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Critical Legal Studies versus Critical Legal Theory: A Comment on Method

FRANK MUNGER and CARROLL SERON

Over the last decade the Conference on Critical Legal Studies (CCLS) has rekindled an important debate about the study of legal ideologies. The work by scholars within this movement is provocative because it demands that we take seriously the contradictory needs and ideological parameters of liberal legalism. The growing body of work associated with this movement has not, however, included a criticism of the ideological underpinnings of legal methods in general and doctrinal analysis in particular. We begin with the premise that scholarship must include a self-critical method.

In Part I—The Political-Economic Constraints of Liberal Legal Scholarship—we explore why questions of methods, i.e. of how one asks and answers questions, has not been a central issue within CCLS. In Part II—Reformulation of Method—we present a beginning toward a framework for developing a self-critical method for understanding legal ideologies.

A central concern of progressive socio-legal studies is to unravel the ideology of legal institutions. In what ways do legal institutions cloud understanding of social processes and simultaneously, provide a seedbed for progressive social change? Since law may be viewed as a source of alienation and oppression in contemporary society, transformative political goals include discovering how law can further reconstruction of social relations in ways which are not oppressive or alienating. It is this question, we believe, that attracts many scholars to the social study of law. Yet as we begin to explore avenues for study, the complexity of the task often seems overwhelming.

In the last decade, however, a group of legal scholars has tackled this question. The Conference on Critical Legal Studies (CCLS) was organized by a group of scholars to "demystify" liberal legalism.¹ As a progressive movement the Conference has promoted a critique of law and legal ideology that suggests possibilities for transforming society. Building upon the groundwork laid by Legal Realism, the common thread of this loosely connected movement has been to document and to map the incoherent and illogical underpinnings of liberal legalism which reveal the myriad ways in which law legitimates inherently unequal social relations. In recent years this critique has taken a central place in socio-legal studies and now constitutes a leading edge in scholarship (for a further discussion, see Unger, 1983).

We were drawn to the work of the scholars within this movement because they are asking the important questions. As we read this work, however, a

problem emerged: repeatedly, the work revealed little, if any, questioning of doctrinal methods for doing research. We found recurrently that the substance of Conference research was quite different from more conventional legal scholarship but that its form, the law review article, was remarkably similar to its conventional cousin.

This troubled us. How can one do critical scholarship without questioning conventional methods? How can one do critical scholarship without considering one's role as a scholar engaged in a social enterprise? This paper, then, is about method.

Part One presents the methods of conventional legal scholarship. Here, we begin by considering the role of scholarship in the socio-historical context of legal education and elaborate three methodological constraints: (1) legal scholarship is defined by the study of doctrine and, therefore, is centered on cases, statutes, and rules; (2) when legal scholarship moves beyond the examination of doctrine it does so for one purpose, substantiation of a preconceived position about the meaning of the doctrine under study; and (3) legal scholars write exclusively for other legal scholars. We then present the work of CCLS and demonstrate that it, too, exhibits repeatedly the limitations of conventional scholarship. Thus we draw an explicit parallel between characteristics of conventional legal scholarship and critical legal studies. While readers may disagree with the force of the parallel, the point is simple. In choosing to meet conventional legal scholars on their own ground, members of the Conference have assimilated critical studies to methods of conventional research. As a result, some of the normative and theoretical assumptions which limit the range and penetration of conventional research re-emerge in CCLS research.

Part Two presents a beginning toward the difficult task of developing a critical method for understanding the ideology of liberal legalism. Here, we begin with the work of the Frankfurt School; we find this an informative place to start because this tradition provides methodological strategies built upon theoretical elaboration and empirical investigation by researchers committed to self-criticism and self-reflection. Thus we show that critical theory presents a method, a framework for asking questions about legal ideologies, that moves beyond the confines of normative social science and legal methods. To document the force of a critical method, in the final section of Part Two we return to the work of CCLS and present the steps that must be taken to understand the ideology of liberal legalism.

I. THE POLITICAL-ECONOMIC CONSTRAINTS OF LIBERAL LEGAL SCHOLARSHIP

Why has it been so difficult for CCLS to move beyond the "mapping" of doctrine? Why has the Conference separated itself from other progressive movements by refusing to join in the elaboration of a theory of political economy (Tushnet, 1978)? To answer these questions we begin by consider-

ing the origins of CCLS in the law school, in the hierarchical environment of legal education with its emphasis upon professionalism (Konefsky and Schlegel, 1982; Priest, 1983). We describe conventional legal method as an outgrowth of the ideology of liberal legal education. Conference research often resembles conventional legal scholarship. As we explain at length in this section, conventional doctrinal analysis (1) assumes the autonomy of legal doctrine from its historical context; (2) is result-oriented and as such a poor method of theory testing; and (3) pays limited attention to the role of any legal process other than appellate advocacy, thereby largely ignoring significant aspects of legal practice. The failure to progress beyond demystifying legal doctrine arises in part from reliance on an inappropriate "method" for selecting and analyzing issues.

A. *The Elite Law School*

Mirroring trends in contemporary society, the development of modern secondary and professional education may be described as a process of increasing specialization, segmentation of disciplines (followed by segmentation of sub-disciplines) (Wiebe, 1967), professionalization, and stratification (Collins, 1979; Veysey, 1965; Laumann and Heinz, 1977; Kennedy, 1982).²

Legal education, even in its elitist mold, is the business of training lawyers; this means that law schools specialize in training people to "think like a lawyer," i.e., to take a position (usually with the interests of a "client" in mind), to develop a well-conceived and tight argument backed up with legal decisions that persuasively substantiate the validity of one's argument. In the process of imparting this skill one learns that those who are "best" at this specialization are those who can develop an argument, backed up by a tight analysis of legal precedent, in support of *any and all* positions.³

At elite law schools, however, there is the presumption that the credential itself will stamp one a lawyer; in fact, one feature of these schools' elitist persona is that they believe they are above imparting the law unadorned.⁴ Thus in the "top" law schools one finds courses on law and economics, the history of Chinese law, or the sociology of law, one finds historians, sociologists, economists and neo-Marxist legal scholars on the faculty, and it is assumed all are engaged in the pursuit of knowledge for its own sake.⁵

Yet, no matter how much lip service is paid to the notion that legal education can broaden and develop the law student, one must nevertheless depart the ivy-covered walls of the law school knowing how to "think like a lawyer." This means that attention must be given to the specialized, professional training of a lawyer, albeit in an elite and "cultured" form. In sum, while elite law schools impart a much broader, even "experimental," education, it is still, and most importantly, an education in doctrinal analysis—learning how to work with the development of appellate precedents and doctrine.

This development has left an interesting contradiction in elite law schools between their willingness to include new or experimental areas of legal research in the curriculum and the assumption that such schools must teach their students the skills of "lawyering" better than those who attend less elite institutions (Priest, 1983). This tension is addressed by emphasizing legal method regardless of the subject area. Legal reasoning, i.e., argument grounded in legal authority, is presented as an apolitical, value-neutral method (Kennedy, 1982). Thus it is assumed that one who graduates from an elite law school need not have bothered learning the content of, for example, marriage and family law, but that one does know how, in the abstract, to construct the best legal argument.

B. Legal Scholarship as Legal Brief

The emphasis placed on legal method in elite law schools has significant implications for legal scholarship.⁶ Legal scholarship is in fact a sophisticated and elaborated form of legal brief. Doctrinal analysis, the chief method for legal scholarship, is undertaken to establish a particular interpretation of case law on the basis of arguments and authority which would be acceptable to an appellate judge. As a method of inquiry, conventional legal scholarship serves the narrow professional function of supporting lawyers' advocacy. At least three characteristics of conventional legal scholarship are entailed by this function. We emphasize these because, as we demonstrate in the next section, all three also characterize critical legal studies.

First, conventional research is primarily, though not exclusively, focused on doctrine—cases, statutes, and treatises. Doctrine is of primary interest because normatively it is the basis for legal system behavior (Abel, 1980).⁷ This limitation of focus within mainstream legal scholarship reflects not only the normative basis for liberal legal method, but also the assumptions about the role of the legal system that are acceptable within liberal ideology. Doctrinal analysis assumes that neither the political origins of rules nor the way in which decisions may ultimately redistribute benefits or burdens has relevance in a legal decision. The processes that produce rules and policies in cases are treated as if they do not matter, and most legal scholarship treats the effects of decisions as if law will be translated into behavior. It is assumed that the relationship between the legal system and other social behavior is either unproblematic or can be rendered unproblematic through incremental improvements. The effects of legal intervention are assumed to be rational, beneficial, and predictable. Legal scholarship is focused primarily on problems of rational extension and reconciliation of rules and policies which are present within cases. *That this paradigm for legal decision is continually breaking down, widely viewed with skepticism and universally violated does not detract from the fact that it exercises a powerful limiting effect on arguments made to courts and thus on legal scholarship generally.* The function of the normative premise and of the embedded descriptive assumptions underlying legal scholarship is to keep the research at home—

focused on case law and not on issues which render the process of decision questionable and over which the practicing lawyer, judge, and scholar are presumed to have no control.

Second, when conventional legal scholarship does draw upon sources beyond doctrine, it does so for *one* purpose: further substantiation of a preconceived position about the development of the rules under study. Various types of presentation of legal arguments may be thought of along a continuum from conventional legal arguments substantiated by cases/precedents to arguments (usually scholarship) incorporating ideas from other disciplines. Incorporation of social science findings, constructs, or theories is, from the vantage point of doctrinal method, simply another form of evidence to support conclusions already grounded in existing legal doctrine. When developed in this mode, the law review article often contains both "the case analysis and the policy prescription" (Tushnet, 1981b: 1208). Thus a law journal might be described as a series of sophisticated legal briefs, often on fairly esoteric topics. Legal scholarship tends to use theories and research from other disciplines in a result-oriented way, rather than as tools for inquiry about the behavior of the legal system. In the more elite schools, the scholarly research that is produced tends to borrow ideas, constructs, and information from other disciplines, but such materials are inevitably used to support legal argument.⁸ The question is rarely raised as to whether or not the work taken out of context has the same meaning or implications.⁹

Third, conventional legal scholarship self-consciously addresses a narrow audience: other legal scholars and appellate practitioners for whom doctrine is important. The origins and significance of legal rules, policies or behavior are taken for granted; they are not exposed and explored. Among scholars it is assumed that doctrine is the principal focus of lawyers' efforts to assist clients. Doctrine is viewed as the centerpiece of policy making, the source of the effects produced by the legal system. A practitioner adds only technique. Practice is not viewed, then, as a method of "testing" the strength or validity of doctrinal constructions (but see Handler, 1978). Liberal scholarship downplays both the importance of the relationship between doctrine and society as a separate object of study and the importance of the members of the profession who actually mediate this relationship. Finally, doctrinal analysis is inaccessible to members of other professions; hence, the theoretical and behavioral assumptions embedded in legal scholarship are unlikely to undergo scrutiny.

Of course, these three issues within conventional doctrinal analysis are not new; debates concerning these limitations date from at least the turn of the century and came into bold relief during the New Deal (Gordon, 1975). In the area of legal scholarship specifically, substantiation of a position through the borrowing of information and/or constructs from other disciplines is first seen in the work of the Legal Realists. The Legal Realists attempted to open up legal scholarship by demanding that law be analyzed as part of a socio-political institution.¹⁰ In taking this step, they challenged

the then-dominant ideology of legal formalism and, at the same time, suggested an important agenda for cross-disciplinary work between the then-emerging social sciences and law. However, there has been much criticism of the realists and their progeny because they often came to "believe" in the scientism of these emerging social sciences (Schlegel, 1980) while, at the same time, continuing to use legal "method" and reasoning to present their position. Seen in a larger context, the realists suffered from the disciplinary blinders created by a specialized, professionalized, and apparently systematized organization of education: while they tried, they did not break out of the mold of legal scholarship summed up in a method of legal argumentation (see Hunt, 1978).¹¹

The pressures within professional law schools to engage in the perpetuation of conventional legal research are great. In fact, prestige and tenure are earned on the basis of how well one does this type of research. Not only is there enormous pressure to be conventional, it must also be recognized that doctrinal analysis is *intrinsically* a method of research that legitimates liberal legalism.

C. A Critique of the CCLS Critique

CCLS has set for itself an agenda to document the ideological force of liberal legalism. The body of work produced by the Conference has centered on contemporary doctrinal issues, namely, private law (Horwitz, 1977), labor law (Klare, 1978; Stone, 1981), civil rights (Freeman, 1978), and welfare rights (Simon, 1978; but see Sparer, 1984), as well as more abstract debates in jurisprudence (Kennedy, 1976; Unger, 1983), feminist issues (see e.g., MacKinnon, 1982a, 1982b), and law and economics (see e.g., Kelman, 1979).¹² Unlike conventional work on these issues, however, research by members of the Conference has emphasized a systematic and self-conscious understanding of the ideological role of law in a capitalist society.¹³ In this way the Conference departs sharply from mainstream legal research. While mainstream research implicitly legitimates legal process, the explicit goal of the Conference is to delegitimize legal process by documenting the incoherence of doctrine. In undertaking this task, however, the Conference has assumed that the role of legal ideology can be explained through a close reading of selected case law and that there is no need concretely and historically to sort out its impact or self-critically to examine the methods employed in one's research. Notwithstanding the clearly stated objectives of the Conference, we must ask to what extent the work of CCLS contributes to our understanding of the ideological role of law in a liberal capitalist state.

Liberal legal method continues to inform the work of CCLS. Beneath the surface of the Conference's attempt to undermine liberal legalism, there is, in fact, the same paradigm for research. Echoing the conventions of traditional legal research, three specific attributes persist in the work of the Conference: 1) the assumed autonomy of legal doctrine, 2) the argumentative use of theory, and 3) the targeting of an exclusive audience in a way which

leaves practitioners and others largely on the outside of Conference debates.

1. *The Autonomy of Doctrine*: To date, a primary objective of CCLS research has been to undermine liberal theory of legal doctrine by demonstrating that on its own terms doctrinal development is essentially incoherent, illogical, and irrational.¹⁴ In pursuing this task members of the Conference have, like their liberal counterparts, limited their selection of evidence to doctrine, cases, rules, and statutes. The concern to meet mainstream scholarship on its own terrain may, in part, explain this focus. Regardless of this rationale, however, the end result is a body of research that *reinforces* the very assumption it sets out to demystify, i.e., that doctrine develops autonomously, albeit incoherently. Some members of the Conference have sought to examine the ideological significance of legal doctrine without reference to *any* economic or political environment within which legal doctrine evolves; this, we refer to as the “nihilist” strand. Other members of the Conference, in various ways and from various vantage points, have sought to couch their work on method and doctrine in a larger historical context as well as within a theoretical and critical framework; these we refer to as the “totalistic” and “normative effects” strands. But elaboration of the ideological role of law, even in these terms, continues to rely upon the evidence provided through doctrinal analysis of appellate decisions alone. Just as liberal method subsumes a theory of the relationship between law and society and the relationship of law practice to legal doctrine, so the methods of analysis employed by CCLS members have had a similar effect on their interpretation of legal theory and practice (for e.g. to contrary, see Spence, 1982). Thus there has, for example, been little consideration of the extent to which the law is an active and direct force in generating class conflict; rather, the production of doctrine at the appellate level has been considered as a self-contained process. The end result is a body of research that *reinforces* the very assumption it sets out to demystify, i.e., that doctrine develops autonomously.

a) The “Nihilist” Strand of Research: For some leading members of the Conference the primary objective of research is to “take the doctrinal content of law seriously on its own terms” as an object of study (Gordon, n.d.). In this research the evolution of legal doctrine and legal theory is explained as a process driven by the internal contradictions of liberal legal theory. This research rejects purely logical or “natural” (Kennedy, 1979) explanations of the development of legal theory on the one hand and all “instrumentalist” theories of legal evolution on the other, including both interest group theory and reductionist Marxist explanations of legal doctrine.¹⁵ As the problems of offering a coherent explanation of the significance of legal doctrine “on its own terms” have become more and more complex, the task of relating legal ideology to socio-political context has not only been postponed, but declared inappropriate for current consideration. Describing his analysis of the thought of William Blackstone, Kennedy explained his focus on doctrine in this way:

My focus on interpreting the larger framework as simultaneous mediation and legitimation means that what I have to say is descriptive, and descriptive only of thought. It means ignoring the question of what brings a legal consciousness into being, what causes it to change, and what effect it has on the actions of those who live it. My only justification for these omissions is that we need to understand far more than we now do about the content and the internal structure of legal thought before we can hope to link it in any convincing way to other aspects of social, political or economic life . . . Given this limitation of focus, it would be a delusion to think that the study of the history and prehistory of our contradictory feelings can resolve the contradiction, provide a basis for political action, or even help us in the task of formulating and reformulating our goal. . . . (Kennedy, 1979: 220-221).

While acknowledging a commitment to humanitarian reform, this line of analysis isolates socio-political context from liberal legal contradictions.¹⁶ Further, statements like the one just quoted tend to deny the value of exploring theory which does link legal ideology to other aspects of social, political or economic life. Instead, the nihilist research, in particular Kennedy's discussion of contradiction in Blackstone's *Commentaries*, begins with a statement about universal and pervasive feelings of contradiction which are "an aspect of our experience of every form of social life" (Kennedy, 1979: 213). Assumptions of a universal human nature as a premise for arguments is a characteristic of philosophical idealism. While Kennedy derives this universal from social contradictions, the specific historical form of the contradiction does not enter into his analysis. Skeptical of all social theory, this strand of research assumes that a critique of liberal legalism can be undertaken without putting forward *any* social theory. In the case of "nihilist" research within the Conference, the absence of explicit social theory leaves the legal scholar secure in the faith that understanding doctrine on its own terms is the most important form of research, in fact the only one which can be undertaken.

b) The "Totalistic" Strand of Research: Members of the Conference who have sought to place their work in a larger theoretical and critical tradition share a belief that law must be understood as an ideology. Several leading Conference members employ a social theory derived from Sartre's existential-phenomenological Marxism. This theory begins with the notion that we make sense of the world by interpreting the material conditions of our existence. In the act of interpretation, social relationships are created, given meaning, and are instilled with particular characteristics. To analyze social relationships, the investigator must try to understand these interpretations and how they unfold. This starting point is common to a number of sociological theories which are anti-positivist in orientation, including Critical Theory. The particular form of phenomenology adopted by Conference scholars may be termed "totalistic" because of a further characteristic, namely a tendency to see social relations as part of a Hegelian system of ideas (Tushnet, n.d.; Gabel, 1982a). According to this formulation, the legal scholar, the "workers on the shop floor" (Trubek, 1984) and the

investigator share the *same* consciousness of capitalist society because the primary factor shaping interpretations of the world is unitary, namely the material social relations of production. Since every piece of the network of social relationships created through consciousness of these forces is implied in every other piece, investigation of *any* particular piece will reveal as much about the common consciousness as investigation of any other piece. This approach has been used to justify examination of legal doctrine as if it were representative of a *common* consciousness shared by all members of a capitalist society.

The first point to observe is that in this research legal doctrine is used as evidence of consciousness. Yet, in most of this research, it is the doctrine, in its own right, which the researcher seeks to explain, not the doctrine considered as one kind of evidence of the ideology or consciousness of a particular group. Nor is it always clear which individuals are the focus of concern. Different individuals are the focus of the argument at different points. At one point it may be the judge since the consciousness of a judge creates legal opinions. In considering the significance of cases, however, the interpretation of the world which they reveal are said to reflect the will of a ruling class (Tushnet, 1981a: 30) or to reify forces affecting consumers, workers and others formally subject to law (Gabel, 1982a). Since these individuals are not subject to the same material forces that judges are, their interpretations of the world require a different process of understanding. Indeed, as this analysis shows, there must be two separate elements in Marxist phenomenology: (1) the state of individuals' consciousness of the world and (2) the manner in which consciousness is formed and expressed in behavior, including verbal behavior.

Once the need for a second element (process) is perceived, totalistic theory leads in one of two directions. The first, more radical, alternative is to deny that the theory requires anything beyond the analysis of legal decisions and the structure of the consciousness they seem to imply. Phenomenological accounts of social behavior frequently stop with analysis of the meaning of an individual's acts in the context in which they occur, without attempting to link them to larger patterns or to integrate the meaning attributed to social activity by individuals in widely dispersed settings. But the totalistic theory of Gabel and Tushnet asserts that a larger structure exists, which may be called capitalism, and that specific structures within capitalism also exist which have consistency and meaning across widely diverse areas of conduct. Examples of such specific structures are class and legal ideology. Even if they did not assert that a larger structure exists, the claim that the role of legal ideology across areas of conduct can be understood by looking at doctrine alone is simply implausible. The conditions of creation, maintenance, and change in the meaning of material forces are concrete and specific. The position of the industrial worker is *not* the same as the position of the judge. Only general structural characteristics of ideologies are likely to be shared by individuals in very different situations (see Munger, 1983).

Different classes may appropriate quite different aspects of legal ideology, and what they appropriate may bear a very different relationship to behavior as a result of the various circumstances in which they exist (Mann, 1975). Radical totalistic theory simply cannot explain enough.

The second direction in which totalistic theory may proceed is to acknowledge the presence of structures (i.e., capitalism, class, etc.) which form the elements of a theory of political economy. Indeed, this is the route followed in practice by CCLS writers. For example, the connections between material forces in capitalist society and consciousness are critical to Gabel's argument that legal reasoning "passivizes" individuals:

Legal thought originates, of course, with the consciousness of the dominant class because it is in this class's interest to bring it into being, but it is accepted and interiorized by everyone because of the traumatic absence of connectedness that would otherwise erupt into awareness (1982a: 263).

This statement has meaning only within a theory in which classes exist, have identifiable interests, act as agents of those interests, and are oppressed by their own and others' actions, where oppression has the same meta-theoretical status as the concept of mental illness in the vocabulary of the therapist and therefore requires the same tentative understanding of "objective" human potentiality. Similarly, Tushnet's examination of the internal contradictions of American legal ideology caused by the requirement that it reconcile the paternalism of slavery with the social relations of capitalism, requires a theory of political economy.¹⁷ The elements of a political economy which will support the homology between commodity and law are complex and require empirical evidence of processes ranging well beyond the interpretation of legal texts.

We do not take issue here with phenomenological interpretations of Marxist theory. Our critique is a narrow one. Assertion that social relationships begin with the way people interpret the world is a plausible starting point for understanding ideologies. Yet, the totalistic view does not attempt to examine or to explain the origins of ruling class ideology, let alone its penetration outside the ruling class, as Tushnet concedes (1981a: n.54: 38). Totalistic theory leads either to a radical assertion of the autonomous development of doctrine, which we believe most members of the Conference reject in principal, or to a theory of political economy in which the creation and function of ideology are questions to be studied empirically. Gabel and Tushnet fail to examine the full implications of the theory. Totalistic theory implies a program of research well beyond the mapping of legal doctrine. Failure to undertake it is another example, we think, of lingering reluctance on the part of law professors to move beyond a traditional mode of legal scholarship.

c) The "Normative Effects" Strand of Research: Still other work relying on theoretical traditions within Marxism acknowledge the importance of connections between historically situated social relations and legal ideology.

Thus some Conference research is intended to demonstrate that legal doctrine does not represent progress, or even-handed distribution of the benefits and burdens of social life, or rational solutions to conflict, but that doctrine represents specifiable class interests. By relying exclusively upon doctrinal evidence, this research falls short of its own goals and, once again, implicitly rests upon the assumption that the law is autonomous.

This strand of research by members of the Conference acknowledges that the connection between legal ideology and class relations in capitalist society is an essential element of any explanation of the evolution of legal doctrine (Horwitz, 1977; Klare, 1978; Freeman, 1978). Yet, in much of this work there is an unstated assumption that to call law an "ideology" is to evoke a known process of cause and effect in liberal capitalist society. This assumed process of cause and effect takes two forms. First, rules in the legal system (doctrine and cases) are assumed to have a direct impact on beliefs and, therefore, on actions of members of the society. Second, class struggle is assumed to have a direct impact on the evolution of rules, but this evolution always has the effect of undermining working class struggle, and this undermining process, through legitimation, inevitably recreates the status quo, i.e., there is no change, no progress in terms of a group's vision achieved through struggle.¹⁸ This research often focuses on the evolution of doctrine alone. The conditions of the evolution and the impact of feedback to the society from such evolution, though essential to the significance of doctrine, are not examined directly; rather, these authors invoke a vague, yet essential, correspondence between the socio-political context of legal doctrine and legal doctrine itself to justify the categories in terms of which the analysis proceeds and to explain both the evolution of doctrine and its effects outside the legal system.

Two illustrations will make our observations more concrete. We select Alan Freeman's (1978) analysis of desegregation decisions by the Supreme Court and Karl Klare's (1978) examination of the Supreme Court's deradicalization of the Wagner Act. Freeman argues that decisions by the Supreme Court are part of the mechanism of social control which ultimately legitimates and stabilizes class rule. An aroused minority proletariat mounted an intense civil rights campaign in the 1950s and 1960s. Pro-civil rights decisions of the Supreme Court, departing from liberal ideas of causation and responsibility for injury, coincided with the most intense activity of the movement. Thereafter, the movement was deflected into the courts and the administrative enforcement of legal remedies, and it declined in force. In the current period, the Supreme Court has returned to traditional concepts of cause and liability, undermining much of the earlier law. The focus of this research is on evolving Supreme Court doctrine, which is insightfully presented. But the links between decisions and movements should be critical to Freeman's argument. Far from proposing an analysis of legal doctrine on its own terms, Freeman acknowledges that in light of his "view that laws serve largely to legitimize the existing social structure and, especially, class relationships

within that structure, the ultimate constraints are outside the legal system" (Freeman, 1978: 1051). Thus while the major emphasis of the work "is on how the process of legitimation works through the manipulation of doctrine" (Freeman, 1978: 1052), that process has meaning *only* in relation to a socio-historical context. To explain the connection between legal ideology and structures existing outside the law, Freeman describes two perspectives on discrimination—the "perpetrator" perspective and the "victim" perspective—which by implication are both manipulated by the Supreme Court and also reflect a consciousness of discrimination within the civil rights movement itself. Thus the ideology generated by the Supreme Court implicitly mediates class relations by providing interpretations of cause and effect. In a later article Freeman (1981) interprets his findings in this way:

Those developments led me to conclude that the process by which the law absorbed the civil rights struggle, reprocessed it, and turned it out in recent cases is in some fashion a part of what may be called the legitimation process. Today's legal ideology pretends in many ways that racism has been cured, that the problem has been dealt with, that we can go on to other problems, that the legal rights that have been created amount to sufficient equality or liberation for formerly oppressed people. . . . It seems to me that, despite the massive struggles underlying the demand for civil rights reform, acceptance of that reform and the shape that it has ultimately taken must be understood in the context I have sketched (1894).

The essential links in this argument, between ideology and class conflict, are largely presumed on the basis of broad characterizations of a complex movement and the occurrence of peaks and valleys of activity in roughly appropriate historical periods. The evidence is simply inadequate to substantiate any particular causal relationship between Supreme Court decisions and the civil rights movement. To state the theoretical/methodological assumption clearly, once Supreme Court doctrine has been examined and categorized, its effects are assumed without further analysis.

Our second illustration follows a similar pattern. Klare's analysis of the interpretation of the Wagner Act by the Supreme Court demonstrates how the alienated form of liberal legalism asserted itself to negate the potentially radical content of the Wagner Act, helping to end the realist threat of a politicized jurisprudence.

The New Deal solution to the crisis of legalism was to update legal consciousness and to make it more responsive to contemporary social exigencies—that is, to give a new life to the liberal legal order—while at the same time preserving its contradictions and mystifications (Klare, 1978: 280).

The explanation of how the Supreme Court accomplished this objective through statutory interpretation obviously depends on a background in which class struggle made changes in the content of the law necessary and which gives meaning to such terms as "alienation," "mystification," and "legitimation" which motivate the entire analysis. "Labor law reform in the 1930's," Klare concludes, "served as a vehicle for the preservation of

liberal capitalism and the alienated social relationships that constitute it" (Klare, 1978: 339). Yet, as in Freeman's research, the focus is exclusively on doctrinal developments and interpretations, even though the results are meaningful, according to the author's own interpretation, only within an undeveloped theoretical framework relating legal ideology to class struggle.¹⁹

One cannot expect that work will be emancipated from its alienated character without the abolition of the social relations, including legal relations, that produce that character. Alienation can only be transcended through a comprehensive historical metamorphosis of social and political relationships, a process that would profoundly transform the quality of legal arrangements, indeed, the very nature and form of law. Conversely, while legal practice remains a form of alienation, there can be no fundamental change in the character of work for any other aspect of social life (Klare, 1978: 338).

We do not in any way challenge these assertions. In fact, they lead to the kinds of questions which should guide research. Since the correspondence between law and alienation among workers is asserted without more exact description of its implications for the significance of statutory interpretation by the Supreme Court, this analysis implicitly rests on unexamined assumptions about the role of legal ideology. In this respect, it is like liberal legal research. The assumption Freeman accepts is that the consciousness of those subject to the law is in some way a simple reflection of the alienated form of the law in capitalist society.

Underlying all three strands of research is an implicit premise: tracing, or mapping, legal decisions will, in and of itself, reveal the ideological role of law, as well as its incoherence. The absence of a serious attempt to examine the relationship between doctrine and other institutions in society insures that this research will fall short of its own goals. Failure to make a creditable case for the ideological role of law in its historical context prevents the Conference from maintaining that law potentially has *any* part to play in transforming society. More important, the Conference cannot creditably rebut assertions made by liberal scholars that law is not class dominated, not repressive, and instead is a rationalizing force (whether or not its doctrine is troubled by logical inconsistencies).

Thus this research, by and large, has treated doctrine as if it were autonomous. Whether or not members of the Conference actually believe that doctrine is independent of historical context, and there is much evidence that they do not,²⁰ their intense debate with conventional scholarship has led to placing undue reliance on analysis of doctrine as a source of learning about the role and meaning of law. To move forward, it is necessary to make explicit the relationship between legal doctrine and other events in society. As we attempt to show in Part II, such relationships are already implicit in each of these strands of research. Indeed, the critique of liberal legalism could hardly be progressive, that is, it could not comprehend the problems of oppression and alienation, if it did not have implicit standards for the

betterment of human life and an implicit understanding of how law is related to the rest of society.

2. *Argumentative Use of Theory*: Closely related to the autonomy of doctrine reflected in the methods employed in CCLS research, theory is used in the process of research in ways which are inappropriate. Theory should be a means of deriving questions. Theory describes the elements of the world that are relevant for a particular inquiry. By focusing observation, it guides the empirical inquiry of the investigator. Instead of guiding inquiry, we have found theory used in CCLS research, as in liberal legal research, to justify the continued reliance on exegesis of doctrine as a research method without seriously challenging or testing the premises of such a method. Too often, Marxist theory is cited as if it made basic research on political economy unnecessary rather than central, and too often it is cited to explain the significance of doctrinal developments which by themselves do not support the theory.

Research in the "totalistic" strand provides examples of these problems. The research by Gabel on contrasting ideological structures underlying contract law and on reification in legal reasoning is categorical rather than descriptive of process. Legal doctrine is categorized and as categorized is said to provide evidence of a certain process of consciousness formation. His essay on reification claims to describe "the way that 'the law' emerges within our alienated culture as a kind of quasi-religious belief-system which simultaneously compensates for our feelings of loss within these alienated groups and conceals these feelings from us" (Gabel, 1982a: 264). But beyond assertions that legal concepts are appropriated by individuals in ways which produce these effects, the essay does not report direct observation of consciousness formation or its effects on groups of persons. Instead, the essay examines the words used in legal rules (see pp. 272-273), inferring the impact they have on consciousness from the theory alone. The vagueness of the process of consciousness formation as described by Gabel, by comparison with concrete processes which we have all experienced, is highlighted strikingly by his essay on the mass psychology of the Burger court's political imagery (Gabel, 1982b). Here consciousness formation is described as a result of a process more like an ad campaign than language or culture acquisition. While ad campaigns and culture are certainly related, if consciousness, at the level involved in Gabel's theory, is subject to rapid shifts in Supreme Court imagery, then considerable complexity is added to the concept of consciousness formation, for consciousness formation now depends on networks of communication and an immediate context of communication in ways not suggested by his earlier essay. In any event, the problem lies not in the idea that the significance of law in capitalist society is inseparable from the process of consciousness formation, but in the haste made to reach a conclusion about the effects of doctrine without equal

attention to the need for an empirical base for theory construction and validation (see e.g., Stinchcombe, 1968).

By contrast, Tushnet's historical research is more engaged in theory testing. Hence, he predicts, and explains, incoherence in legal categories based on conflicting ideologies held by judges. But, the ideologies themselves and their origins are presumed, and the work does not confirm or disconfirm the underlying theory of political economy. The work is narrow, therefore, focusing only on how doctrine is used in the process of legal decision, leaving open questions about the relationship between doctrine and consciousness. More than others holding similar theoretical views, Tushnet also examines alternative theories of legal consciousness to show that they suggest patterns of doctrinal development not confirmed by the data.

Causal connections between capitalist social relations and the development of legal doctrine are explicitly incorporated into the theory underlying the "normative effects" strand of research. But "normative effects" research, like "totalistic" research, has tended to use theory for the purpose of bypassing rather than focusing relevant empirical inquiry on these causal links. This research has often relied on "ideal typical" constructs as a basis for inferring the effects of doctrinal development rather than using theory to generate questions for research. Freeman constructs a model of black-white relations in which blacks are defined, *a priori*, as victims and whites as victimizers:

The concept of 'racial discrimination' may be approached from the perspective of either its victim or its perpetrator. From the victim's perspective, racial discrimination describes those conditions of actual social existence as a member of a perpetual underclass. The perspective includes both the objective conditions of life . . . and *the consciousness associated with those objective conditions* [italics added] . . . The perpetrator perspective sees racial discrimination not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator (1978: 1052-1053).²¹

As presented, Freeman has borrowed categories from research on racism from Piven and Cloward (1971), Fanon (1967), Grier and Cobbs (1968) and others (see fn. 14-15: 1053), but in so doing takes this work out of context, specifically out of a historical and political context where the relations between victim and victimized are in process, where the "consciousness" of victims may, for example, not be directly determined by their objective conditions or conversely where the conditions of the perpetrators may be forced to change regardless of issues of political consciousness. In other words, Freeman has constructed a model of racial patterns that "fits" his argument and fails to take account, *within the elaboration of that perspective to guide empirical study*, of the possibility of alternative sets of socio-political relations: perpetrators are *always* perpetrators, victims are *always* victimized.

Similarly, Klare (1978) constructs a model of relations between labor and management that is static: the passage of the Wagner Act ushered in a new

era of labor-management relations that is organized around collective bargaining. From the vantage point of labor, Klare asserts, this change was a mixed blessing: "collective bargaining has become an institutional structure not for expressing workers' needs and aspirations but for controlling and disciplining the labor force and rationalizing the labor market" (p. 267). Though Klare clearly acknowledges a debt to current work by Marxists on law and considers questions of method, including the concept of "relative autonomy of legal consciousness" (see e.g., fn. 13), he nevertheless relies upon a static *model* to guide his work. There is no consideration of the possibility of other outcomes of the relations between labor and management. The development of law moves, albeit with a few "reverses," towards the interests of management and thereby, *ipso facto*, circumscribes the consciousness, including the legal consciousness, of organized labor: organized labor's "consciousness" echoes the constraints imposed by collective bargaining. The model presents a position. The cases "fit" the model. Therefore, it is asserted, labor has capitulated its "needs and aspirations," its political consciousness.

As we demonstrated in an earlier section, liberal legal scholarship often borrows theory to support a preconceived position. In much the same way, Conference authors also begin by presuming the validity of theory which justifies the analysis of doctrine.²² Substituting neo-Marxist categories for liberal ones does not address the more fundamental limitations of a method of research which in practice relies on the presumed significance of the exegesis of doctrine.

3. *Audience*: Because CCLS research resembles conventional scholarship in its doctrinal focus, one is forced to conclude that its audience, too, is the professional legal community. Even lawyers opposed to the conclusions reached by CCLS research will concede (as they are intended to) that the results have been reached by acceptable means from acceptable premises. At best, CCLS research speaks to other legal scholars to convince them of the errors of their arguments about the significance of legal doctrine, but not to convince them of the more fundamental error of their methods of drawing such conclusions through analysis of doctrine alone.

There are three serious side-effects of the method of research and its consequent narrowing of the audience reached by the Conference. First, given the particular critical views of the Conference, the CCLS audience in practice may be limited to those who are converts to the CCLS agenda. There is evidence that there is wider interest in the particular criticisms of more conventional analyses of doctrine made by Conference members. Whether this dialogue becomes broader and continues will be one measure of success.

A second more serious side effect of speaking only to a professional audience is that even if the Conference *intends* only to influence other legal

workers, its work will be directed to persons who share the same professional ideological blinders. Assumptions about appropriate topics, theories of the relationship between legal ideology and practice, and the selection of relevant "data" (i.e., exclusive reliance on legal authority) to support arguments are all the less likely to be carefully examined and criticized.

The third side effect is the low visibility and scant attention paid to practitioners by the Conference. Like the treatment of practice in liberal research, Conference research focuses on the production of doctrine by judges and scholars and relegates practice to a small role in the legal system. Instead of recognizing the role of legal practitioners and other legal workers in the production of legal ideology and theory (other than doctrine) and in mediating the effects of doctrine, legal practice is reduced to an ancillary role—the decision to ask a court to make doctrine or not to make doctrine. A serious consequence is that important effects of legal practice, such as the defense of legal rights at historically specific and important moments or the mediation of the effects of doctrine on politically significant groups, are ignored in the attempt to demonstrate the unreliability of "rights" in abstract doctrinal analysis (Sparer, 1984). The Conference cuts itself off from a major source of learning about the significance of doctrine and legal system behavior in general.

The Conference must clarify for whom it is actually writing: Is it simply other members of the Conference? Is it the academic legal community? Or, is it a wider community concerned to describe, explain, and transform the role of law in society? If the Conference's audience is limited to other members of the Conference, then what we have to say may not be relevant; hence, we take it as a given, at least for the purposes of this piece, that the Conference began with the intent of reaching a wider audience committed to understanding and transforming the role of law in contemporary society.

D. A Methodological Critique: Failure to Engage in Critical Self-Analysis

The source of each of these problems is that the Conference has not fully freed itself from the traditions of liberal legal scholarship. The function of liberal legal scholarship ultimately is to legitimate a system for authority in capitalist society. Hence, liberal legal scholarship is not self-critical, or "reflexive" (Gouldner, 1970), because the fundamental function of legal scholarship cannot be questioned within liberal legal ideology. To be misled by the doctrinal focus of liberal legal scholarship is to adopt a method of research which (1) hinders fundamental questioning and testing of alternative conceptualizations about the nature of legal ideology, (2) hinders the development of new theory and (3) ignores the need to develop mechanisms for self-reflection and self-criticism by the scholar engaged in social study. It is not sufficient to reorder, to redocument, or to "map" the irrational,

illogical and incoherent foundation of legal developments; to substitute irrational for rational, incoherent for coherent, unpredictable for predictable and call it demystification of law does not a *method* make!

Progressive critique, in the dialectical sense, includes a commitment to a historically situated analysis of social relations and struggle and, simultaneously, an examination of the ideological limits of one's own theory and method (see e.g., Horkheimer, 1976). Any method of research inevitably creates ideological blinders that must be exposed to criticism and reflection. Certainly this is true of social science research methods (Furner, 1975) and, it is equally true of legal research. Both are ideological outcomes of professional activities. Hence, it is not possible to develop a critique of liberal legalism without, at the same time, examining the ideology of doctrinal analysis and its relationship to the legitimacy of law. A progressive analysis of legal ideology entails critique of legal method. This is especially important in light of the centrality of a *doctrinal method* to the legitimacy of liberal legalism. Doctrinal method assumes the normative authority of law. Doctrinal method makes possible a common language, even as it structures authority, between the academician and the practitioner. Thus it is as important to develop a critique of this method as it is to develop a critique of the structural characteristics of liberal legalism (e.g., rule, formal equality, etc.). In fact, a critique of liberal legalism as ideology is not possible without a simultaneous examination of the researcher in unravelling that ideology. This much should be self-evident: those who currently study the ideology of liberal legalism are socialized in a professional setting organized to legitimate liberal legalism; therefore, it is incumbent upon these scholars to examine self-critically the ways in which their professional socialization structures their vision about these institutions. This step in turn raises questions about *how* one has come to understand; i.e., it raises questions about method.

Yet within CCLS little, if any, attention has been devoted to self-reflection about the role of the scholar and to critique of legal method.²³ While CCLS writers work out their ideas in a self-conscious manner and are aware of themselves as persons engaged in study, they are not self-critical in the sense that they examine their own ideological position.²⁴ That is, self-conscious and self-critical or self-reflexive thought are two quite different processes: self-conscious thought leading to personal explication of the self and self critical thought leading to social explication of the self in relationship to the project. Therefore, drawing upon a tradition of self-conscious reflection, a close reading of CCLS work reveals scant attention to the role of the scholar in *doing* research. CCLS researchers have not taken the step of elaborating their *own* role in demystifying law; they have not questioned why they see, or do not see, certain processes in light of their own social position or praxis. Nevertheless, this vacuum underscores the entrenched power of the stratified, cloistered and specialized system of contemporary scholarship, and legal scholarship in particular.²⁵

II. REFORMULATION OF METHOD

The problem we have elaborated in the first section is one of method. The fact that CCLS researchers study doctrine is not itself problematic. Nor are any particular hypotheses or theory employed by CCLS members in research the source of the difficulty. Rather, there is a problem with the way CCLS members think about and do research. Both the fact that doctrine alone is used as data about ideology and the fact that theories are misemployed as descriptions of reality are traceable to methodological errors, as we have shown. If the Conference moved in the direction of a self-critical method, that is, if its members had a more fully developed view of the activity of research, we believe that the laudable objectives of CCLS research would carry it in a productive direction.

The research method which we describe in this section is dialectical. We describe its premises and implications for formulating and testing hypotheses about legal ideology, or, for that matter, any aspect of a social formation. This method of viewing and exploring the world does not impose new goals on CCLS. On the contrary, as social scientists we were drawn to CCLS research on legal ideology because of its concern with the role of ideology and its professed skepticism of positivism. These themes reflect the influence of a dialectical method underlying many varieties of Marxist social theory. In this sense, we are describing a way of adding to the project begun by CCLS.

The importance of dialectical method had been given meaning through the work of the Frankfurt School and its commitment to place this contribution at the center of Marxist analysis. The members of the School arrived at this question through their attempt to come to grips with the problem of authority, and particularly, the apparent trend toward an all-encompassing rationalization of contemporary society.²⁶ The forms of oppression in contemporary society are reflected in the movement toward orderly social processes, predictable outcomes, rules for their own sake and an objectification of social relations in all spheres of human endeavor. Put simply, alienated human relationships are no longer limited to the "shop floor"; rather, bourgeois ideology finds expression in all arenas of human endeavor from the most public, politics, to the most private, the family (see e.g., Lasch, 1977). The question posed by the Critical School was how does one explain, and specify, bourgeois ideology?²⁷

The Frankfurt School found exploring capitalist society inseparable from issues of research methodology. Thus the Frankfurt School opened the debate on method (see esp. Adorno, 1976). To this end, they began by rejecting positivism, including neo-Marxist positivism (McCarthy, 1982: 126-272). Instead, they emphasized the development of theory guided by praxis, and they engaged in empirical study, though with great debates about appropriate techniques (see e.g., Jay, 1973). According to this view, the study of social phenomena builds upon theoretical elaboration, a self-critical scholar, and empirical investigation.

At this point we intend to sketch the basic propositions of a self-critical method. We do this to demonstrate the centrality of two related ideas that evolve from a Marxist tradition—dialectic and contradiction. These constructs have clear implications for research. By showing how they follow from fundamental theoretical and epistemological premises we demonstrate that this research has certain methodological requirements.

A. A Self-Critical Approach to Research

Human activities are social activities that exist within a network of interaction among individuals and continue as part of the ongoing existence of a society. To be a human being is to be a social being.²⁸ The actions of any particular individual take place within concrete, historical configurations of social relations. In the short run, at least, such configurations tend to persist as institutions, organizations, and classes—significant entities which shape relations among individuals. These configurations are themselves the outcome of historical activities of individuals whose role, position, power and consciousness, i.e., “actualization,” is explained in the context of situated events. We use the general term *group* to denote such entities. The relations between groups guide social action—consciously and/or unconsciously—and hence are the most important agents of change and the most important source of meaning for a theory of society.²⁹ Research, then, is the study of the formation and transformation of relations between and within social groups. For example, Marx’s analysis of the formation of a proletariat class could not be historically explained separate and apart from the formation of a bourgeois class. The relationship between the two classes defines each, and at the same time the concrete relationship constitutes the most important historical contingency in the lives of individuals. That is, the underlying relationship *between* the classes is the most significant long-run factor in determining the conditions, including consciousness, of members of each class. The historical contingency of all social life, implying continual tension and change through the relational nature of social existence, is what is meant by the term dialectical.

The intellectual’s role is a precarious one. The intellectual, too, is a product of a group’s historical location. The principal question in research is thus how one overcomes one’s own historical blinders so that the product of one’s work does not reflect only the limited perspective of group ideology. The researcher must be involved in a process of self-criticism, i.e., a process of reflection about one’s own basic predispositions and assumptions. The scholar is not an outsider to social activities.³⁰ In this regard, the scholar’s role is analogous to that of a pilot—one who understands wind patterns but is never free of wind conditions: the scholar understands social patterns, but is never free of social conditions. As Habermas writes, “[s]elf-reflection brings to consciousness those determinants of a self-formative process of cultivation and spiritual formation which ideologically determine a contemporary praxis of action and the conception of the world” (1973: 22).

Inevitably, this creates a tension for the scholar. In the process of self-criticism, the researcher becomes a part of the endeavor itself. If research is a process of developing a coherent political framework for understanding and changing societies,³¹ then it must evolve as political activity reorders society. Research is thus useful in the political struggles of a particular time and location. In sum, the intellectual is engaged in the study of group activity of which she is a part, group activity is always in the process of becoming, and understanding the relational and contingent nature of group activity gives meaning to the endeavor.

From this starting point, we may derive three methodological principles which govern how we must do research: (1) the relational nature of human existence means that there is a disjunction or contradiction between human activity and the outcome of that activity; (2) contradiction is fundamental to social theory and research; and (3) the relational position of the researcher and the contradictory nature of research itself means that there will always be a tension in research between the activity and its outcome.

(1) *Disjunction between human activities and the outcome of that activity*: Because groups exist only in relation to other groups, activity always affects the social relations comprising the group in which action is located.

Each component of an entity is itself a Relation whose development is a function of the particular configuration of circumstances in which it stands. It is the result of all these different developments (viewed as occurring within the entity) that determines what the entity as a whole will become. "Contradiction" is a way of referring to the fact that not all such developments are compatible. In order to progress further in the direction made necessary by its own links of mutual dependence a component may require that the probable course of change of another component be altered. The developments of the two . . . stand in contradiction, and it is through the working out of such contradictions that the larger entity takes on the form it does. (Ollman, 1976:56-57).

Thus social action is generically contradictory. For example, in the process of formation, a bourgeois class created a political ideology based upon liberal, egalitarian, and universal values; however, that ideology played a contradictory role in class relations because it inevitably came into conflict with bourgeois political interests when it was appropriated as a goal of proletarian political aspirations.

The principle that social action is contradictory has some clear implications for research. First, if contradiction is a given of social action, then it must be taken into account in planning and developing research strategies, including the development of hypotheses for analysis of the meaning of institutional relations. Hence, we must rethink all of our assumptions about a positivist or a doctrinal tradition where it is taken for granted that relations may be held constant or static for the purpose of "scientific" analysis, or that a relationship between two or more variables (or cases) is unidirectional, or that relations within an institutional context can be analyzed

apart from historical and theoretical analysis of that context. Second, the activity of research is itself contradictory and must be understood as such.³²

(2) *Contradiction is fundamental to social theory and research*: In positing that contradiction is fundamental, we are stating that patterns of daily life can be explained as disjunctions between activity and outcome. Some of these disjunctions—contradictions—are momentary while others are played out over long periods of time, with enduring effects upon the formation and transformation of human activities. Thus while all social activities are contradictory, some patterns are more important than others because some are more enduring than others.³³

While social formations may be long enduring, with perhaps all of the appearance of permanence, relations are in fact active, in conflict, and contain seeds of their own transformation. It is the task of the scholar to sort out and specify why, how and for whom social formations exist, why some last for only brief periods on the map of history while others endure across long sweeps of time, and which have great significance for the future of humanity.

In order to determine the conditions of existence and the relative importance of components within historical formations, the scholar must always examine the relations in which components, or groups, stand to one another. To take a long-enduring example, capitalism is a socio-economic formation that has historically produced groups—classes—whose interests and activities can only be explained in a relational and contradictory context: one cannot explain the endurance of this social formation by focusing upon the power of dominant groups, or upon the weaknesses of exploited groups. Rather, the researcher must examine the *relational* nature of these elements in a historically situated context.

(3) *Research itself is contradictory*: If the researcher is comprised in large part through her relation to the research project, and the project itself is in the process of becoming, then there will always be a tension in research between activity and outcome. Whereas a positivist method claims that the researcher is unique in that she has the luxury to step outside of the formation under study and that she has the power to stop change for the purposes of study, a dialectical method claims that the researcher is of society and without the power to hold change in check.

Critical theory is doubly reflective: it is self-conscious of its origins in the historical development of society, and it is self-conscious of its role in the further development of society. This double reflexivity distinguishes it not only from the objectivism of the exact sciences but from the self-sufficiency of traditional philosophy (McCarthy, 1982: 135–136).

At a minimum, then, the results of research are (a) incomplete and (b) provisional.

(a) Research is incomplete and imperfect because, of necessity, something less than a social totality must be considered. The subject matter of all

research, as the researcher herself, exists as a social relation and is, therefore, contingent. But no research project can account for all such contingencies. Not only are researcher and subject matter contingent, but the unaccounted for contingencies cannot be "held constant" because they constitute the researcher and her project. Thus scientific method is imperfect, yielding at best an approximation of social relations, not only because research produces incomplete information but also because there are no wholly external objects in society to be studied.

(b) In addition, the vocabulary—language—and concepts for doing research are themselves provisional (see esp. Heydebrand, 1977). At an abstract level, language is the product of human activities and is therefore subject to all of the same possibilities of change and transformation of any human activity. At a more concrete level, the research project may modify the position of the researcher, the significance of the theory, and the meaning of the concepts used to describe the project under study. One develops sensitivity to this problem through interaction with the research project itself: a dialectical method requires an awareness of the relationship between the research project and its institutional moorings (i.e., activities not previously illuminated, contradictions not previously seen) so that new elements may be taken into account and one may revise the research strategy. The researcher must step back from the project in order to establish new relational bearings on the historical trajectories of key elements of change and activity. The world keeps changing; yet, research is possible. Research is an endless process of producing knowledge for the moment. If research is to aid progressive change, then it too must change—and so must the researcher.

B. Dialectical Method and Research on Legal Ideology

In this section we show how dialectical method would change CCLS research. We will focus on the need to examine the relational nature of legal ideology. The reader should note that a dialectical method also informed our discussion of CCLS scholarship outlined in part one and in this sense provides an example of the direction we suggest; there, we demonstrated that the failure of CCLS members to be self-critical results in a failure to take account of the relational nature of the researcher and the project under study. Once the researcher is aware of the influence of historical or situational forces on the way questions for study are posed, it is then possible to understand how legal ideology, as a subject matter for research, must be considered as itself a component in the continual unfolding of social relations of which the scholar is a part.

Before turning to a consideration of how the CCLS agenda might be recast and developed it may be useful to recapitulate our argument:

- 1.) Doctrinal analysis carries its own ideological baggage that serves to legitimate liberal legalism. Doctrine cannot be analyzed on its own terms (and is

never in fact so analyzed). Documenting, or mapping, the internal incoherence, irrationality, and unpredictability of legal decisions in and of itself does not lead to an accurate understanding of legal ideologies.

2.) Critical analysis requires a reflexive scholar, i.e., a scholar who examines her role as itself the product of a social context. Pressures to accept a specific professional paradigm for research or to make assumptions about objects of inquiry which arise from the position of the researcher within a particular professional group must be examined and scrutinized. Critical research depends upon one's view of the nature of society and requires an understanding of potential bias due to the historically situated nature of research.

3.) Social theory evolves from analysis of the inherently contradictory nature of social life and must focus upon the historically situated formation and transformation of relations between groups. Thus, a theory of the role of law must take account of the group-relational significance of events within the legal system.³⁴ In particular, the full significance of legal doctrine can be understood only in terms of the concrete effects which the legal system has on social activities, i.e., as the incomplete and momentary outcome of relations between groups.³⁵

CCLS research, as we demonstrated in Part I.C, repeatedly assumes that ideology bears a static relationship to social structure. All strands of CCLS social theory assume that an ideology, by its very nature, performs a known role in the ordering of social relations without making the role, i.e., the relational nature of ideology, *an object of study in its own right*.³⁶

Implicitly, CCLS research acknowledges that theoretical assumptions about the relationship between legal doctrine and socio-political context must guide the categories in which legal doctrine is described and explained. Therefore, in spite of its lack of self-critical content or dialectical understanding, it provides a point of departure for extending our understanding of the ideological underpinnings of liberal legalism. There is, however, no evidence in this work of a fundamental questioning of the scholar's role as itself contributing to the legitimation of liberal legalism. That is, the very act of doing doctrinal scholarship is an act of legitimation of liberalism, even when the tone of that analysis is critical, as indeed it is in the case of CCLS. We have pointed to two factors that help account for this pattern: (1) the isolation of professional law schools and the premium placed upon a method of research that conforms to certain "taken-for-granted" standards and (2) the acceptance of a role for scholars which is self-conscious but not self-critical.

In sum, one might argue that the work represents a series of exciting but unanswered questions. In taking this step, we are attempting to develop questions that are informed theoretically, draw upon data grounded in historical context, demand that the researcher announce and self-critically examine her "standpoint," and, finally, develop "knowledge with a use potential" (Cain and Finch, 1981: 112). How might these questions be recast?³⁷

To consider the nihilist strand of research: though Kennedy denies the possibility of relating doctrine to external economic or political events, the very categories in which his analysis is couched were not selected for their

doctrinal significance alone. The categories “rule” and “standard” have no real *a priori* significance, but in fact are interesting to readers because of the claims lawyers make about the way “rules” and “standards” relate to the legitimacy of their activities. The discussion cries out for a more precise conceptualization of the processes which make the form of legal principles significant to lawyers, and that requires self-reflection about the role of the lawyer. The parallels in moral and political history described by Kennedy do not supply such a conceptualization. The history of attempts to recast the theory of common law adjudication is just that—history, not a series of logical exercises, like a long-term chess game. There are interpretations of the timing and sequence of doctrinal evolution to be explored at every turn. Whether or not Kennedy discusses the historical (and group-relational) significance of the development of common law adjudication, his contribution is important because of its potential for future study; however, the mode of analysis he adopts hinders the formulation of questions that demand a historically situated analysis. Thus the historical relationships implicit in Kennedy’s work must be made explicit and central in conceptualizing doctrinal change.

Similarly, Kennedy’s analysis of Blackstone’s *Commentaries* is a major contribution to the research of the Conference even though his explanations of its significance are couched in ahistorical and psychologically reductionist terms. The power of the *Commentaries* derives from the relationship between contradictory pressures for legal legitimacy and specific historical events. It is precisely such historically positioned and contradictory pressures on the one hand, and the appeal of the *Commentaries* to eighteenth-century lawyers on the other, that made the *Commentaries* significant. The ascendancy of a Whig aristocracy initiated legal evolution described in part in E. P. Thompson’s *Whigs and Hunters* (1976). The eighteenth-century English ruling class also used legal ritual to achieve social control in eighteenth-century England as described by Douglas Hay (1975). These works provide a rich context for scholarship relating formalism and contradiction in legal practice to historical processes which lend significance to both formalism and contradiction. It is doubtful whether Kennedy’s readership actually believes that logical contradiction in the theory of judicial decision, as Kennedy sometimes characterizes the central dilemma of liberal legality, matters very much absent strong assumptions about the economic and political role of law which simultaneously make the contradictions necessary and make it necessary to deny that they exist.

The “totalistic” and “normative-effects” strands of research also begin with exciting and important questions. Gabel, Tushnet, Freeman and Klare assume that doctrinal change is to be understood in terms of its group-relational significance. The categories which each of them uses to describe changes in legal doctrine are constructed on the basis of a theory of the relationship between law and other activity in society. The fact that much of this theory remains implicit, and that the social relations which give ideology

meaning are not made the *object* of study greatly weakens the power of the research. That these relationships are acknowledged and described, however vaguely, represents the great potential of the research in each instance.

Gabel's phenomenological account of legal ideology is based on implicit hypotheses about social relations. Gabel argues that legal ideology is an example of the dominant world view, containing within it an image of people as members of society. Moreover, the image created by legal ideology is shared by the persons whose image is projected in the world view on which it is based. As such, Gabel concludes, it "passivizes" by making the social relations it projects seem inevitable, even ordinary or normal. Subtle forms of ideological repression and control exist, and we do not take issue with Gabel's hypotheses. But the fact that the links between ideology and action are *assumed* rather than the focus of his analysis is a reflection of the problems we have already described. Consciousness and its passivizing ideologies are open-ended, fluid entities. The hypotheses concerning the social relations underlying legal ideology should be subject matter for inquiry. Tushnet is quite explicit about the political economy upon which he predicates his phenomenological account of the law of slavery (see Section I.C, 1.b above). But unless the social relations conditioning that political economy are drawn into the research on ideology, the contradictory, dialectical development of that ideology is lost. The internal tensions within legal ideology and the attempts to accommodate both capitalist (free market) and paternalistic (slave-holding) principles are an important focus of study because they can tell us how legal ideology helps constitute social relations. Tushnet is certainly not oblivious of this significance. Absent an inquiry which looks specifically at ideology as relational, we are left with a base-superstructure model of the production of doctrine which greatly oversimplifies the way in which legal ideology actually becomes constitutive of social relations in historical contexts.

To recast Freeman's analysis requires the exploration of doctrinal change from a properly group-relational perspective. The question for research becomes: To what extent are changes within a politically significant movement related to major shifts in Supreme Court doctrine? And, simultaneously, what happens to the lawyer advocate in the process? Stated in this way, there is no assumption about the repressive effects of Supreme Court decisions on the civil rights movement; the requisite evidence to answer this question demands far more than that contained in published decisions of the Supreme Court. Rather, the relationship between Supreme Court decisions and a popular movement becomes an object of inquiry, i.e., problematic: how does litigation, a social activity, stand in a concrete relationship to a social movement? The manner in which particular theories of civil rights violations are presented to a court by participants in the movements or by lawyers who act on behalf of one or more participants in the movement should itself be an object for study and must be explored, given Freeman's original question and concern. More specifically, the question demands

examination of the *process* of litigation and the strategies adopted. For example, to what extent were legal arguments at the *trial* level presented from the vantage point of the "victim" thereby demanding consideration of a *social* definition of the violation and of the remedy, and in conformity with the *political consciousness* of the movement, knowing full well that this strategy might prove precarious? In turn, the Supreme Court's decision may be a product of these intervening factors. More significantly, the question as posed here demands consideration of the possibility that Supreme Court decisions may have contradictory effects. After all, leaders of political movements are used to living with the whims of a court system that hands down such contradictory decisions and may manipulate them to their advantage. Hence, one is also forced to examine what a hostile reaction from the courts means to the strength of a movement and its political consciousness. Before any plausible theory can be put forward, the civil rights movement must be acknowledged as a process of on-going change in its own right and a general theory must be proposed so that one may relate measurable characteristics of movements to the doctrinal change described by Freeman. Without a test of *some* hypothesis linking doctrine and movements, little is learned about the significance of changes in doctrine for the political consciousness of the movement itself, even though a major purpose of the research was to describe precisely this significance.³⁸

Klare's study of Supreme Court interpretations of the Wagner Act is subject to similar problems. Both the class origin of common law contract doctrine and the repressive effect of such doctrine are assumed rather than explored. Again, the significance of legal doctrine cannot be assumed in view of the changing and potentially contradictory group-relational significance of law itself. The core of Klare's analysis shows the tendency of formal analysis to capture and assimilate doctrinal change to existing doctrine. The analysis carried out in these terms alone cannot be faulted, but without more it has no significance for the stated interests Klare himself puts forward, viz. the relationship between the political consciousness of the labor movement and changes in legal doctrine. Clearly, the significance of the research is the implication that formality springs from and favors certain class interests. Unable to treat all aspects of the relationship between class conflict and law in a single article, it might be said that Klare simply explores one aspect of the relationship, a point he makes in subsequent work (1982). However, since a major object of the research was clearly to confirm the class nature of the law, and thus its alienating and repressive qualities, those very effects should not be assumed, but related to the particular analysis performed in the research. The essay fails to do this.³⁹ Analysis of doctrine on its own terms, even with the best of intentions, is never sufficient if one's concern is to explain legal ideology as a social relation.⁴⁰

Each of these examples represents an important contribution to the work of the Conference. The most valuable aspect of each contribution is its potential for stimulating insights into the role played by law in society. Each

piece relies upon assumed relationships between doctrinal evolution and socio-political context. In research within the "normative effects" and "totalistic" strands, these relationships are explicit. However, they are not developed to a point of conceptual clarity, and they remain untested. In research within the "nihilist" strand, the relationships are only implicit. In all three cases, it is necessary to move beyond a focus on doctrine alone; doctrine cannot be treated as an isolated variable: researchers must be aware of and resist the biases of professional training and the pressures of other legal scholars to treat doctrine on its own terms. To carry this agenda forward, research must reflect explicitly the group-relationship significance of an historically situated legal system. The relationships between the legal system and other events in society give doctrine its significance. Therefore, any research which explores the significance of doctrine must make these relationships an object of inquiry.

CONCLUSION

If human activity is social activity and the outcome of this activity is always in the process of becoming, then the interests and relations of some groups echo the past, others envelop the present, while still others resonate with the possibilities for the future: group activities generate different, partial and unequal points of historical view. Yet, if a theory of society gains its meaning, its richness, by explaining social relations, then some points of view—albeit partial and unequal—are nevertheless better than others. To quote Lucien Goldmann,

Viewed in terms of their effect on scientific thought *different perspectives and ideologies do not exist on the same plane*. Some value-judgements permit a better understanding of reality than others. When it is a question of determining which of two conflicting sociologies has the greater scientific value, the first step is to ask which of them *permits the understanding of the other as a social and human phenomenon, reveals its infrastructure and clarifies, by means of an immanent critical principal, its inconsistencies and its limitations* (Goldmann, 1969: 52; emphasis in original).

In this essay, we presented the problems that the researchers within the Critical Legal Studies movement face in developing a useful description of legal institutions that will provide a framework for both critique and reconstruction. Our point is not that the goals of the Conference have outrun actual achievements. This is true of any serious movement for social change. Our point is that the goals and actual methods of achieving them are at odds, reducing the chances for success. We demonstrated that the critique of legal doctrine by the Conference has had the effect of reinforcing the centrality of doctrine and the role of the legal professional as uniquely qualified interpreter of law. The Conference has created a mystique of demystification. Further, the antipositivism of the movement's underlying Marxism has given way to a suspicion of empirical research relating law to social context.

Analysis of legal thought has been transformed into exegesis of legal texts rather than a search for new, relevant data to inject into sterile doctrinal debates. And finally, the goal of transforming society has stalled in debates with other schools of doctrinal interpretation. Despite these problems, the work of this movement suggests a useful beginning. Thus, our critique of CCLS has not been merely an intellectual exercise; rather, we hope that we have articulated a basis for moving socio-legal scholarship toward a more effective research program with a commitment to explanation and progressive social change.

*This is a revised paper prepared for a panel at the 1983 Annual Meeting of the Conference on Critical Legal Studies held at Camden, New Jersey. When a call for suggestions for the Conference went out, we proposed a panel that addressed methods for studying legal ideology, with specific consideration of the need to examine self-critically the inherent biases of normative legal and social science methodologies. This paper began, then, as a discussion piece. As the paper, and the panel, evolved the topics addressed included (1) an examination of the limitations of traditional legal scholarship and its relationship to legal education, (2) a description of the parallels between CCLS scholarship and more traditional scholarship, and (3) an outline of a self-critical methodology. We would like to thank the members of this panel, David Trubek and Mark Tushnet, for joining us in a discussion of this important issue.

Along the way, there were many who provided intellectual and moral support, discussed ideas with us, and provided comments on various drafts. Our thanks to Rick Abel, John Brigham, Maureen Cain, Bliss Cartwright, Robert Gordon, David Greenberg, Joel Handler, Christine Harrington, Wolf Heydebrand, Wythe Holt, Felice Levine, Carrie Menkel-Meadow, Martha Minow, Judy Munger, David Trubek, and Barbara Yngvesson. And, our deepest appreciation to Vivian Rodgers who cleaned up more revised drafts than we are sure she cares to recall. There are no doubt many questions that remain to be explored, perhaps because we did not accept all of the suggestions of our generous colleagues. These problems are our responsibility. Nevertheless, we hold out the hope that we stimulated others to engage in a collective effort to improve upon our understanding of the contradictory forces of liberal legalism and to use that understanding to create a more just society.

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NOTES

1. Karl Klare provides a definition of liberal legalism: "With respect to the modern Anglo-American form, [liberal legalism] include[s] adherence to precedent, separation of the legislative (prospective) and the judicial (retrospective) functions, the obligation to formulate legal rules on a general basis (the notion of *ratio decidendi*), adherence to complex procedural formalities, and the search for specialized methods of analysis (legal reasoning). All of these institutions are designed to serve the fundamental desideratum of separating morals, politics, and personal bias from adjudication. . . . "Not surprisingly, the crisis of liberal capitalism revealed itself within law as a breakdown of the separation between law and politics and between law and private interests, as a tendency for law and politics to merge or for law to become politicized" (1978: 276–277).
2. Ironically, the notion of a liberal arts education has itself become a "specialty" of certain kinds of colleges, or schools within universities; what was assumed to be an educational foundation for an emerging male elite in the late nineteenth century, has today become one specialty within a larger division of educational options.
3. It is interesting to note that this is one facet of legal training that closely "fits" the ideology of an adversarial model of dispute resolution and is in turn one facet of the ideology of liberal legalism.
4. In a recent, and very moving, eulogy to Arthur Leff, Owen Fiss (1981) captured the essence of this tradition; Leff was known to have taught an unusually wide variety of courses. At one point, Fiss learned that Leff, ever a good Yale Law School citizen, had gone to the dean to find out what courses needed to be taught so that the school could continue to claim its name as a law school.
5. See Pipkin, 1976: 1173–1176. Pipkin's point is well taken. He found that students at national law schools were more skeptical about the value of legal pedagogy to their experience than students at regional schools (p. 1176).
6. See Tushnet (1981b) on legal education who claims, with justification, that there is a "break in the stratification system" between the schools at the "top" (Harvard, Yale, Chicago, and Stanford) and the next rung (e.g., New York University, Michigan, Duke, Columbia). Tushnet goes on to suggest that "[t]hat judgement could be confirmed by an examination of the circulation of faculty members, which I suspect would show that faculty members circulate within each stratum" (p. 1207).
7. In an intellectual history of the study of legal history, Gordon, citing Abel's work on law books, points out that one of the reasons that legal history remained "inside the box," i.e., constrained by the methods of legal reasoning, was that it was itself a "form of professional activity within the legal system—like adjudication, or advocacy, or counseling" (1975: 20) and like those activities became a process of filling in the "legal details" (p. 26).
8. Elite law schools produce/supply law faculties. Within these schools there is, of course, yet another pecking order that defines a small, and closed, hierarchy

(see n.6). For our purposes, however, it is interesting to note that the elite schools, that form the focal point of this discussion, probably play their most influential role in establishing the form that legal scholarship takes.

9. One legal scholar, in a moment of candor, has described his research, and reading in an area of the social sciences, as being akin to "briefing" a case, i.e., he reads for the facts that support his position.
10. Legal realism is in part to be understood as one response to the socio-political currents that came of age during the Progressive Era. Many historians have begun to trace the threads of this "watershed" (see esp. Commager, 1950; Hofstadter, 1955; Wiebe, 1967). By the turn of the century, American capitalism had come of age. In response, state and federal regulations were first introduced, giving rise to administrative agencies (Lowi, 1969). Municipal reforms were developed (Weinstein, 1968). Higher education took on new importance (Veysey, 1965) as did professionalism and professional expertise (Bledstein, 1976) Hofstadter, 1955; Larson, 1977).

This "watershed" also had its effect upon the law: a crisis emerged in the viability of formalism as a sufficient and self-contained legitimating premise. Moreover, new, and "scientific," solutions to social conflicts emerged. The strands of this intellectual transformation emerged by the late nineteenth century as descendents of Dewey's generation insisted that society is an interdependent process in which the parts are connected and mutually dependent. A world which is seen to be "interdependent" posed a direct threat to the most basic assumption of legal formalism, i.e., individualism, and, at the same time, had significant consequences for the development of intellectual communities. Thus the social sciences, and especially economics, suggest the possibility that (1) human affairs are open to scientific study; (2) it is possible to develop a "quasi-paradigm" for research; and (3) there is "a market for expert advice" that may "discredit traditional systems of belief" (Haskell, 1977: 43). Most specifically, this quasi-paradigm discredited the notion that law is a self-contained and sufficient perspective for writing social policy. Thus a direct threat to the assumptions underlying formalism came, in part, from the emergence of the social sciences at the turn of the century. In response to a historically new set of social problems the social sciences, especially economics, presented a strategy for "solving" conflicts that seemed reasonable because they rested upon scientific, i.e., objective, standards. In so doing, this young science challenged the autonomy and control of earlier notions of legalism, especially formalism, as well as the control of the legal profession.

Yet, the legal profession did not sit by and passively watch its demise; rather, it developed new, and powerful, strategies for reasserting control in twentieth-century guise. (See Larson [1977] for the history of this development.) In part, the reassertion of control entailed the development of a "scientific" approach to legal education; here, the course of history at Harvard, and particularly the role of Langdell, was pivotal. Equally important, if somewhat later, the emergence of legal realism, and particularly the law's first waltz with empirical research, sought to merge scientism with the law. As Schlegel (1980) has documented, the most vibrant center of this development was at Yale, where Hutchins presented a fertile haven for exploring the possibilities of merging legal analysis with empirical research and thereby took the formalists head on. Thus the realists were willing to begin by asserting that the law is not objective, timeless, and universal. Rather, it is subjective, influenced by historical events and the product of specific economic, political and social currents. Having taken this leap, they confronted a fundamental dilemma: how can the law be legitimate if it is acknowledged to be political? It is at this juncture that they deferred to the trappings of scientific legitimation. By deferring to science and the inescapable

"discovery" that the world is an interdependent and social reality, the realists pulled the rug out from under legalism, i.e., its most fundamental assumptions had no meaning. In its most extreme form, and apparently echoing current developments in Critical Legal Studies—if from a different starting point—one strand of legal realism gave way to a form of "legal nihilism": general principles of law, precedents, and relevant constitutional texts no longer had any meaning; all that remained was the hollow base of the law's "essentially irrational" foundation (Yudof, 1978: 65–66). Other realists tackled the subtle and complex question of trying to synthesize the "discovery" of society, and all that flows from that discovery, with the values of liberal legalism. Just as the discovery of society took on various political casts, from more radical to mainstream interpretations, so the attempt to synthesize took on various political hues. Again, these events foreshadow contemporary developments in Critical Legal Studies: the "normative effects" strand, as we described it, seeks to "demystify" the LAW by demonstrating its political role and, in the process, implicitly holds out the hope of contributing to the development of a more humane society.

Finally, the realists and Critical Legal Studies share a common pitfall: both movements have skirted the question of examining the underlying assumptions of legal reasoning and methodology and its centrality to liberal legalism. It is in this sense that both movements fall short of being radical, or providing an alternative framework for understanding, and changing, society.

11. In making this point, we are perfectly aware of the fact that social scientists suffer the same night vision. Our intent here will not be to state that one form of traditional research (i.e., the "scientism" of most social science or the argumentation of most legal research) is better than another. Rather, as we will attempt to show, we are committed to a dialectical method which means a commitment to a research strategy that supersedes *both* scientism and predetermined argumentation.
12. For an overview of this work, see David Kairys (ed.) *The Politics of Law* (1982).
13. It must be noted that not all would accept this characterization, specifically the point concerning the ideological role of law in a capitalist society. As we shall show in the next section, there is an acknowledged commitment among some to document or map the irrationality of law and, with it, the reification of legal consciousness, separate and apart from socio-historical context. Nevertheless, it is reasonable to suggest that all would agree that those identified with CCLS share a "common disenchantment with liberal legalism" (Gordon, as quoted in Levinson, 1983: 1466).
14. Dalton (1983) describes the "nihilist" strand of research as "irrationalist," arguing that the goal is to expose "the contradiction at the heart of the liberal order, to pry open the rule structures" . . . and argues that the constraints they impose on resolution of disputes they purport to govern are imaginary" (p. 235). Having taken this position, there remains a political agenda, if an uneasy one, of social transformation that, inevitably, must make some accommodation to more reformist positions (also see Trubek, 1984).

We prefer the term nihilist because it provides an anchor point for considering this movement in a larger social context and places the political question center stage; if *all* symbols (though in this case only legal rules, doctrine and decisions are considered) are mystifications, how can one act? How does one begin to formulate the question for political action? Since social transformation is a central concern of the CLS agenda, the question is appropriate (also see Harvard Law Review 1982: 1682).

See Levinson's (1983) review of *The Politics of Law* and his characterization of one strain, particularly Kennedy's work, as a "nihilistic response to the attempt to assign to law any discernible content independent of the moral and political

- desires of those who purport to make decisions in the name of the law" (p. 1470). While we agree with Levinson's description of this issue, there are others with which we would take issue.
15. In a recent article Yudof makes a similar point about the earlier realists: He suggests that in some forms values can be carried "to the point of legal nihilism. For them there are no general principles; . . . Law is essentially irrational" (1978: 65-66). Thus it is interesting to note that an important theme to emerge from the work of the Conference has its origins in a convergence of socio-political events that date from the turn of the century.
 16. The vacuum, even the impropriety of criticism of doctrine without the aid of a social theory explaining the relevance of the critical enterprise itself, seems implicitly recognized in Kennedy's own work. At the conclusion of another work on the internal structure of doctrine he qualified his findings in the following way: "Even this conclusion applies only so long as it is possible to abstract from the context of compromises within the mixed economy and the bureaucratic welfare state. In practice, the choice between rules and standards is often instrumental to the pursuit of substantive objectives. We cannot assess the moral or economic or political significance of standards in a real administration of justice independently of our assessment of the substantive structure within which they operate" (Kennedy, 1976: 1776).
 17. As Tushnet acknowledges, "The exchange of labor power for a wage is the basic transaction of bourgeois society, in the sense that it defines that society. In order for a market in labour power to operate, each worker's contributions to the market must be homogenized; a common unit of measurement is used to reduce the varying forms and quality of individual labor to an undifferentiated mass of fungible labor power. Thus, in the defining relations of capitalist production, each worker's individuality is eliminated in favor of an incomplete version of his or her ability. The first characteristic of bourgeois social relations that people must interpret is thus the role of partial relationships among people" (1981a: 32).
 18. In some instances, the work seems to suggest that society is a self-maintaining "system" seeking equilibrium. There is a certain irony in this: traditional notions of liberal legalism assume evolutionary progress. In the attempt to reveal the fallacy of this position, by showing that the law does not really, or always, represent the interests it ostensibly sets out to serve, the work often falls into a trap of presenting society as a static entity, a world without change, a world without changed visions or consciousness through struggle.
 19. Here Trubek (1984) draws a similar conclusion. He writes, "To demonstrate the existence of labor law ideology, Klare concentrates exclusively on appellate court opinions and academic commentary. . . . Because Klare *assumes* that the justificatory messages in this elite literature have a direct influence on worker and union decision making, he is able to assert that there is a relationship between the creation of a labor law ideology and the relative passivity of American unions in the post-war period". As Trubek goes on to point out, Klare is not able to "explain why workers or union officials might accept labor law's justificatory rhetoric" (p. 46).
Trubek also raises similar problems or concerns with Kennedy's work. While we would agree with Trubek that Klare's work evidences an awareness of and a sensitivity to the problem outlined above, there is little evidence in Kennedy's work that the issue is of concern to him. We would suggest that this difference in the concerns of Klare and Kennedy may be traced to the starting points or underlying premises of each scholar as outlined herein.
 20. See for example, Tushnet's astute summary:
"Social theory in the twentieth century has revolved around efforts to resolve

what have been conceived of as epistemological problems of social knowledge. The problems arise as claims to objective knowledge are confronted with the reality that knowledge is produced by individuals located inextricably within the arena about which they are said to have knowledge. Marxism, by insisting that all knowledge is a social product and thus that knowledge can have no transcendent validity, generates the central position to which all theories of knowledge respond" (1981b: 1220).

Or, as Gabel has written:

"Legal theory must avoid producing fiction by transforming its phenomena into facts: that is, its method must incorporate a critical phenomenology. . . . It must begin by describing the field of necessity within which consciousness is conditioned in order to disclose the dialectical unity of the inert force of worked matter on the one hand with the transcendent intention of the legal idea on the other. A whole grasp of the legal moment cannot be forged from a mechanical materialism that speaks of the law as merely a 'form' 'reflecting' the rigors of necessity, nor from an intuitive apprehension sitting smugly outside of history, ignoring the weight of its structured direction" (1977: 602-603). Note, however, that there is no mention of the role of the scholar in shaping this description; that is, there is no discussion of how the scholar must prepare for the task. We will return to this problem in a later section of this paper.

21. As was shown earlier, Freeman then demonstrates how Supreme Court decisions in the area of civil rights "fit," ultimately, into a view of the world as defined by "perpetrators."
22. We assume that theory has not been *misappropriated*. (See Priest, 1981). Even when not misused, legal scholarship treats as conclusive of issues theory which should only be used to raise questions and to formulate hypotheses for testing.
23. Discussing the concept of legitimation, we would agree with Trubek when he writes "despite the appropriation of the label 'critical' the Americans [as compared to the Germans] have paid scant attention to the Frankfurt tradition or to the work of its contemporary interpreters like Habermas" (1984: 30). On the other hand, Trubek does not discuss the self-critical emphasis of the Frankfurt tradition in developing a method for studying the legitimation of ideologies and in so doing glosses over a basis for clarifying the limitations of "social transformation" as understood by the Critical Legal Studies movement.
As Trubek describes it, for CCLS, "If society is in some sense constituted by the world views that give meaning to social interaction, then to change consciousness is to change society itself. That is the central tenet of the critical legal studies creed, the grounding for the belief that scholarship is politics" (p. 22). Or, as Trubek describes it at a later point in his article, "For the contradictions [of liberal legalism] can be uncovered, the 'incoherences' demonstrated, the denied material brought to light. And if that occurs, then the society can be transformed" (p. 42-43). Here we would disagree; see pp 277-279 for a discussion of the problems of this position.
24. See, for example, the work of Althusser and Balibar (1970), Wright (1978), or Poulantzas (1973), all of which evidence a self-conscious perspective, but are not self-critical in the way we are using the term here. In fact, Althusser, in differentiating himself from Lukacs, challenges this position.

There are many descriptions of the institutionalized practices which reinforce liberal legalism, from discussions of legal advocacy (Simon, 1978) to case method (Klare, 1979a), student-teacher relations (Kennedy, 1982) and lawyer-client contacts (Gabel and Harris, 1982-83). In each, remedies are assumed to flow from a description of the oppressive practices and an alternative vision of, for example, lawyer-client or teacher-student relations. What this leaves out of the account is a self-critical examination of the categories in which the analysis

takes place (for example "lawyer" and "client") and the assumptions about the autonomy and efficacy of choices exercised by a "liberated" scholar or practitioner. To reach these problems one must begin from a self-critical position, not merely from a position of critic.

25. Given this lack of self-reflection, it is not surprising that much of CCLS research comes across as the received word with little consideration of the limitations of that "word" or how an angle of vision shapes presentation and often limits full understanding. Here, it is interesting to note that CCLS was organized, primarily, by a group of white, male academics with elite legal training: To the extent that self-reflection more naturally, though not necessarily or exclusively, flows from the bottom up and that the impetus for self-reflective research more naturally, though again not necessarily, flows from a need to understand, we can begin to piece together why so much of CCLS research has skirted any consideration of the role of the researcher as a *part* of study itself.
26. Eloquent testimony to this problem is contained in the work of Weber and his concern to understand the forms of rational authority and bureaucracy and its relationship to modernization. However, the scholars of the Frankfurt School clearly rejected Weberian methods, specifically his concern to develop a value-free social science; they rejected this method because of its positivist pretensions. Nevertheless, it is not unreasonable to suggest that much of the work of the Frankfurt school is, implicitly, a response to the Weberian challenge. The similarity of topics selected for study is striking: the rationalization of music and literature, politics, and culture. However, they approached this challenge from a different methodological starting point and built upon a self-critical *method*. Members of the Frankfurt School have, for the most part, remained squarely committed to the central role of class conflict in any understanding of contemporary society. In examining the work of critical legal studies, it is these aspects of critical theory that are clearly not apparent: (1) attention to the concept of class and (2) attention to questions of appropriate methodology for the problem under study. And, if concepts of class and method are dropped, Marxist theory offers little more than a skepticism of capitalism.
27. We would suggest that this same cluster of problems has confronted the analysis of social class. On the one hand there has been an almost intuitive sense that Marx's analysis of social class in its broadest contours is appropriate, but on the other hand, that it suffers from being over general and failing to explain the formation of new fragments of class (e.g., a managerial class) and the persistence of old fragments (e.g., a petty bourgeoisie). Yet, this work has, of late, made enormous strides as scholars have attempted to look at the formation of classes organized around socio-economic activities, e.g., management (Braverman, 1974; Noble, 1977), professional work (Larson, 1977), government (O'Connor, 1973), as against one, all encompassing activity, i.e., capitalism. This strategy then provides a unique model for exploring the equally overwhelming construct of ideology and suggests that it is possible to do research that refines the "big" picture but, at the same time, respects the specificity of changing historical circumstances. As the shortcomings of examining ideology as psychology have become more and more apparent, there has been a renewed interest in the work of the Frankfurt School and the research strategies put forward by this tradition. In part this tension may be seen in the recent debates between structuralists (Althusser) and radical historians (Thompson) over the meaning of the rule of law. The structuralists take the position that the development of categories, separate and apart from historical analysis, is at the very least a necessary first step; radical historians, on the other hand, reject this argument and set out to concretely demonstrate the historical unfolding of this contradictory cluster and the forms it takes under different historical circumstances. As O'Malley (1982)

has recently shown, the historians are able to take us a lot further precisely because they pay close attention to, and respect the significance of, the historical context. Thus they are able to show the circumstances under which legal formalism has appeal to dominant class interests.

28. Gabel has put this quite nicely. Paraphrasing Sartre, he writes "before I can be conscious of myself as a person in the ordinary sense, I must have had the experience of being recognized as such by someone else. Therefore to recognize myself as myself is to be already a social being" (1977: 630).
It therefore follows that "the search for an 'essential' identity which is non-social is a search for something non-human, for an identity not conceived or reflected upon in language" (Cain and Finch, 1981: 111).
29. Of course, under some historical configurations class is one appropriate location for studying social relations. Class is, however, only one, among many, types of group activities. It should, of course, be noted that there are schools that take a different position. For example, there are those who only point to Marx's analysis of capitalist society and conclude that class relations *determine* social relations (i.e., the base-superstructure debate); it is this line of argument that liberal theorists usually point to as a basis for rejecting, quite appropriately we think, Marxist theory. From our point of view, this is, however, a misunderstanding of Marx. Marx's great contribution to social inquiry was his development of a historically informed method for explaining social relations as dialectical processes, i.e., as processes in the process of becoming. For an excellent clarification of this point, see Lukacs, 1971.
30. Describing critical theory, McCarthy writes "From this perspective, critical theory can be seen to belong essentially to the self-formative process on which it reflects. Extending in methodical form the practical self-understanding of social groups, it seeks to raise their self-consciousness to the point where it 'has attained the level of critique and freed itself from all ideological delusion.' In unmasking the institutionally anchored distortions of communication that prevent the organization of human relations on the basis of unconstrained intersubjectivity, the subject of critical theory does not take up a contemplative or scientific stance above the historical process of human development. Knowing himself to be involved in this development, to be a result of the 'history of consciousness in its manifestations' on which he reflects, he must direct the critique of ideology at himself. In this way critical theory pursues self-reflection out of an interest in self-emancipation" (1982: 88).
31. It was this issue that gave the Frankfurt School its greatest challenge (both because of the historical period during which these intellectuals worked and because of the great effort they expended to overcome a scholarly tradition that eschewed debate on the political role of the scholar as scholar) and provided the basis for wide debate, i.e., what is the appropriate role for a reflexive scholar? How does he or she overcome the tension of description, explanation and participation? While a complete answer to these questions warrants its own investigation (see e.g., Jay, 1973) on two points these intellectuals agreed: (1) scholarship is a political activity; this means that one's work is influenced by values that must be clearly articulated, questioned and open to modification and change and (2) any form of scholarship that begins with a predetermined conclusion is suspect; this means that a scholar must be willing to accurately and fairly describe and explain the data. It is for these reasons that critical theory rejected, on the one hand, empiricism for its own sake and, on the other hand, determinist theories of history: whereas scientism espouses value neutrality, determinist theories of society begin with a predetermined conclusion (e.g., the inevitability of a proletarian revolution).
32. We realize that there is a long tradition in the social sciences that takes the

position that “value-neutral” scientific research is possible. That is not the position that we take here; a full understanding of the scientific method, as used in good social science, is much more complex and subtle than the simple belief that it is possible to determine “objective” truth. Of course, many who tend to oversimplify the meaning of the scientific method reject it out of hand for precisely this reason.

33. In making these points, it should be emphasized that what we have said thus far is presented as the basic building blocks of society and that there is nothing that is assumed to be inherently determined or directed about the nature of human activities beyond this basic point.
34. Because of their relational nature, events in the legal system produce contradictory effects which in turn produce change. This means that the relationship between the legal system and other economic or political events in society can never be described in simple functional or instrumental terms.
35. If the full relational significance of law is appreciated, the results of research should be useful to progressive lawyers. i.e., a full understanding of the contingencies in social relations makes radical legal practice possible.
36. Trubek calls the implicit theory linking ideology to social life “the simple transmission belt model” (1984: 49).
37. At this point, it may be useful to respond to an argument against our position outlined by Trubek. We argue that, to use his phrase, the “burden of proof” remains with CCLS to provide “evidence that legal consciousness does affect what goes on in society” (1984: 48). We would assert, his description of our work to the contrary notwithstanding, that doctrine *may* provide one appropriate data source, but we would question whether it is ever sufficient if the task is to develop a historically-situated critique of legal ideology. It is possible to read Trubek’s own criticism of CCLS as conceding our point, although without sufficient development. Trubek acknowledges that “reading ideologies by analyses of texts” must be enriched “to encompass studies of the construction of meaning and its relationship to action at all levels” (p. 48).

Trubek cites as a promising lead in this direction the work on law schools by members of CCLS, particularly that of Kennedy. While some of Kennedy’s points are insightful they remain problematic. Given the fact that the academic contingent within CCLS is the most active, these descriptions of law school education are not a surprising development, and they are, of course, a necessary one. CCLS should be in the business of questioning the limitations of law school education, but that questioning should go beyond “trashing,” to use Alan Freeman’s description. While it is “fun,” a central question is absent: What role does one play as a law teacher in legitimating liberal legalism, even as one debunks or demystifies its supposed coherence and logic? To return to our earlier point, Kennedy’s writing on the law school is self-conscious in the sense that there is the ever-present quality of him as a law professor, but it is hardly self-critical in that he does not question his own role in perpetuating another mystification, i.e., the taken-for-granted assumption that there is one right answer to the question and that the law teacher possesses that information. Here, one should not be misled: just because the “right” answer is that the substance of legal education is a mystification does not mean that the *form and process* of question and answer has been examined by Kennedy.

In sum, a major difference between our position and Trubek’s is our belief that the development of a reflexive scholarship is central to the development of a critical theory of law. While Trubek shows that CCLS has not dealt directly with the theoretical and methodological issues central to the Frankfurt tradition (see n. 23), he does not consider the methodological requirement of self-criticism. We take this methodological constraint to be pivotal. For Trubek, however, it is

- not, or it does not appear to be. Therefore, he is less troubled by some of the problems with CCLS research that are exposed by both of us (see e.g., n.19).
38. What we suggest here is similar to Tushnet's argument regarding Horwitz's description of the development of American private law in response to the rise of commercial enterprise in the nineteenth century (Horwitz, 1977). Tushnet argues that Horwitz must make the relationship between doctrinal change and economic change an object of study in its own right employing both theory and data appropriate to the class relationships which mediated the link between judges and the economy. Tushnet suggests, as we do, that appropriate research can be done only by going beyond descriptions of doctrine in order to understand its significance and therefore how it was created and with what effect. (Tushnet, 1978: 105-110).
 39. Indeed, the Conference was formed because the relationships between legal system and society are open to question and debate. Conference research, therefore, cannot, and does not, assume that questions such as these are settled, even in Marxist theory.
 40. We would be remiss if we did not also appreciate other works by Klare which we believe present the group-relational, self-reflective analysis of law which the Conference should strive for (see esp. Klare, 1979b). Interestingly, in a recent piece on labor and civil rights law (1982) and the failure of these movements to come to grips with a common set of concerns, Klare much more self-consciously clarifies what his analysis of doctrine can *not* explain.

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