were not useful in predicting how future decisionmakers, who are likely to be either the same individuals or similar types of people, will react to similar disputes in the future. But this in no way implies that there is any necessary relationship between the doctrinal formulations contained in those materials and the results of concrete cases.

Indeed, I suspect that lawyers who use doctrinal materials to predict results in concrete cases read and evaluate them in very different ways from students or scholars seeking to derive "correct" doctrinal formulations. For example, we are taught that there is a hierarchy of doctrinal authority in which Supreme Court cases come first, courts of appeals cases second, and so on. In trying to predict a federal district court decision, however, my own hierarchy would probably be: recent decisions by that district court judge, first; recent decisions of the court of appeals likely to review the case, second; recent decisions of other district court judges my judge is likely to know, third; and Supreme Court decisions, perhaps fourth.

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[12] This point is similar to William Dray's distinction between X as a reliable inductive sign of Y, and X as the explanation of Y. See W. Dray, Laws and Explanation in History 61 (1979).

This distinction between prediction and causation leads to the observation that there is no necessary connection between the formal realizability of a set of legal rules and the predictability of legal results. This observation, while hardly new,[13] is often obscured or ignored in much current scholarship where one finds an assumption that a more formal, clear or consistent set of legal rules automatically leads to greater "certainty" of result—that is, greater predictability.[14] In fact, as we have seen, there is no necessary connection between the formal realizability of a set of legal rules and the predictability of results. As Cardozo noted, a group of "right thinking men" with no statutes (or established doctrinal rules) may still be able to predict the results of equally "right thinking" jurists most of the time.[15] Moreover, as a practical matter, if we live in a legal regime which is both formally indeterminate (since doctrinal arguments can always be invoked on both sides) and predictable, no assumptions can be made as to whether adoption of more or less formal legal rules will lead to more or less certainty of prediction in such a legal regime.[16]

B. *Determinacy as Causation*

Once it is recognized that predictive statements about legal re-

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[13] For example, in the first quarter of the twentieth century, John Dewey observed:

> Enormous confusion has resulted, however, from confusion of *theoretical* certainty and practical certainty. There is a wide gap separating the reasonable proposition that judicial decisions should possess the maximum possible regularity in order to enable persons in planning their conduct to foresee the legal import of their acts, and the absurd because impossible proposition that every decision should flow with formal logical necessity from antecedently known premises.

Dewey, Logical Method and Law, 10 Cornell L.Q. 17, 25 (1924).

[14] See, e.g., Brudney & Chirelstein, A Restatement of Corporate Freezeouts, 87 Yale L.J. 1354, 1376 (1978) (proposing a new classification for analyzing corporate freezeouts in the expectation of a "material improvement both in the outcomes of litigated cases and in the capacity of company managers . . . to forestall litigation"); Yablon, Contention Disclosure and Corporate Takeovers, 6 Cardozo L. Rev. 429, 459–61 (1985) (suggesting four factors that should be considered by a court evaluating corporate disclosure standards, for the purpose of providing "a structure in which courts and lawyers can analyze the relevant considerations," id. at 461). The point, of course, is not that greater formal realizability will never lead to greater predictability, but rather that the correlation can never be simply assumed. For a discussion of how an increase in formal realizability leads to less predictability in welfare cases, see Simon, Legality, Bureaucracy, and Class in the Welfare System, 92 Yale L.J. 1198, 1221–22 (1983).

[15] See supra note 7.

[16] See Shupack, Rules and Standards in Kennedy's *Form and Substance*, 6 Cardozo L. Rev. 947, 961-62 (1985) (systemic or general formally realizable rules can introduce standard-like concepts into legal analysis that increase the opportunities for judicial discretion and thereby decrease predictability). Certainly, no assumption can be made without knowing a great deal about those who will be applying the rules and those to whom the rules will be applied. See Simon, supra note 14, at 1226.

sults can be made without necessarily believing that such results are caused by the existence of clear and knowable existing rules, a question arises: What is it that Critical theorists are denying when they deny any determinate relationship between doctrinal rules and legal results? Since Hume, it has generally been understood that the assertion of a causal relationship between two events or conditions does not imply any logical necessity or the existence of any unobserved power in the first event to bring about the latter; rather, that statement asserts an invariable conjunction between the occurrence of the first and second event.[17] To assert that X is the cause of Y is to assert that X is invariably followed by Y, or, stated another way, X is the set of all necessary and sufficient conditions for the occurrence of Y.[18]

In practice, this concept of causation, which Mill refers to as the "philosophical" concept of causation,[19] is primarily applied in the experimental sciences. There, events can be sufficiently controlled and generalized so as to create a limited and manipulable set of such conditions. For example, the statement "the volume of a gas is determined by its temperature and pressure" uses "determined" in this rigorous sense of philosophical causation.

However, when this concept of causation is applied to particular-

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[17] D. Hume, An Enquiry Concerning Human Understanding 61–81 (1927). Hume defined cause as objects in succession of one another, where objects similar to the first object are invariably followed by objects similar to the second object. Id. at 79.

[18] 1 J.S. Mill, System of Logic, bk. III, ch. V, §§ 1–5 (6th ed. London 1865) (1st ed. London 1843). A cause, in Mill's view, "is the sum total of the conditions . . . the whole of the contingencies of every description, which being realized, the consequent invariably follows." Id. § 3, at 372. Mill did not restrict his discussion of causation to discrete, isolatable phenomena. The prototypical event in Hume's causal analysis is the collision of billiard balls: one event invariably follows another. See D. Hume, supra note 17, at 28. But Mill acknowledged that in the real world only quite rarely is there a single antecedent cause for a given event. More often events in nature are the result of complicated clusters of events, including both positive and negative conditions. J.S. Mill, supra § 3, at 367–71.

This redefinition of causality has led some commentators to suggest that Mill embraced the doctrine of the plurality of causes. See H.L.A. Hart & A.M. Honoré, Causation in the Law 17–20 (1959). For Mill, any given event may be caused by several conditions and, therefore, these conditions must be sufficient to cause the event. However, they are not the necessary cause of the event, in the sense of being the exclusive cause. See id. at 18.

[19] 1 J.S. Mill, supra note 18, § 3. Mill's rigorous philosophical definition of cause requires identification of all "conditions, positive and negative taken together." Id. at 372. But Mill distinguished this rigorous definition of cause from the common usage of the word which typically identifies a single event as the cause. The common usage, according to Mill, is improper for scientific discourse. Id. at 370. See also R. Collingwood, Essay on Metaphysics 285–327 (1972), in which Collingwood identified three senses of the word cause: the first associated with historical or common usage, admits of a possible multiplicity of causes; the second, associated with the practical sciences, identifies a single cause against a background of manifold, necessary conditions; and the third, associated with the pure sciences, corresponds with Mill's philosophically rigorous, unconditioned cause that encompasses all background conditions. Id. at 301–02.

ized historical events, such as the making of a judicial ruling, it ceases to be useful as a practical matter, and perhaps even as a theoretical one. If, to state the "cause" of a judicial ruling, one must delineate all the necessary and sufficient conditions leading to that ruling, the impossibility of the undertaking is obvious. While the existence and apprehension by the judge of various doctrinal materials might well be one of the background conditions of the ruling, there are numerous others including the identity of the judge, her personality, her legal training, her law clerk, the lawyers, their preparation, their training, on ad infinitum.

Even if one agrees that doctrine may be one of the numerous background conditions involved in "causing" a judicial result, the very complexity of the decisionmaking process ensures that there can never be any necessary connection between a particular doctrinal development and a concrete act of judicial decisionmaking. This is what the Critical theorists mean when they speak of the "contingency" of the relationship between doctrine and results.[20] Given the large number of potentially applicable doctrinal formulations (every case can be argued at least two ways) and the large number of other background conditions, Critical theorists can confidently take the strong position that there can *never* be a necessary connection between any doctrinal formulation and a given result.[21] In every case, if the other background conditions were sufficiently different, a different result would apply.[22]

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20 See, e.g., Gordon, supra note 1, at 101 ("The causal relations between changes in legal and social forms are likewise radically underdetermined: Comparable social conditions . . . have generated contrary legal responses, and comparable legal forms have produced contrary social effects."); Hutchinson & Monahan, supra note 2, at 206 ("Legal doctrine is nothing more than a sophisticated vocabulary and repertoire of manipulative techniques for categorizing, describing, organizing, and comparing; it is *not* a methodology for reaching substantive outcomes.").

21 On one level, indeterminacy is manifest in legal doctrine as evidenced by contradictory impulses within supposedly coherent doctrine. See supra text accompanying notes 1–5. On another level, it has been argued, indeterminacy is embedded in language itself, or in the structure of thought underlying language. See Boyle, The Politics of Reason: Critical Legal Theory and Local Social Thought, 133 U. Pa. L. Rev. 685, 695 (1985), in which the author states:

> There is no objective translation of social phenomena to legal phenomena, no neutral interpretation of unambiguous doctrine. At each stage of the legal process a subjective and essentially political act of interpretation is required. This political choice is involved in the wording of rules, in the construction and maintenance of the "legal world" . . . .

22 This is the point Robert Gordon makes:

> The Critical claim of indeterminacy is simply that none of these regularities are *necessary* consequences of the adoption of a given regime of rules. The rule-system could also have generated a different set of stabilizing conventions leading to exactly the opposite results and may, upon a shift in the direction of political winds, switch to those opposing conventions at any time.

According to this view, the assertion that law is indeterminate reduces to the claim that the relation of legal doctrine to results is extremely complex and probably never fully understood. While this is a view many Critical theorists hold, such an observation does not appear particularly disturbing to any lawyer or legal scholar who has spent time studying or practicing in a given field of law. The full implications of this view only appear in connection with the problem of *explaining* the actions of judges or other legal decisionmakers, an activity in which many legal scholars purport to be engaged.

II. INDETERMINACY AND THE PROBLEM OF EXPLANATION

A. *The Problem of Historical Explanation*

Explanation, in its most rigorous form, involves a statement about the event sought to be explained and the assertion of a causal (that is, invariable) generalization that if an event of the first type occurs, an event of the second type will also occur. For example, one can "explain" why the lake froze on December 30 by stating that: (1) the lake contained 10,000 gallons of water; and (2) the temperature had been below 25°F for five days. Implicit in this explanation is the causal generalization: If 10,000 gallons of water are subjected to temperatures below 25°F for five days, that volume of water will freeze. Note that this causal generalization is of Mill's philosophical type in that it sets forth the necessary and sufficient conditions for the freezing of the lake.[23]

Most explanations of historical events, however, set forth only a small fraction of the background conditions that "caused" the event in Mill's philosophical sense of causation. For example, one might explain Ronald Reagan's election in 1980 by referring to a host of events—the Iranian hostage situation, low voter turnout, a conservative trend among the electorate—none of which were sufficient, in themselves, to cause the election of Reagan, but all of which constituted background conditions required for his election to occur in the way it did. At the same time, however, one would probably ignore a whole series of other conditions which, while equally necessary, in that they were required to exist in order for Reagan's election to occur, would not be considered very illuminating as explanations of that

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Gordon, supra note 1, at 125.

[23] According to Ernest Nagel, one characteristic of causal laws found in modern physical sciences is that such laws assert "a relation of functional dependence . . . between two or more variable magnitudes associated with stated properties or processes." E. Nagel, The Structure of Science 77 (1961). The relation of functional dependence between temperature and quantity of water is one example.

event: that the United States is a democracy, that the Republican party exists, that California is a state.

Thus, the problem of explanation with respect to complex historical events is that they are "overdetermined":[24] there are a multitude of events and conditions which jointly constitute the necessary and sufficient conditions for the occurrence of that event, and no identifiable principle exists for selecting one or more of those conditions as a more valid "explanation" of the event than any other.

Nevertheless, in a historical or common sense usage of the concept of explanation, it is clear that some background conditions are "better" explanations of the event than others. For example, consider the person, asked to explain the occurrence of a fire in a nearby building, who replies that it occurred because there was oxygen in the air at the time. Certainly the explanation is true in the sense that the presence of oxygen was a necessary, though not sufficient, condition for the occurrence of a fire. This statement, however, would not generally be considered a "good" or "adequate" explanation of the occurrence of a particular fire. By contrast, the statement "a man in the apartment building had been smoking in bed" would likely be considered an adequate explanation.

A number of philosophers have attempted to develop some principle whereby explanatory conditions (often referred to, in this more limited sense, as "causes") can be distinguished from mere background conditions. Collingwood suggested that, as a matter of "practical science," the distinguishing feature of explanatory conditions was that they could be manipulated or used to obtain or prevent the explained effect.[25] For example, the explanation that my car is not moving because sufficient energy is not being imparted to the rear

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[24] See Gordon, supra note 1, at 70–71. Gordon uses different terminology to make a similar point. Critical scholarship, according to Gordon, attacks the assumption that social events are "determined by impersonal social forces." Id. at 70. Instead, Gordon views social events as overdetermined in the sense that "they are processes whose logic is one of multiplicity, not uniformity of forms." Id. at 71.

[25] R. Collingwood, supra note 19, at 302–11. Collingwood formulated two principles from his critique of Mill's discussion of causation. First, he argued, "for any given person the cause . . . of a given thing is that one of its conditions which he is able to produce or prevent." Id. at 304. This principle, rephrased as the relativity of causes, leads to the identification of multiple causes in the analysis of a common phenomenon. Collingwood put forward the example of a car skid, which by this principle, can be said to be caused by the car's speed, the road's grade, or the car's design, depending upon the analyst's vantage point and which factor is most under the analyst's control. Id. As a corollary to this principle, Collingwood proposed that "for a person who is not able to produce or prevent any of its conditions a given event has no cause . . . at all." Id. at 306. See also Collingwood, On the So-Called Idea of Causation, in 38 Proc. Aristotelian Soc'y 85, 85–90 (1938) (defining cause, in one sense, as the power to produce or prevent an event at will).

wheels to overcome inertial forces, while implying a true causal generalization, is unsatisfactory. The explanation that my car is not moving because the battery is dead is much better.

Hart and Honoré criticized this method of distinguishing explanatory causes, pointing out that, according to it, we could not know the cause of cancer, in this explanatory sense, if we could not prevent it.[26] They proposed instead a distinction between normal and abnormal conditions, arguing that what distinguished the explanatory condition was that it was unusual or out of the ordinary. For this reason, smoking in bed, since it constitutes a relatively unusual event, can be the explanation for a fire, while the presence of oxygen cannot.[27]

These philosophers also give special attention to the causal explanation of voluntary human acts. For Collingwood, all causal thinking is built upon an anthropomorphic metaphor that refers to the experience of compulsion in human affairs.[28] Causation or compulsion in human affairs, though, does not negate the idea of free will.[29] Rather, the explanatory cause of a voluntary action is the event that provides an inducement or persuasion to that actor.[30] Hart and Honoré use similar language to describe a causal connection between two human actors. In order to preserve the concept of free will, Hart and Honoré stress that such causal statements do not imply any generalizable regularity between reasons and voluntary acts.[31] Instead, causal state-

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26 H.L.A. Hart & A.M. Honoré, supra note 18, at 31. They further noted: "The discovery of the cause of cancer would still be the discovery of the cause, even if it were useless for the cure or avoidance of the disease . . . ." Id. at 34. Compare Collingwood's definition of cause, supra note 25 and accompanying text. Hart and Honoré conceded that there was much overlap between their definition and Collingwood's: "What very often brings 'controllability' and cause together is the fact that our motive in looking for the abnormality which 'makes the difference' is most often the wish to control it and, through it, its sequel." Id. Hart and Honoré's definition is broader than Collingwood's, then, because it includes, within the category of causes, such uncontrollable events as droughts and lightning bolts. Id.

27 Id. at 31–36. But when oxygen is not normally present, as in a laboratory with a controlled atmosphere, the presence of oxygen can serve as the causal explanation of a fire. Id. at 33.

28 See R. Collingwood, supra note 19, at 296–327. Causal thinking, in the first sense of the word, describes the causes of voluntary human actions. Id. at 296. The second sense of the word cause, associated with the practical sciences, involves the idea of compulsion, which, according to Collingwood, is based upon the experience of compulsion in man's social life. Id. at 309. Thus, causal thinking in the practical sciences, which describes man's manipulation of nature, resembles causal thinking about purely human actions. Id. at 310–11. Collingwood claimed that even the third, purely scientific sense of cause is also based on the idea of compulsion in human affairs. Id. at 322.

29 Id. at 293. Indeed, Collingwood indicated that causal thinking depends upon a belief in free will: "The act so caused [in the first sense of the word] is still an act; it could not be done (and therefore could not be caused) unless the agent did it of his own free will." Id.

30 Id. at 292–95.

31 H.L.A. Hart & A.M. Honoré, supra note 18, at 52 ("The statement that one person did

ments, in their view, describe particularized "mental acts."[32]

Yet the problem of overdetermination—that is, the existence of a multitude of true and necessary conditions for the occurrence of an act—is present with voluntary acts, as well as other events. For example, my voluntary act of coming to school today may be explained by the statements: "I came because I had a class today"; "I came because I am a responsible person"; or "I came because I have recovered from the flu." All are true statements. All constitute reasons for the same voluntary action. Indeed, in a rigorous sense, my action may only be explained by the sum total of all such reasons. Yet some of those individual reasons would be considered more adequate explanations than others. If the concept of a voluntary, choosing subject is jettisoned, even more explanations become possible. Rather than explaining my being at school as a result of my individual action, it then becomes possible to analyze the concept of school and show that it is dependent upon people like me being there.[33]

One of the features of explanatory statements, which the preceding discussion illustrates, is that their adequacy depends, to a considerable extent, on the knowledge and assumptions of the person seeking the explanation. Both Collingwood's "practical science" view, which expressly relies on the questioner's ability to recreate or prevent the effect,[34] and Hart and Honoré's normal/abnormal distinction presuppose that explanatory causes may be different for different questioners. Collingwood calls this the "relativity of causes."[35] Hart

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something because, for example, another threatened him, carries no implication or covert assertion that if the circumstances were repeated the same action would follow.")

32 Id. at 48–53. They explain: "One person can only be 'induced' to act by another if he knows and understands what that other has said. In this sense the relationship between the two actions in such cases is 'through the mind' of the second person." Id. at 50.

33 A common feature of structuralist analysis is a rejection of subjective consciousness as an analytic category. See P. Petit, The Concept of Structuralism: A Critical Analysis 69 (1977) (suggesting that a common theme in the works of Althusser, Foucault, Lacan, and Lévi-Strauss is that "the conditions determine subjective consciousness to the extent that [it is] self-understanding . . . present[ing] subjective consciousness as 'false consciousness', a consciousness systematically beset by illusion about its own autonomy"); see also Heller, supra note 2, at 148–51 ("The subject is denaturalized because it recognizes its own mediation through structure. It rejects the sense that it has an ontologically given existence, perceiving itself instead as a social artifact with a discursively given constitution." Id. at 148); D. Trubek, TAKING RIGHTS LIGHTLY?: Radical Voices in American Legal Theory 21 (unpublished manuscript based on remarks made at The New School for Social Research & Benjamin N. Cardozo School of Law Lecture in Law and Social Theory, Nov. 19, 1984) (available in Benjamin N. Cardozo School of Law Library) ("There are, in fact, no such things as 'individuals' in the liberal sense, since all of us are constructed by the institutions we are engaged in and by the language we speak.").

34 R. Collingwood, supra note 19, at 296–97.

35 Id. at 304–07.

and Honoré illustrate it by describing two different explanations of a case of indigestion. To the wife of the man with indigestion, the cause is the parsnips he ate the night before. To the man's doctor, it is the ulcerated condition of his stomach lining. Hart and Honoré note that it is the questioners' different assumptions about what is normal and abnormal that lead to this difference in explanatory causes.[36]

It is not necessary, for purposes of this argument, to decide whether either Hart or Collingwood have provided a satisfactory criterion for distinguishing explanatory causes from background conditions. Rather, it is simply necessary to note (as they both do) that the questioner's own assumptions play a large role in determining the adequacy of any explanatory response.

Such assumptions may be blatantly instrumental. For example, the questioner who wants to know why his car won't go will be satisfied only with the explanation which enables him to fix it. Yet this is just an example of the broader point—that the adequacy of any explanatory response is determined contextually. Individuals in differing societal roles will explain the same phenomenon differently. The birth of a child with a birth defect may be explained by a doctor as a result of chromosome damage, by a lawyer as the result of a negligent failure to perform amniocentesis, and by a priest as an act of divine will. Thus, the form and adequacy of an explanatory statement is dependent on the discipline of which that statement is a part. With this in mind, we can reconsider the Critical concept of indeterminacy in connection with the problem of legal explanation.

B. *Indeterminacy and the Problem of Legal Explanation*

The problem of explaining legal decisions is a particular instance of the general problem of historical explanation. Judicial decisions (and, for that matter, all other governmental actions taken pursuant to "legal" processes) are historical events and are overdetermined. Thus, they may be explained by a set of innumerable background conditions, in the same way as other historical events.[37] A potentially infinite number of "reasons" exist—that is, a potentially infinite number of background conditions can be cited—all of which are necessary for the judge to have taken precisely the action that she did.

This observation, combined with the Critical insight that doctrinal argument can be invoked in support of any judicial result, leads to what I believe to be one of the central Critical claims of indetermi-

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[36] H.L.A. Hart & A.M. Honoré, supra note 18, at 33–34.

[37] See Gordon, supra note 1, at 75–81. Gordon maintains that "statements of regularity in legal-social relations don't stand up very well to historical criticism." Id. at 75.

nacy: *legal results can never be adequately explained by doctrinal materials.*

In this view, it is not a satisfactory explanation of a judge's dismissal of a contract action to say she did so "because she applied the Parol Evidence Rule." We know (because doctrinal argument can be invoked in support of any judicial result) that if the case had not been dismissed, it would be possible to explain *that* result "because the agreement was not integrated" or "because the agreement contained ambiguous terms."

None of these proffered reasons are "false" in the sense that they had nothing to do with the judge's decision. They may even be the "reasons" that floated to the surface of her mind as she wrote the opinion. But to the Critical theorists, they are no more adequate than the explanation that the fire started because of the presence of oxygen in the air. Just as the investigator of a fire knows that he will find oxygen at the site, the investigator of judicial decisions knows that he will find doctrinal justifications. In neither case does that fact illuminate why this particular judicial event occurred and not some other.

So far, the argument appears to refute only the most extreme kind of formalism. It might be argued that extreme formalists are the only ones who would invoke the Parol Evidence Rule to explain the dismissal of a contract action. The more sophisticated mainstream theorist would explain the invocation of that doctrine by reference to the policies and principles that are presumed to underlie it. Thus, a standard form of legal explanation these days might well be that the contract action was dismissed to encourage careful drafting or to avoid potential fraud by requiring contracting parties to set forth the entirety of their agreement in a writing.

Yet the Critical theorists perceive that arguments from principles and policies, like doctrinal arguments, are infinitely malleable. Indeed, they perceive such arguments as merely another form of doctrinal justification: one in which every potentially relevant doctrinal position has as its epigone a set of policy or principle justifications which can be invoked as mechanically in support of any side of the argument as can the underlying doctrine.[38]

Thus, the principle of not penalizing contracting parties for the drafting failures of their lawyers can be invoked as the counterpolicy to the application of the Parol Evidence Rule. The infinite malleability of such policies and principles is at least as familiar to most law

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[38] See Frug, The Ideology of Bureaucracy in American Law, 97 Harv. L. Rev. 1276, 1292–93 (1984); Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1722–24, 1731–37 (1976).

professors as the manipulation of doctrine is to practicing advocates. Indeed, it is not at all unusual anymore to find such policy arguments being made directly to judges, as practicing lawyers find that they too can be used to argue any side of an issue.

To the Critical theorists, invocations of such disembodied policy formulations to explain concrete decisions are as unsatisfactory as doctrinal formulations, because they are equally indeterminate. Indeed, it is the indeterminacy of such forms of argument which leads Unger to lump them with strict doctrinal arguments as simply another version of "formalism."[39]

Thus, implicit in the Critical assertion of legal indeterminacy is an attack on the adequacy of legal explanation through doctrine. Moreover, by recognizing that such indeterminacy is characteristic, not only of strict doctrinal argument, but of policy argument as well, a similar attack can be made against policy arguments as inadequate to explain legal results. Pointing out the doctrinal or policy bases of a decision—like pointing out the presence of oxygen in a room which has been set afire—may be an accurate description of a necessary condition, but does not tell us anything we want to know about the event.

III. Explanation through Motivation and Structure of Thought

A. *Motivation*

If doctrines and policies cannot explain judicial results, what can? It is in the attempt to answer this question that some of the familiar outlines of Critical theory become apparent.

Since Critical theorists are well aware that doctrines and policies exist to justify any legal result, the decisionmaker's *choice* of any particular doctrine becomes the fundamental event that requires explanation. This is true even if the decisionmaker believes herself to be constrained by doctrinal rules and does not recognize that she has made such a choice at all. If the judge believes herself constrained by the Parol Evidence Rule, it is the source of that belief which requires explanation. That explanation cannot be provided by the Parol Evidence Rule itself, but may perhaps be provided by an analysis of her attitude toward the Rule—her *motive* in concluding that that rule was applicable, and not some other. Thus, the Critical theorists' awareness of legal indeterminacy leads them to seek explanations not in doctrines or policies, but in the motivations connected with a particu-

[39] Unger, supra note 1, at 570–73.

lar policy or doctrinal choice, and leads to their concern with the relationship between motivations and legal doctrine.

Consider then three possible explanations of a result which refer to the judge's motivation in applying the Parol Evidence Rule:

(1) She decided, based on her personal experience and sympathies, that the defendant deserved to win, and she used the Parol Evidence Rule as a convenient justification for that previously determined result;

(2) She believes that the sole purpose of law is to maximize the efficient use of goods and services in society and, after a careful reading of the law and economics theorists, she determined that an unwavering application of the Parol Evidence Rule in all cases would help achieve that goal by minimizing ambiguity in contracts, and thereby reducing transaction costs;

(3) She conceives of society as composed of autonomous individuals acting to benefit themselves at the expense of others, only grudgingly seeking mutual benefit by expansion of their obligations to each other through contract. Since she perceives most human relationships—or at least business relationships—as taking this form, she believes that the application of a rule that prevents enforcement of obligations not expressly delineated in the contract is "right" and "appropriate."

The first explanation assumes that doctrinal materials play no part at all in the selection of legal results. The offeror of such an explanation agrees with the view that doctrine cannot produce determinate results but goes further and denies the possibility of any relationship between doctrine and legal results other than a *post hoc* hypocritical one. Such a view locates the motivations of legal decisionmaking solely in the decisionmaker's personal beliefs, prejudices, and sympathies. On this view, doctrine is merely a useful method of putting a false patina of objectivity on the enactment of judicial prejudices and sympathies.

This view, which may be found in varying degrees among the Legal Realists,[40] implies that any systematic study of doctrine is likely to be of little value. The sources and explanations of judicial value choices (if they can be found at all) will be found in the study of how

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[40] See, e.g., J. Frank, Law and the Modern Mind 111 (1930), wherein the author states:

> The peculiar traits, disposition, biases and habits of the particular judge will, then, often determine what he decides to be the law. In this respect judges do not differ from other mortals: 'In every case of actual thinking,' says F.C.S. Schiller, 'the whole of a man's personality enters into and colors it in every part.' To know the judge's hunch-producers which make the law we must know thoroughly that complicated congeries we loosely call the judge's personality.

judicial sympathies and prejudices are formed—matters on which the social sciences may shed light—but not in the analysis of doctrine.[41]

The second explanation appears to provide precisely the kind of determinate explanation of legal results the Critical theorists believe cannot be provided by doctrinal or policy justifications. A single and universalizable societal goal is posited (i.e., efficiency) which is presumed to be a necessary and sufficient condition for the choice of any particular rule. All that remains is to perform a calculus of rules to determine which doctrinal rule, or set thereof, can best achieve that goal. Assuming that the persons seeking and providing the explanation share the view (which is assumed, but never demonstrated) that efficiency is indeed the only legitimate basis for choosing one doctrinal formulation over another, explanations of rule choices as efficiency maximizing do indeed "explain" the choice of one rule over another.

The Critical attack on law and economics is not with respect to the theoretical form of such arguments, which purport to provide a determinate motivation for rule selection. Rather, the Critical attack is based on: (1) the lack of any justification for positing efficiency as the sole "metaprinciple" or basis for rule selection; and (2) their demonstration that the efficiency calculus is invariably corrupted by *ad hoc* factual assumptions usually derived from our market economy or our particular legal regime.[42] Thus, while law and economics appears to provide a determinate model of rule selection that can explain particular rule choices on the basis of efficiency, any attempt to explain particular decisions according to such a model requires reference to malleable and unverifiable factual assumptions that quickly render such explanations as indeterminate as other forms of policy justifications.

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[41] See K. Llewellyn, Jurisprudence: Realism in Theory and Practice 100 (1962) ("I have spoken of a new approach [in Legal Realism] to law as a social science, as a matter of behavior to be seen, recorded, and studied . . . ."); see also Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 822 (1935) (describing Legal Realism's method as "an assault upon all dogmas and devices that cannot be translated into terms of actual experience").

[42] See, e.g., Kennedy, Paternalist Motives, supra note 1, at 597–604; Kennedy & Michelman, Are Property and Contract Efficient?, 8 Hofstra L. Rev. 711, 714 (1980) ("The result of this exercise, we believe, is to show convincingly, if nonrigorously, that any argument for the economic virtue ('efficiency') of any legal rule must depend on specific assumptions about the actual wants and factual circumstances of the persons affected by the choice among possible rules . . . ."); see also Unger, supra note 1, at 574 ("As a result, an analytic apparatus intended . . . to be entirely free of restrictive assumptions about the workings of society and entirely subsidiary to an empirical or normative theory that needs independent justification gets mistaken for a particular empirical and normative vision.").

B. *Structures of Thought*

The third explanation—which I take to be in the form of a Critical explanation of legal decisionmaking—differs from the first two explanations in that it does not view judicial motivation as separate from, and extraneous to, the structure of the doctrinal rule itself. Rather, it views judicial motivation as the result of structures of thought that are at least partially constituted by the doctrinal rule. Accordingly, there is a determinate linkage between the doctrinal rule and the mode of social interaction and normative assumptions embodied in the rule.

This linkage is an outgrowth of the method of Critical theorists, who extensively analyze doctrinal material in order to understand the structures of thought that underlie the statement and justification of legal rules.[43] Any statement of doctrinal rules—indeed, any statement justifying such rules—must be phrased in language about society and the "preexisting" social structure. It may also reflect various normative judgments about the social structure. Such background structures are implicit in, and needed to "make sense" of, the doctrinal rules.

For example, when Duncan Kennedy asserts that "[t]he rhetoric of unequal bargaining power is distributionist in that it asserts the desirability of intervention in favor of . . . weaker part[ies] in situations where there is nothing like common law fraud, duress or incapacity,"[44] he is finding, implicit in the language used by judges to justify compulsory contract terms, an underlying normative vision of the structure of society—a vision in which government may properly intervene in favor of those who are relatively weak.

Such a vision is not merely posited—as efficiency is posited as an overarching value by law and economics theorists—but rather is developed as an outgrowth of a particular doctrinal rule the Critical theorist seeks to explain. In this sense, Critical theory is quite different from Legal Realism. It also explains why the Critical theorists, despite their assertion that doctrinal argument is indeterminate, consider doctrine worthy of serious study.[45] One can find in some Realist thought a rejection of any link between doctrine and motives for judi-

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[43] See, e.g., Casebeer, Teaching An Old Dog Old Tricks: *Coppage v. Kansas* and At-Will Employment Revisited, 6 Cardozo L. Rev. 765 (1985).

[44] Kennedy, Paternalist Motives, supra note 1, at 615.

[45] See Bratton, Manners, Metaprinciples, Metapolitics and Kennedy's *Form and Substance*, 6 Cardozo L. Rev. 871 (1985), for a detailed comparison of Critical and more traditional forms of doctrinal analysis.

cial action.[46] The Critical theorists believe there is a necessary link and, indeed, that important general statements about the nature of the legal regime may only be derived from the study of doctrine.

When the Critical theorist develops such structures of thought from the language of doctrinal materials, he is not asserting that he has found the single and true "cause" of that judicial decision. Rather, he is asserting, I believe, that understanding the underlying structure of thought is necessary to understand the judicial rule choice, in much the same way that calculus is necessary to understand physics, or knowledge of Jackson Pollack's work is necessary to understand that of Roy Lichtenstein.[47]

The Critical theorist would not, I believe, insist that decisionmakers necessarily have such structures "in mind" when making rule choices (although that might be the case), but he would insist that such structures are implicit in every such rule choice. Thus, the judge might not be aware, when she invokes the Parol Evidence Rule, that she is instantiating a structure of social thought which views society as composed of autonomous individuals acting to maximize their personal needs and desires and which views law as desirable only insofar as it permits private ordering between such individuals. In her role as judge, she may have no need to refer to her underlying social vision at all. Yet, in explaining and justifying her decision, she would be likely to agree that this view of human relationships is implicit in, and justifies, her choice of rule. The Critical theorist can therefore claim—and I believe this is a central claim—that no legal decision can be adequately *explained* without reference to the underlying social and normative structures of thought which give meaning to the decision.[48]

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[46] For example, Jerome Frank reasoned: "If the law consists of the decisions of the judges and if those decisions are based on the judge's hunches, then the way in which the judge gets his hunches is the key to the judicial process [and w]hatever produces the judge's hunches makes the law." Frank, supra note 40, at 104. Frank acknowledged that "rules and principles of law are one class of [hunch-producers]," id., and that doctrine helps the judge check up on the propriety of his hunches, id. Yet, he believed that legal doctrine plays only a minor role in shaping a judge's hunches, in comparison to "hidden factors in the inferences and opinions of ordinary men" which are "multitudinous and complicated, depending often on peculiarly individual traits of the persons whose inferences and opinions are to be explained." Id. at 105–06.

[47] A. Danto, The Transfiguration of the Commonplace: A Philosophy of Art 107–11 (1981). Danto suggested that Roy Lichtenstein's paintings about brushstrokes of the 1960's can only be understood in reference to Abstract Impressionism of the 1950's because they "connoted a set of associations only available to those who had known about the dense artistic controversies of the 1950's." Id. at 111.

[48] See, e.g., Trubek, Where the Action Is: Critical Legal Studies and Empiricism, 36 Stan. L. Rev. 575, 591–95 (1984). Trubek states: "[T]he consciousness of any society rests on its set of world views, on basic (and sometimes implicit) notions about what is natural, necessary,

Two decisionmakers who would apply different doctrinal principles to the same case are, in effect, seeking to instantiate different social and moral visions.[49] Thus, the claim that law can only be adequately explained through such social structures leads to the declaration by Roberto Unger and others that all legal arguments are arguments over the nature of political and social activity.[50]

Most of the Critical theorists, however, do not seek to replace the search for "true" doctrine with the search for "true" social visions. Since such structures are implicit in doctrinal rules, and there are a multiplicity of potentially conflicting doctrinal rules, the expanded study of doctrine will generate a multitude of conflicting visions of human social interaction and the nature of society. Yet by locating the level of conflict among such structures—that is, among differing visions of the nature of society—the Critical theorists would maintain that they have provided a better, more adequate account of the legal regime.

IV. The Epistemological Status of the Assertion of Indeterminacy

In the preceding sections I argued that the Critical assertion that the law is indeterminate can best be understood as a statement that legal results can never be adequately explained by doctrinal rules or the principles and policies commonly used to justify such rules. I further suggested that this insight leads to a second important Critical assertion: legal results can be adequately explained by reference to social and political visions implicit in doctrinal rule choices.

This section will discuss whether these assertions are true or, more specifically, the conditions which would determine their truth or falsity. I reach the perhaps surprising conclusion that the Critical attack on doctrinal explanation is true largely by virtue of the fact that Critical scholars are indeed making such an attack, and thereby advancing a particular view of the goals of legal explanation. I similarly argue that the Critical claim that law can be adequately explained

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just, and desirable." Id. at 592. Thus, he describes legal consciousness as a subset of social consciousness—the set of world views that gives meaning to the legal order. He explains: "Taken most broadly, legal consciousness includes all the ideas about the nature, function, and operation of law held by anyone in society at a given time." Id.

[49] See, e.g., Kennedy, Paternalist Motives, supra note 1, at 570, 620–21; Klare, Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law, 4 Indus. Rel. L.J. 450, 451–52 (1981).

[50] Unger states: "The starting point of our argument is the idea that every branch of doctrine must rely tacitly if not explicitly upon some picture of the forms of human association that are right and realistic in the areas of social life with which it deals." Unger, supra note 1, at 570.

through underlying social structures of thought also rests on an assertion, albeit a more problematic one, about the goals of legal explanation.

The statements I have taken as central to the Critical position on indeterminacy are not statements about the actions of decisionmakers, but rather statements about the nature of legal explanations. They are statements about the nature of *understanding* of the law by legal academics and thus, have a somewhat different epistemological status from either descriptive or normative statements about the law itself.

One ground for dismissing a class of explanatory statements as inadequate is that the regularity asserted by such statements does not, in fact, exist. Presumably, the rejection of astrological explanations of events is based on the absence of any regularity between the configuration of the stars and the occurrence of events on earth. But explanatory statements may assert perfectly valid regularities and yet be inadequate as explanations. Statements such as "the fire was caused by the presence of oxygen in the air" or "Reagan won the election because he was more popular than Carter" are true statements, but they are likely to be inadequate as explanations. Adequacy, in this sense, is determined as much by the question as the answer.

Thus, determining the validity of the Critical theorists' claims is primarily a matter of evaluating the appropriateness of their questions about the legal rules. We have seen that the assertion that a form of explanation is inadequate is an expression that it does not provide the kind of information expected or provide the kind of understanding that is sought by the questioner. Is there any way to evaluate such expectations, and judge them appropriate or not?

Collingwood and Kuhn, writing from very different perspectives, have both suggested that such evaluations can be made only within the context of a particular "science" or intellectual enterprise. Collingwood suggests that certain types of explanations belong to certain types of enterprises. For example, the person who explains my car's inability to start by describing the inertial forces acting upon it may be an excellent physicist, but a lousy mechanic.[51] He is not asking the right question—the question appropriate to a mechanic: "What is the condition that I can change that will result in the car's starting?" Similarly, the anthropologist who seeks to explain a tribe's ritual sacrifice of pigs rather than goats by pointing out that the tribe's gods had demanded pigs would not, we could say, be "doing" anthropology, but perhaps some sort of comparative theology. In such cases,

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[51] R. Collingwood, supra note 19, at 302–03.

the ability to evaluate the adequacy of the explanation for an event rests on the purposes of the enterprise in which the parties are engaged.

Kuhn, while not speaking specifically about the problem of causal explanation, but about the way scientific enterprise is conducted, locates the source of the scientific enterprise in the shared beliefs and values he calls a paradigm.[52] In admittedly circular fashion, he defines "paradigm" as certain shared beliefs and values held by the scientific community.[53] He further argues that certain types of scientific explanations constitute "exemplars" which form part of the shared paradigm of that community. Accordingly, new scientific explanations may be evaluated on the basis of whether or not they resemble (that is, refer to) the same type of explanatory causes as those explanations which are "exemplars" of the shared paradigm.[54]

Thus, both Kuhn and Collingwood recognize that an evaluation of the adequacy of an explanatory statement can be made only by reference to the goals of the discipline within which the explanation is proposed. Each discipline provides goals of explanation that are distinct from the questioner's subjective concerns. Their explanations can be evaluated in light of those goals, thereby ameliorating the relativity of causes. Thus, it is the very existence within a discipline of a consensus as to its goals which permits the making of evaluations as to the "adequacy" of particular explanations.[55]

This does not mean, of course, that the truth of explanatory statements is determined *solely* by the existence of such a consensus. Rather, the recognition that an explanatory statement has been made within a discipline enables one to utilize the criteria which exist

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52 See T.S. Kuhn, The Structure of Scientific Revolutions 176 (2d ed. 1970).

53 Id. Kuhn's definition of paradigm is circular because, while he defines a paradigm as the shared beliefs of a scientific community, at the same time, he defines a scientific community as those who share a paradigm. Nonetheless, the idea of paradigm is a core concept in Kuhn's work. Id. at 174–87.

54 An exemplar (or shared example, as Kuhn uses the term) is the type of knowledge embedded in the "concrete problem-solutions" of a scientific discipline. Id. at 187. An exemplar includes laboratory, exam, and text book problems that are an integral part of the beginning student's daily experience. Kuhn distinguishes between the type of knowledge contained in scientific laws and the practical exercise of working through exemplars. Id. at 187–88.

55 Where a consensus as to the goals of a discipline is lost, an existing paradigm may cease to function adequately. The most extreme case in which an older paradigm is replaced by an incompatible, new one is that which occurs in a scientific revolution. As Kuhn explains: "Like the choice between competing political institutions, that between competing [scientific] paradigms proves to be a choice between incompatible modes of community life." Id. at 94. For a further discussion of the nature and necessity of scientific revolutions and the ways in which they change the world view, see generally id. at 92–135.

within that discipline for determining the truth of such statements.[56] But the truth of the causal relationship implied by such statements is logically distinct from their status as explanations within a given discipline. The statement "the American Civil War was caused by English secret agents" is a false statement, but it clearly belongs in the genre of historical explanation, rather than that of science or mechanics.

Of course, absolute consensus never exists in any discipline and a reevaluation of the purpose of the enterprise is always open. It is at this level that the Critical attack on the adequacy of doctrinal explanation carries real weight, because it carries with it certain assertions about the nature and goals of the study of law. It asserts that the goal of the study of law is to understand the value choices implicit in legal decisionmaking. Since doctrinal rules exist to justify any such value choice, explaining such value choices as "caused" by doctrine, or by principles or policies underlying the doctrine, can never provide an adequate basis for understanding such value choices.

This claim can only be refuted in one of two ways. One can deny the basic claim of indeterminacy, arguing that in some cases, only one doctrinal rule is potentially applicable and reference to that rule can therefore explain the value choice. We have seen, however, that this requires more than merely showing that one can accurately predict which of a number of potentially applicable doctrines will be applied. Rather, it requires a showing that the contrary result cannot be justified within the doctrinal system. Here the Critical theorists are in a powerful alliance with the practicing bar. The very fact that opposing lawyers are invariably able to ask courts or other decisionmakers for directly contradictory results and have no trouble finding potentially applicable doctrinal rules with which to fill their briefs is strong evidence for the Critical claim that doctrinal rules are indeterminate and, therefore, cannot explain value choices.

The other basis for opposing the Critical scholars' position is to attack their view of the goal of legal study. This requires denying that the goal of legal study is the examination of societal value choices. If,

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[56] Raymond Aron made a similar point regarding the truth of historical statements. See Aron, Relativism in History, in The Philosophy of History in Our Time 158 (H. Meyerhoff ed. 1959). On the one hand, Aron argued that historical selection limits the validity of historical argument to those who accept a given "system of reference." Id. However, on the other hand, he stated: "[O]nce such a decisive, if not arbitrary, selection has been made, the subsequent steps of the historian may well be rigorously scientific and claim to be universally valid." Id. Somewhat similarly, Thomas Kuhn discussed how "proponents of competing [scientific] paradigms will often disagree about the list of problems that any candidate for paradigm must resolve." T.S. Kuhn, supra note 51, at 148.

for example, the goal of legal study is to predict the results of future appellate cases, doctrinal explanation may prove adequate. But, as Collingwood and Kuhn have noted, the adequacy of a particular explanatory form must be evaluated within the context of a particular intellectual discipline and with specific reference to whether it advances the goals of that discipline. Such goals, however, are evidenced by the shared beliefs and values among those within the discipline. Thus, when a substantial group of legal scholars declares doctrinal explanation inadequate because it cannot explain the value choices made within the legal regime, that declaration is, in a sense, self-justifying, since the scholars are declaring that the goal of their discipline is the study of value choices, but that these value choices cannot be explained by indeterminate doctrine. While the assertion that every case can be argued both ways may be challenged as a matter of fact, the assertion of the goal of legal explanation cannot. The very fact that a goal is asserted by those within the discipline makes it, in some sense, the goal of legal explanation.

Of course, it is possible for members of a discipline to disagree over its goals. For example, opponents of Critical theory might claim that the "true" goal of legal explanation is the prediction or categorization of the actions of appellate judges and not the explanation of value choices. But, as Collingwood and Kuhn point out, the only way to determine that issue is to look at what those engaged in the study consider to be the goals of their discipline. When the consensus splits, it may lead to a new consensus arising from debate over the fundamental goals of the discipline, or to development of a new discipline. In either event, the very existence of the Critical Legal Studies movement establishes, in a sense, its critique of the adequacy of doctrinal explanation.

As to the second central Critical assertion—that law (i.e., the rule choices of decisionmakers) can only be adequately explained through the political and social values implicit in such rule choices—the problem of consensus becomes more acute. Most legal scholars are likely to agree that at least one goal of legal study is to explain the societal value choices of decisionmakers; yet, we have seen that explanations may take forms other than analyses of the structure of social or political visions. One can analyze the social background or psychology of individuals or classes of decisionmakers;[57] view law as rit-

[57] For example, Charles Grove Haines outlined a plan for a general study of the educational background, family life, legal and political experience, and affiliations of Supreme Court justices. Haines, General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges, 17 Ill. L. Rev. 96, 115–16 (1922). Haines' proposed

ual or religion;[58] or even, subject to all the caveats about methodology, explain value choices on economic grounds.[59] The Critical theorist, in my view, does not assert that the implicit social and political vision is the sole cause of legal decisions but merely a necessary one. Thus, one may ask: What basis, if any, is there for rejecting explanations based on other necessary causes?

I suggest that at this point the problem of legal explanation collapses into the broader problem of historical explanation. Historians are faced constantly with the problem of overdetermination.[60] Wars, for example, may be attributed to the actions of kings and diplomats, the operation of economic forces, various forms of class struggle, or even demographic and geographic conditions. All of these may constitute valid historical explanations because they are all necessary conditions, without which particular wars would not have occurred as they did. Similarly, the legal scholar, while recognizing the explanatory power of societal structures of thought, must concede that there are also many other conditions that explain why value choices in the legal regime occur the way they do.

Does any basis, then, exist for asserting that such structures form a better or more adequate ground for explaining such value choices? The notion that such structures of thought are somehow more fundamental than other modes of legal or historical explanation is an appealing one since it can be plausibly argued that such structures provide the very "language" within which such concepts as "judge" and "law" acquire meaning.[61] Yet such a claim is ultimately prob-

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study was discussed by Jerome Frank, who observed: "[S]uch investigations might prove of immense value if they would stimulate judges to engage in searching self-analysis." Frank, supra note 29, at 114.

[58] For example, Thurmond Arnold wrote:

> The thing which we reverently call "Law" when we are talking about government generally, and not predicting the results of particular lawsuits, can only be properly described as an attitude . . . a way of writing about human institutions in terms of ideals . . . [that] meets a deep-seated popular demand that government institutions symbolize a beautiful dream . . . .

T.W. Arnold, The Symbols of Government 33 (1935).

[59] See, e.g., Calabresi, About Law and Economics: A Letter to Ronald Dworkin, 8 Hofstra L. Rev. 553, 558–59 (1980); Posner, The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication, 8 Hofstra L. Rev. 487, 488 (1980).

[60] For a general discussion of the Critical Legal theorists' interest in history, see Gordon, supra note 1, at 57.

[61] See, e.g., Heller, supra note 2 at 177. Heller sets forth precisely this claim for the priority of a structuralist model, as compared to other models, for explaining legal reasoning. Discussing various theories of property rights based on sociobiology or Hobbesian philosophy, Heller contends:

> I do not believe that any of these accounts [of the origin of property rights] can dispel the structural counterclaim that a cultural or linguistic system of dif-

lematic. If these structures are truly fundamental, both the explanation and the explainer are similarly bound by their conceptual categories and can make no special claim for the epistemological superiority of this form of explanation.[62] If the legal scholar tries to preserve his privileged epistemological perspective by claiming that these structures are bound by time and space and therefore may be "seen whole" by some observers, the way is open for others to claim priority for conditions which explain these structures in terms of individual psychology and class interest.[63]

One way out of this dilemma is to move from a pure structuralist position to a form of pragmatism that argues that some explanations are more adequate because they are "fuller," within the context of the discipline within which they are proposed. That is, they are better explanations because they enable the historian to describe more of the necessary conditions relevant to the occurrence of a given event. Such a justification always involves a reference to the current state of knowledge within the discipline. A social historian, for example, may justify his explanation of the Puritan Revolution in terms of class conflict by claiming that everybody (by which he means other historians) already knows who Cromwell was and that the religious aspects of the Revolution have already been fully explored. In this view of historical explanation, examination of certain types of conditions are better simply because they identify aspects of the causal background which have not been previously examined and which, when added to the existing analysis of causes of the Puritan Revolution, lead to a fuller and therefore more "accurate" account. Robert Gordon seems to adopt a variant of this position when he argues that there is "nothing wrong" with a "functionalist" explanation of the enactment of a Wisconsin

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> ferentiations constitutes the concrete theory of the subject. However, a *liberal* social order must reflect the bifurcated grammar that is expressed in classical Western philosophical commitments. The dominant legal discourse must originate in the twin representations of a knowable, objective . . . world and direct subjective . . . apperceptions of norms originating only in individual volition.

Id.

62 Id. at 170–71. The problem could be rephrased in structuralist jargon as the delegitimation of the analyst, or in the more pungent lingo of some Critical scholars, the zapper gets zapped. As Heller himself puts it: "One methodological problem within the logic of delegitimation concerns the position of the analyst: How does the analyst step outside his or her own conceptual categories to evaluate determining structures, if one's categories themselves were formed by these structures?" Id. at 170. These structural constraints on the analyst's perceptions are, for Heller, the major problem of poststructuralist knowledge. See id. at 182–97; see also Boyle, supra note 21, at 759 (phrasing the problem as a matter of how to distill "experiences that *constitute* [one] structure from those that *contradict* it," without making recourse to an "infinite regress into meta-principles, meta-meta-principles, and so on").

63 See e.g., Jacobson, Modern American Jurisprudence and the Problem of Power, 6 Cardozo L. Rev. 713 (1985).

lien law "as far as it goes."[64] But he then goes on to show that an explanation in terms of the underlying political consciousness of the lawmaker provides a fuller explanation of why that law, rather than some other, was enacted and thus constitutes a better explanation.[65] This justification presupposes that an explanation of value choices is part of the goal of the discipline of legal history, and that one explanation of a historical event is better than another if it enables historians to set forth more of the historical causes of that event.

But goals of historical explanation may sometimes involve selecting among necessary causes, rather than aggregating them. Historians sometimes have bitter disputes about causes, even when the causal explanations advanced by both sides describe different necessary conditions for the occurrence of the same event. William Dray points out an example of such a dispute surrounding the causes of the American Civil War.[66] He observes that, while some historians blame the Civil War on various acts of individuals, others ascribe it to conflicts over issues like slavery and states' rights or to the blunders of contemporary politicians.[67] Dray rightly notes that this type of dispute makes no sense if the goal of historical explanation is simply to set forth the fullest possible account of all the necessary conditions of the Civil War. He argues that in this case, the goal of the historian is to make a normative judgment. The debate over what "caused" the Civil War is really a debate over who was responsible—that is, who was to *blame*—for the outbreak of the Civil War.[68]

Legal explanation, even more clearly than historical explanation, partakes of this normative character. We "explain" the Parol Evidence Rule in terms which normatively justify it (i.e., "it prevents fraud" or "it leads to greater certainty among contracting parties as to their obligations"). Such justifications, as we have seen, presuppose their own societal and political structures and a set of values inherent in such structures. The legal scholar who explains the law in terms of

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64 Gordon, supra note 1, at 110–11.

65 Id. at 111.

66 Dray, Some Causal Accounts of the American Civil War, 91 Daedalus 578, 579 (1962). Dray states: "[T]he very concept of causation employed by historians is such that no attempt at mere 'fairness,' or increase of mere 'information,' would guarantee agreement by investigators with different standards of value. . . . [T]he concepts of value and of historical causation are not logically separable." Id.

67 Id. at 580–87.

68 Id. at 587. Dray argues that causal conclusions in history are logically dependent on moral values: "As long as 'cause' is not to mean 'sufficient condition,' there must be some reason for singling out one relevant condition of what happened from the others. In the cases we have examined, at least, the historian's reason appears to derive from moral considerations." Id.

those structures reveals the value system implicit in that structure and permits it to be evaluated in terms of the (possibly different) values of the person seeking the explanation. Thus, the adequacy of the explanation of law through social structures of thought is justified by a redefinition of the goals of legal scholarship. If the goal of explaining a legal rule is to enable the one seeking the explanation to make a normative judgment about the rule, then the explanation must be in terms that reveal the implicit normative structures embodied in the rule. Such scholars seek to understand rules in a different way from those who simply seek to understand why an individual judge decided a case the way she did, or whether she will decide a similar case the same way.

This view of legal scholarship is analogous to the vision of some philosophers of history who recognize that the enterprise of history is in some sense contradictory: historians seek to provide an account of historical events, including the social and political structures of thought in which the historical actors understood those events, yet must do so in terms of the perspectives, the structures of thought, of their own time.[69] Yet this same contradiction may also be seen as a healthy tension, a means of discovering the differences that make judgments, including normative judgments, possible. For example, it would be impossible to study the American law of slavery without invoking the contemporary historian's own normative perspective;[70] indeed, that perspective will have much to do with what questions the historian chooses to ask and what aspects of the law he chooses to study.[71] Yet the historian will be unable to answer those questions if he does not attempt and to some degree succeed in his effort to recreate the social and political structures of thought, including the normative aspects of thought implicit in those legal rules. For example, the ability to understand and make judgments about the law of slavery exists in the tensions or contradictions between those different normative structures.[72]

While this view of history is surely not "objective" in that it de-

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[69] See R. Aron, Introduction to the Philosophy of History 308–09 (G. Irwin trans. 1961). All historical descriptions, Aron says, consist of "taking in the whole from a certain point of view." Id. at 308. He continues: "As long as the plurality of [historical descriptions] persists . . . the truth of any one of them can be proved only by supra-historical arguments, by the values which each one incarnates or the future it announces." Id. at 309.

[70] See Tushnet, A Comment on the Critical Method in Legal History, 6 Cardozo L. Rev. 101 (1985). (explaining the decisions of antebellum southern judges with reference to their underlying social visions, a methodolgy influenced by the author's own structuralist jurisprudence).

[71] R. Cover, Justice Accused 1–7 (1975).

[72] Id.

nies the possibility of a universal historical truth, it is far from purely relativist in that it assumes an ability to transcend existing structures of thought or at least perceive alternative structures. The ability to perceive alternative structures is, of course, also a central feature of Critical thought; without it the very notion of an explanation in terms of underlying structures of thought would be impossible.[73] In much the same way that explanations of historical events seek to bridge the gap between contemporary and historical conceptual frameworks, these explanations of law seek to bridge the gap between the normative framework of the rule and the normative framework of those seeking the explanation. Thus, these explanations can be evaluated only by their ability to illuminate, and therefore advance, the enterprise.

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73 For example, in the work of Roberto Unger, perception of alternative structures is necessary to Critical thought in two senses: "On the one hand, there are practical and imaginative structures that help shape ordinary political and economic activity . . . . On the other hand, however, no higher-level order governs the history of these structures or determines their possible identities and limits." Unger, supra note 1, at 665. In other words, knowledge of alternative structures of thought helps us to understand the frozen, limited nature of other past and present social organizations, and at the same time helps us to anticipate a truly alternative structure emerging from that critical understanding.

Unger further states:

> [The Critical method] interpret[s] the formative institutional and imaginative contexts of social life as frozen politics, traces each of their elements to the particular history and measure of constraint upon transformative conflict that the element represents. This method must wage perpetual war against the tendency to take the workings of a particular social world as if they defined the limits of the real and the possible in social life.

Id. Robert Gordon makes a similar point: "The hope of getting out of that trap and of exploring the alternatives is what fuels the enterprise of criticizing the dominant vision." Gordon, supra note 1, at 71.