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Albert P. Cardarelli

Stephen C. Hicks

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# CRIMINOLOGY

## RADICALISM IN LAW AND CRIMINOLOGY: A RETROSPECTIVE VIEW OF CRITICAL LEGAL STUDIES AND RADICAL CRIMINOLOGY

ALBERT P. CARDARELLI\* & STEPHEN C. HICKS\*\*

### I. INTRODUCTION: HISTORY AS A PRELUDE

As the end of the century approaches, there is a growing sentiment that we may be witnessing the end of the "Left" as a major ideological force in American society.<sup>1</sup> The reasons for the purported demise, especially in American politics, are not always in agreement, even among leftist scholars themselves.<sup>2</sup> One explanation posits that the fall from power began with the ascendancy of the "Right" in national politics with the election of Ronald Reagan, and was accelerated by the collapse of communist governments through-

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\* Senior Fellow, John W. McCormack Institute of Public Affairs, University of Massachusetts, Boston. Ph.D., Sociology, University of Pennsylvania; J.D., Suffolk University Law School.

\*\* Professor of Law, Suffolk University Law School. M.A., LL.B., Downing College, Cambridge England; LL.M., University of Virginia.

<sup>1</sup> See generally JOHN P. DIGGINS, *THE RISE AND FALL OF THE AMERICAN LEFT* (1992); JEFFREY GOLDFARB, *THE CYNICAL SOCIETY: THE CULTURE OF POLITICS AND THE POLITICS OF CULTURE IN AMERICAN LIFE* 82-102 (1992); Maurice Isserman & Michael Kazin, *The Failure and Success of the New Radicalism*, in *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980*, at 212 (Steve Fraser & Gary Gerstle eds., 1989); CHRISTOPHER LASCH, *THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS* (1991); WINI BREINES, *COMMUNITY AND ORGANIZATION IN THE NEW LEFT, 1962-1968: THE GREAT REFUSAL* (1989). For a retrospective analysis of the New Left from a former member of the movement, see generally BREINES, *supra*.

<sup>2</sup> See Carolyn J. Mooney, *Down but not Out, Socialist Scholars Gather to Redefine Political and Academic Assumptions in Post-Soviet Era*, 38 *CHRON. HIGHER EDUC.*, May 6, 1992, at A19; Michael Ansara & S.M. Miller, *Opening Up Progressive Thought*, *SOC. POL'Y*, Summer 1986, at 3-10 (analyzing the challenges facing the left in American society).

out Eastern Europe and the Soviet Union.<sup>3</sup> Whether this explanation is adequate remains open to debate.<sup>4</sup> There is, however, ready acknowledgment that important political and cultural shifts continue, and that these shifts need to be examined within the historical context of cultural change as it relates to the dominant ideas and beliefs around which political philosophies cohere.<sup>5</sup> In this vein, Christopher Lasch early argued that modern radicalism can best be understood as a phase of the social history of intellectuals whose prime function is to be critics of society.<sup>6</sup> From this perspective, the content of radicalism will always be contingent upon the historical circumstances of the period in which it arises; its intensity likely to wax and wane over time; and its meaning likely to differ at the time of its ascendancy from its historical closure or demise. This premise—that radicalism is itself historical both in terms of its meaning and its political locus—is the theme upon which the present analysis is structured, and from which we draw our conclusions.<sup>7</sup> To explore this premise, our analysis focuses on two self-proclaimed radical alternatives to established schools of thought in Law and Criminology. These movements, “Radical Criminology”<sup>8</sup> and “Critical

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<sup>3</sup> Mooney, *supra* note 2, at A19; BREINES, *supra* note 1, at 150-52.

<sup>4</sup> See GOLDFARB, *supra* note 1, at 103-17.

<sup>5</sup> See LASCH, *supra* note 1, at 21.

<sup>6</sup> CHRISTOPHER LASCH, *THE NEW RADICALISM IN AMERICA: 1889-1963: THE INTELLECTUAL AS A SOCIAL TYPE* ix (1965). For an analysis of radicalism and the role of the intellectual, see Seymour Martin Lipset & Richard B. Dobson, *The Intellectual as Critic and Rebel: With Special Reference to the United States and the Soviet Union*, DAEDALUS, Summer 1972, at 137; IRVING L. HOROWITZ, *RADICALISM AND THE REVOLT AGAINST REASON: THE SOCIAL THEORIES OF GEORGE SOREL* (1968); and RICHARD H. PELLIS, *RADICAL VISIONS AND THE AMERICAN DREAMS: CULTURE AND SOCIAL THOUGHT IN THE DEPRESSION YEARS 151-93* (1973).

<sup>7</sup> Radicalism can, of course, be associated with ideological movements on both the “left” and the “right” of the political and cultural spectrum. For example, WILLIAM B. HIXSON, JR., *SEARCH FOR THE AMERICAN RIGHT WING: AN ANALYSIS OF THE SOCIAL SCIENCE RECORD, 1955-1987* (1992), synthesizes scholarly research on the contemporary American right wing. For a recent and powerful analysis of the American Revolution as a radical event, see generally GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992).

<sup>8</sup> Over the last few decades, Radical Criminology has been variously referred to as “Marxist Criminology,” “Conflict Criminology” and “Critical Criminology,” creating confusion among both sympathizers and critics of Radical Criminology. Radical criminologists readily acknowledge an explicit debt to Marx and the critical theories of the Frankfurt School. See, e.g., Thomas J. Bernard, *The Distinction Between Conflict and Radical Criminology*, 72 J. CRIM. L. & CRIMINOLOGY 362 (1981); W. Byron Groves & Robert J. Sampson, *Critical Theory and Criminology*, 33 SOC. PROBS. 258 (1986); Stuart Henry & Dragan Milovanovic, *Constitutive Criminology: The Maturation of Critical Theory*, 29 CRIMINOLOGY 293 (1991); Jim Thomas & Aogan O’Maolchata, *Reassessing the Critical Metaphor: An Optimistic Revisionist View*, 6 JUST. Q. 143 (1989). In 1990, Critical Criminology, representing a more “leftist” oriented perspective, became a subsection of the American Soci-

Legal Studies" (CLS),<sup>9</sup> rose to ascendancy during the 1960s and 1970s; each raised major intellectual challenges to the accepted bodies of knowledge in their respective disciplines.

#### A. RADICAL MOVEMENTS AS HISTORICAL EVENTS

This article is not intended to develop a detailed history and critique of Radical Criminology and CLS; such analyses have already been established.<sup>10</sup> Rather than focus on the details or agendas of each movement, we shall focus on them as movements in the context of the last thirty years—a period of history that now seems fateful for the Left generally, while calling into question its continued viability in the future.<sup>11</sup> Thus, our analysis is a description and commentary on a stage in the recent history of ideas, particularly radical ideas within law and criminology, both of which were especially vulnerable to ideological controversy.<sup>12</sup>

Further, our analysis suggests that the stage we are seeking to delimit and account for, both internally as a period of radical moment, and externally as a period of conservative political reaction, is giving way as new forces and ideas appear on the horizon.<sup>13</sup> Just as CLS, in particular, made the argument that it is the awareness of historical contingency that undermines the automatic acceptance of the status quo, so too must that insight now be applied to both movements.<sup>14</sup> Their power and critical acclaim are equally not immutable. As feminists, environmentalists, minorities and fundamen-

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ety of Criminology, and itself represents the historical maturation of radical/critical criminology.

<sup>9</sup> See Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991), for an overview of the development of CLS by a major figure in the movement.

<sup>10</sup> For an overview of Radical Criminology, see MICHAEL J. LYNCH & W. BYRON GROVES, A PRIMER IN RADICAL CRIMINOLOGY (1986); RADICAL CRIMINOLOGY: THE COMING CRISIS (James A. Inciardi ed., 1980); Robert M. Bohm, *Radical Criminology: An Explanation*, 19 CRIMINOLOGY 565 (1982). For a general understanding of the Critical Legal Studies movement, see ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986); J. Stuart Russell, *The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy*, 18 OTTOWA L. REV. 1 (1986); David M. Trubek, *Where the Action is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984). See generally CRITICAL LEGAL STUDIES (Peter Fitzpatrick & Alan Hunt eds., 1987); ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE (1990); Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986); Tushnet, *supra* note 9, at 1515.

<sup>11</sup> See GOLDFARB, *supra* note 1, at 82-102; DIGGINS, *supra* note 1, at 342-83.

<sup>12</sup> See LASCH, *supra* note 6, at ix; DIGGINS, *supra* note 1, at 39-44.

<sup>13</sup> See GOLDFARB, *supra* note 1, at 170. See generally ALBERT BORGMANN, CROSSING THE POSTMODERN DIVIDE (1992); DAVID GROSS, THE PAST IN RUINS: TRADITION AND THE CRITIQUE OF MODERNITY (1992).

<sup>14</sup> See Elizabeth Mensch, *The History of Mainstream Legal Thought, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 18 (David Kairys ed., 1982).

talists seek to control the cultural agenda, one must ask where Radical Criminology and CLS lie in the landscape of the Left today.<sup>15</sup> Therefore, in examining these movements, the aim of this analysis is not so much to ask what each stood for, nor what each achieved, but what has changed in the last thirty years that affects radical movements generally as agents of change and consciousness raising. This, we believe, will inform our understanding of the present and future possibilities for continued change within the Academy.

It is necessary, of course, to both identify and compare Radical Criminology and CLS in terms of their origins, challenges, strategies and the intellectual, professional and social reactions each received.<sup>16</sup> As we will note in more detail, Radical Criminology is generally more directly derived from Marxist analysis, while CLS is much more a product of Legal Realism and the Frankfurt school of critical theory. More important than their similarities and differences or even cross-fertilizations, however, is their overall role as bearers of a radical tradition in what may be known as the "Left," especially with regard to the Academy and politics. The present article shall consider their critiques of liberalism, value-free social science and academic neutrality, as well as their contributions to theory, methodology and praxis. But we see both as ends in themselves, apart from their content—as ideologies destabilizing a particular historical stage, as programs that sustained a membership and engendered creative intellectual energy. The major focus of the present article is, therefore, upon radical movements within the Academy as exemplified by the historical development of Radical Criminology and CLS. However, as both movements are part of the social history of intellectuals, some understanding of the period from which they emerged and flourished is essential to our discussion.<sup>17</sup>

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<sup>15</sup> See generally JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

<sup>16</sup> We shall only consider in passing why CLS never developed a radical criminal law critique, and why Radical Criminology appears to have had little, if any, influence on legal education. It is interesting to note that the revised edition of *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 1982) excluded two chapters on Radical Criminology that were part of the original edition published in 1990.

<sup>17</sup> For an analysis of the 1960s from the perspective of those with direct experience in the "New Left" movement, see generally DAVID CAUTE, *THE YEAR OF THE BARRICADES: A JOURNEY THROUGH 1968* (1988); TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* (1987); JAMES MILLER, *DEMOCRACY IS IN THE STREETS* (1987). For more conservative interpretations, see CYRIL LEVITT, *CHILDREN OF PRIVILEGE: STUDENT REVOLT IN THE SIXTIES* (1984) and GUENTER LEWY, *PEACE AND REVOLUTION: THE MORAL CRISIS OF AMERICAN PACIFICISM* (1988). See also Margaret M. Braungart & Richard G. Braungart, *The Effects of the 1960s Political Generation on Former Left- and Right-Wing Youth Activist Lead-*

## B. THE 1960s: A DECADE OF PROTEST

It is common knowledge that the decade of the 1960s was a time when protest and dissent overshadowed the American landscape. Although the turbulence of the decade was both unanticipated and long-lasting, much of the momentum for the Civil Rights and Anti-War movements, and student protests derived in large part from events taking place during the 1950s, an era generally viewed as one largely complacent and politically quiescent.<sup>18</sup> Thus, *Brown v. Board of Education of Topeka*,<sup>19</sup> the Supreme Court decision which declared the policy of separate but equal schools invalid, was a momentous occasion that raised the civil rights movement of Black Americans to a level of legitimacy previously denied in American culture. Among students, the seeds for protest were already evident in the emergence of the Student Peace Movement in the 1950s and the establishment of progressive student organizations on several prestigious campuses.<sup>20</sup> The complacency and conformity associated with this period are no doubt due in large part to the general absence of public dissent coupled with the active repression of intellectuals, artists and leftists.<sup>21</sup> McCarthyism, at its height during the early 1950s, attempted to place intellectuals in the negative image of being "un-American," and by all accounts was successful in silencing academic radicals.<sup>22</sup>

As America entered the 1960s with the election of a President who promised to move the country forward, the Civil Rights Movement led not only to the widespread militancy within the black community, but also to the creation of a coalition of students, militants,

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ers, 38 Soc. Probs. 297, 297-315 (1991), for an analysis of the lasting generational effects on those who were part of the 1960s political generation.

<sup>18</sup> See generally PAUL A. CARTER, *ANOTHER PART OF THE FIFTIES* (1983); ERIC F. GOLDMAN, *THE CRUCIAL DECADE—AND AFTER: AMERICA 1945-1960* (1960); RICHARD H. PELLIS, *THE LIBERAL MIND IN A CONSERVATIVE AGE* (1985); WILLIAM WHYTE, *THE ORGANIZATION MAN* (1956). For an overview of the radical right during the 1950s, see generally *THE RADICAL RIGHT* (Daniel Bell ed., 1963).

<sup>19</sup> 347 U.S. 483 (1954).

<sup>20</sup> Charles Pettow, *The Sixties Observed*, in *THE DYNAMICS OF SOCIAL MOVEMENTS: RESOURCE MOBILIZATION, SOCIAL CONTROL AND TACTICS* 192, 203 (Mayer Zald & John McCarthy eds., 1988). See Special Issue, *Students Protest* 395 *ANNALS* 1-14 (1971), for a review of student protests in the United States and elsewhere. For a discussion of the impact of the civil rights movement on students associated with the Students for a Democratic Society, see KIRPATRICK SALE, *SDS* (1973).

<sup>21</sup> But see ELLEN W. SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* (1986), for an analysis of political intervention on American college campuses during the 1950s.

<sup>22</sup> RUSSELL JACOBY, *THE LAST INTELLECTUALS: AMERICAN CULTURE IN THE AGE OF ACADEME* 125 (1987); SCHRECKER, *supra* note 18, at 340.

and those associated with the "New Left."<sup>23</sup> Primarily associated with the largely student and racially white movement, the New Left consciously avoided the political scientism associated with the Left of the past and above all had no allegiance to Soviet authority or ideology.<sup>24</sup> This avoidance of Marxist-Leninist ideology was especially evident in the guiding philosophy of the Students for a Democratic Society (SDS) which proclaimed through its Port Huron statement that "the dreams of the older left were perverted by Stalinism and never re-created."<sup>25</sup> As one of the more visible New Left organizations on American campuses, SDS was essentially concerned in its early years with revitalizing the democratic process in America through its committed philosophy of "participatory democracy."<sup>26</sup>

Committed to change, this coalition of students and black activists became a driving force for major civil rights reforms and served as the vanguard for the growing student protest against policies seen by many as anathema to the goals of higher education. Thus, Lasch notes:

Some of the larger universities . . . were directly implicated in the national defense and in the whole "military-industrial complex" by virtue of their role in developing and perfecting new instruments of warfare. To the extent to which they came to depend for support on the government and on the private foundations, they lost their character as centers of independent learning and critical thought and were swallowed up in the network of the "national purpose" . . . .<sup>27</sup>

The growing involvement of university research with the military was to later serve as a primary focus of student protests against United States involvement in Vietnam. In this way, the New Left came to represent many different interests and protest groups. Throughout these protests, the New Left sought to establish an ideological foundation that would provide the basis for building a movement aimed at changing the social fabric of the industrial

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<sup>23</sup> See 1 *THE LEFT ACADEMY: MARXIST SCHOLARSHIP ON AMERICAN CAMPUSES* (Bertell Ollman & Edward Vernoff eds., 1982), for an overview of Marxist influence in American Universities. See also RICHARD FLACKS, *MAKING HISTORY: THE AMERICAN LEFT AND THE AMERICAN MIND* 132 (1988); Alan Hunt, *The Radical Critique of Law: An Assessment*, 8 *INT'L J. SOC. L.* 33 (1980) (discussing "the newness" of the radical critique of law).

<sup>24</sup> *THE AMERICAN LEFT: RADICAL POLITICAL THOUGHT IN THE TWENTIETH CENTURY* 385 (Loren Baritz ed., 1991) [hereinafter *THE AMERICAN LEFT*]. See also Martin J. Sklar & James Weinstein, *Socialism and the New Left in AMERICAN LEFT*, *supra*, at 418; Howard Zinn, *Marxism and the New Left*, in *DISSENT: EXPLORATIONS IN THE HISTORY OF AMERICAN RADICALISM* 355 (Alfred F. Young ed., 1968).

<sup>25</sup> Tom Hayden et al., *Introduction to THE AMERICAN LEFT*, *supra* note 24, at 397.

<sup>26</sup> See JOHN P. DIGGINS, *THE AMERICAN LEFT IN THE TWENTIETH CENTURY* 183 (1973); SALE, *supra* note 20, at 8.

<sup>27</sup> LASCH, *supra* note 6, at 316.

world in which the above mentioned struggles were being played out. For John Kenneth Galbraith, the universities played an important role:

[The universities] led the opposition to the Vietnam War, which forced the retirement of President Johnson, which are forcing the pace of present withdrawal from Vietnam, which are leading the battle against the great corporations on the issue of pollution, and which at the last Congressional elections retired a score or more of the more egregious time-servers, military sycophants and hawks.<sup>28</sup>

Although the direction of the Civil Rights and Anti-War movements was largely peaceful, each had to contend with adherents who became impatient with traditional methods of recourse and saw force—and even violence—as a legitimate response to the perceived injustices of American society.<sup>29</sup> The ghetto riots of the 1960s and the student protests at the National Democratic Convention in Chicago in 1968 resulted in wide-spread condemnation by the public and strong counter-reactive policies by public authorities.<sup>30</sup> It was no surprise to many that “law and order” became a central issue of the 1968 presidential election. Two years later, in response to the killing of four students by the National Guard at Kent State University, college students organized strikes at campuses across the country, effectively bringing the university system to a standstill. Ironically, the success of the strike can be seen as marking the beginning of the end of the student New Left as a political force in American society. Unable to stop the war in Vietnam, the revolutionary youth movement envisioned by the New Left was on the edge of collapse as the 1970s commenced.

### C. THE ACADEMY AND PROTEST

While America focused on the protests of blacks and students, many academics focused on politics.<sup>31</sup> Faculty members throughout

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<sup>28</sup> John Kenneth Galbraith, *An Adults Guide to New York, Washington and other Exotic Places*, quoted in LIPSET & DOBSON, *supra* note 6, at 146. For a view of the universities and protest, see generally Special Issue, *The Universities*, 13 PUB. INTEREST 3, 3-21 (1968).

<sup>29</sup> At the same time that SDS was growing on American campuses, the Progressive Party (PP) began to characterize SDS as an elitist group of middle-class students. Subscribing to violence and basing its directives upon Marxist-Leninist doctrine, the PP was in part responsible for the splintering of the Left during the end of the 1960s. This splintering and call for violence was not unlike the problems faced by activists in the Socialist movement in the early part of this century. See generally JAMES WEINSTEIN, *THE DECLINE OF SOCIALISM IN AMERICA: 1912-1925* (1967).

<sup>30</sup> See Gordon E. Misner, *The Response of Police Agencies*, 382 ANNALS 109, 110 (1964); David Mars, *The Federal Government and Protest*, 382 ANNALS 120, 127 (1964).

<sup>31</sup> The cover of the March 10, 1968 issue of *Newsweek* proclaimed: “Student Rebels: How to Tame the Turmoil?” See also Noam Chomsky, *The Politicization of the University*, in



many of the nation's colleges and universities voiced concern over the direction of American politics and advocated a more radical participation in national affairs.<sup>32</sup> In 1964, a number of respected historians founded the Socialist Scholars Conference to create a forum for socialist intellectual work.<sup>33</sup> No longer associated with party functionaries of leftist groups, radicalism and the call for social change became major topics of discussion among scholars in many academic disciplines. During the 1960s and early 1970s, some two dozen "Left" theoretical journals came into existence.<sup>34</sup> These journals, representing many of the disciplines in the arts and sciences provided an important forum for dissemination of ideas associated with new developments in theory and research.<sup>35</sup> Further, they provided assurance among many adherents of radicalism that their political activity had an intellectual foundation to which they could always refer as critics of society-at-large. Whether the remaining journals will, in the face of mounting costs and political shifts, be able to survive the next decade remains to be seen. That so many were created during the 1960s and 1970s not only says something about the powerful influence of radical dissent during this period, but provides a measure of later radical movements as well.<sup>36</sup>

As self-proclaimed critics and activists, scholars saw scholarship as a means to achieve major social changes in American society. For these radicals, the unity of theory and action (praxis) became the cornerstone of all political agendas. For example, the Union of Radical Sociologists, founded in 1969, called for radical social change: "the immediate and primary task of the radical sociologist is to raise public and professional consciousness through radical research and practice as well as to *engage in radical organizing* on and off the campus."<sup>37</sup>

It was during this period of intellectual and political upheaval that Radical Criminology raised its manifesto of challenge to the

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RADICAL PRIORITIES 189, 199-203 (Carlos P. Otero ed., 2d rev. ed. 1981) (discussing the universities' complicity with the federal government and the role of radical scholarship in the universities); JACOBY, *supra* note 22, at 130-90.

<sup>32</sup> See RADICAL SOCIOLOGY 3-21 (J. David Colfax & Jack Roach eds., 1971).

<sup>33</sup> See PAUL A. ATTEWELL, RADICAL POLITICAL ECONOMY SINCE THE SIXTIES: A SOCIOLOGY OF KNOWLEDGE ANALYSIS 8 (1984).

<sup>34</sup> *Id.* at 14-15.

<sup>35</sup> *Id.* at 16-17.

<sup>36</sup> Unlike Radical Criminology which established the journal, *Crime and Social Justice*, CLS never founded its own journal, nor has become identified with any particular legal publication. Perhaps, because of the plethora of student-run law journals providing ready exposure for an intellectual movement represented by professors at major law schools, this route may have been unnecessary.

<sup>37</sup> RADICAL SOCIOLOGY, *supra* note 32, at 18 (emphasis added).

traditional ideas and teachings of criminology. Since most criminologists were, at that time, trained in sociology, they were familiar with Marxist and leftist scholars, and were able to couch their calls for change within a radical framework.<sup>38</sup> For many sociologists and criminologists, both the legal and the criminal justice systems needed radical reform if a more equitable society was to be established. By the early 1970s, Radical Criminology had launched a major attack on traditional mainstream criminology.<sup>39</sup>

## II. RADICAL CRIMINOLOGY AND CLS: CONVERGENCE AND DIVERGENCE

### A. THE ORIGINS

Radical Criminology and CLS proponents acknowledge that the political, civil and student rights movements of the 1960s are essential to understanding the emergence of radical scholarship that took place within criminology and legal theory.<sup>40</sup> Prior to the 1960s, most criminology and legal theory courses were marked by a high degree of theoretical uniformity and ideological consistency. Students were given little, if any, exposure to radical perspectives, especially those associated with Marxism. In criminology, most research and theory shared a commitment to the consensus paradigm of structural-functionalism with its emphasis on the primacy of the social system and the interrelationship of its institutions rather than on the individuals or groups who made up the institutions or subsystems.<sup>41</sup> Because "equilibrium" of the systems was the hallmark of those sharing the structural-functional approach, critics claimed that the approach minimized social conflict and tension, thereby supporting a more politically conservative agenda within sociology and criminology.<sup>42</sup>

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<sup>38</sup> Since the 1960s, a number of colleges and universities have established degree programs in Criminology and Criminal Justice that do not require courses in Classical Social Theory.

<sup>39</sup> See David Greenberg, *Marxist Criminology*, in *THE LEFT ACADEMY: MARXIST SCHOLARSHIP ON AMERICAN CAMPUSES* 164, 207 (Bertell Ollman & Edward Vernoff eds., 1986).

<sup>40</sup> See William J. Chambliss, *Toward a Radical Criminology*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 230, (David Kairys ed., 2d ed. 1990); John Henry Schlegel, *Notes Toward an Intimate, Opinionated and Affectionate History of the Conference on Critical Legal Studies*, 36 *STAN. L. REV.* 391, 406-07 (1984); see generally Tony Platt, *Prospects for a Radical Criminology in the United States*, 1 *CRIME & SOC. JUST.* 2 (1974); Austin T. Turk, *Prospects and Pitfalls for Radical Criminology: A Critical Response to Platt*, 2 *CRIME & SOC. JUST.* 41 (1975).

<sup>41</sup> See generally ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* (1957); TALCOTT PARSONS, *THE SOCIAL SYSTEM* (1964).

<sup>42</sup> See generally GEORGE HOMANS, *SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS* (1961); PARSONS, *supra* note 41, at 513. Not all theorists, however, downplayed conflict in soci-

The social and political upheavals of the 1960s provided a major challenge to structural-functionalists by raising the issue of conflict within society to a level of theoretical importance long absent among social scientists. Faced with a growing number of protests throughout the country by students, blacks, and the urban poor, sociologists and criminologists searched for alternative theoretical models to explain the events taking place. Further, the personal involvement of many members of Radical Criminology in the anti-war and civil-rights movements strengthened the call for the development of a Radical Criminology that would challenge the prevailing ideology of liberalism that dominated conventional criminology,<sup>43</sup> while seeking "a wider range for research and a broader conceptualization of the [crime] problem."<sup>44</sup> For these scholars, the legal definition of crime limited inquiry to behavior officially defined as criminal by those in power and therefore should be rejected.<sup>45</sup> They argued that, to avoid state imposed restrictions on the study of crime and criminal behavior, what was needed was a conception of crime based on a human rights perspective.<sup>46</sup> This focus on human rights and dignity not only broadened the scope of inquiry by radical criminologists to include "crimes by the state," it also supported the emphasis given by academics to practice and participation in the political struggles themselves.<sup>47</sup>

Although CLS manifested its challenge to legal theory after Radical Criminology, its members acknowledge that its critical thrust derives from the same well-spring of political activism associ-

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ety. See generally LEWIS COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* (1956); RALF DAHRENDORF, *CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY* (1959); C. WRIGHT MILLS, *THE POWER ELITE* (1956).

<sup>43</sup> Platt, *supra* note 40, at 2. In his analysis of Radical Criminology, David Friedrichs notes that "radical" is suggestive of a fundamental break with mainstream criminology with a leftist tradition. David O. Friedrichs, *Radical Criminology in the Limited States: An Interpretive Understanding*, in *RADICAL CRIMINOLOGY: THE COMING CRISES* 35, 37 (James A. Inciardi ed., 1980).

<sup>44</sup> Chambliss, *supra* note 40, at 236. Some of the major figures associated with the beginning of Radical Criminology include William Chambliss, Barry Krisberg, Tony Platt, Herman and Julia Schwendinger, Paul Takagi, and Harold Pepinsky. For a description of the content of courses taught under the rubric of Radical Criminology, see Barry Krisberg, *Teaching Radical Criminology*, 1 *CRIME & SOC. JUST.* 64 (1974).

<sup>45</sup> Platt, *supra* note 40, at 5.

<sup>46</sup> See Herman Schwendinger & Julia Schwendinger, *Defenders of Order or Guardians of Human Rights?*, 5 *ISSUES CRIMINOLOGY* 123 (1970). See also Clayton A. Hartjen, *Legalism and Humanism: A Reply to Schwendinger*, 7 *ISSUES CRIMINOLOGY* 59 (1972).

<sup>47</sup> For a review of the cultural and political issues dominating these decades, see *CAMPUS POWER STRUGGLE* (Howard S. Becker ed., 1973); CAUTE, *supra* note 17; DAVID FARBER, *CHICAGO '68* (1988); RONALD FRASER ET AL., 1968: *A STUDENT GENERATION IN REVOLT* (1988); GITLIN, *supra* note 17; UNGER, *supra* note 10. For further readings in this area, see *The Universities*, *supra* note 28.

ated with the radical developments in the varied disciplines throughout the Academy.<sup>48</sup> Founded in 1977, CLS was viewed as "a response to a deepening skepticism regarding the ability of Legal Positivism and liberal legalism to provide satisfactory analysis of law in a rapidly changing society."<sup>49</sup> Like those movements that preceded it, CLS was instituted to scrutinize and critically judge the ways in which law is taught and practiced, as well as its role in maintaining the status quo of the social structure.<sup>50</sup> Dissatisfied with the empirical thrust of the Law and Society school of thought and the Sociology of Law as alternatives to the typical analysis of rules, systems and norms, the early members of CLS took the position that the road to jurisprudential enlightenment lay in philosophy, not behaviorism.<sup>51</sup> As a movement primarily "leftist" in content, CLS mounted an assault on the traditional legal philosophies guiding the teaching of law.<sup>52</sup> For CLS scholars, any legal theory was merely a reflection of a political system that dominated and controlled the existing judicial system.<sup>53</sup>

In this respect, Radical Criminology and CLS challenged the prevailing social and political structures as supportive of a capitalist system in crisis, and more importantly, viewed existing theory and research as little more than ideological justification for a political economy that supported the status quo in American society.<sup>54</sup> In rejecting the ideology of capitalism, both movements attempted to establish a sustained level of criticism that was linked with political

<sup>48</sup> See Tushnet, *supra* note 9, at 1534.

<sup>49</sup> Russell, *supra* note 10, at 4.

<sup>50</sup> Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 REV. L. & SOC. CHANGE 369, 370 (1982-83). See also Russell, *supra* note 10, at 10. For a criticism of the way law is taught, see generally Jay M. Feinman, *The Failure of Legal Education and the Promise of Critical Legal Studies*, 6 CARDOZO L. REV. 739 (1985); DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983); Karl E. Klare, *The Law School Curriculum in the 1980s: What's Left?*, 32 J. LEGAL EDUC. 336 (1982).

<sup>51</sup> Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 200-01 (1984).

<sup>52</sup> See, e.g., Duncan Kennedy, *How the Law School Fails: A Polemic*, YALE REV. L. SOC. ACTION 71 (1979); Duncan Kennedy, *First Year Law Teaching as Political Action*, 1 LAW & SOC. PROBS. 47 (1980); Duncan Kennedy, *Positive and Normative Elements in Legal Education: A Response*, 8 HARV. J. L. & PUB. POL'Y 263 (1985).

<sup>53</sup> See Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1021-22 (1981); Alan Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1230, 1236 (1981).

<sup>54</sup> See THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note 16, at 4. For Kairys, law provides a false legitimacy to existing social and power relations. In an earlier analysis, C. Wright Mills convincingly argued that liberalism had become irrelevant to American life, *supra* note 42, at 242-297.

action and radical change.<sup>55</sup>

#### B. THE CHALLENGE TO ORTHODOXY

As the United States entered the 1960s, liberalism—with its emphasis on rationality, individual freedom and public discourse—was firmly rooted in the social fabric of society.<sup>56</sup> Strongly committed to democratic balancing of interests with its reliance on the neutrality of the rule of law, liberalism became the chief target of the New Left in its search for alternative models to explain the growing social and political unrest that dominated American politics. In confronting this unrest, for example, adherents of Radical Criminology claimed that traditional criminology—with its acceptance of a legalistic-state definition of crime, its claim of reformism as the goal of the criminal justice system, and its adherence to the behaviorist paradigm and value-free social research—were all part of the prevailing liberal philosophy that saw consensus and rationality as being at the heart of the social system.<sup>57</sup> Thus, liberalism masked the domination of the public interest with its reliance on the objectivity of rational choice and the majoritarianism of those in power. Further, because liberalism reinforced the prevailing view that “radical change is utopian and visionary, thereby helping to impede the development of revolutionary and political movements,” it had to be rejected.<sup>58</sup>

In rejecting a legalistic definition of crime, radical criminologists argued that those in power used the legal order to impose their own interests by force on society, thereby protecting their property and physical safety from those without power and privilege.<sup>59</sup> To overcome the inherent limitations of the legalistic definition, radical criminologists argued for a conception of crime anchored in the violation of human rights, thus raising to observation those activities free of criminal sanctions but destructive of the social fabric.<sup>60</sup>

<sup>55</sup> *Id.* See also Tushnet, *supra* note 10, at 511.

<sup>56</sup> See GOLDFARB, *supra* note 1, at 9; LASCH, *supra* note 1, at 476. See generally C. Wright Mills, *Liberal Values in the Modern World*, in *POWER, POLITICS AND PEOPLE: THE COLLECTED ESSAYS OF C. WRIGHT MILLS* 187 (Irving L. Horowitz ed., 1963).

<sup>57</sup> See Platt, *supra* note 40, at 2-4; Schwendinger & Schwendinger, *supra* note 46, at 144 (arguing that liberalism is an elitist ideology that serves to perpetuate social inequality in the name of equality); John F. Galliher, *The Life and Death of Liberal Criminology*, 2 *CONTEMP. CRISES* 245 (1978). For a critique of “value-free” social research, see Alvin W. Gouldner, *Anti-Minotaur: The Myth of a Value-Free Sociology*, 9 *SOC. PROBS.* 199 (1962); IAN TAYLOR ET AL., *THE NEW CRIMINOLOGY: FOR A SOCIAL THEORY OF DEVIANCE* (1973); and Gresham M. Sykes, *The Rise of Critical Criminology*, 65 *J. CRIM. L. & CRIMINOLOGY* 206 (1974).

<sup>58</sup> Platt, *supra* note 40, at 4.

<sup>59</sup> Chambliss, *supra* note 40, at 237-238.

<sup>60</sup> Herman Schwendinger & Julia Schwendinger, *Social Class and the Definition of Crime*, 7 *CRIME & SOC. JUST.* 4, 8-10 (1977).

Given this perspective, it followed that the "state and legal apparatus . . . should be a central focus of investigation as a criminogenic institution."<sup>61</sup> Only in this way can one begin to understand the cultural and economic dynamics underlying criminal behavior and social deviance. In keeping with this mandate, radical criminologists engaged in a sustained attack on the positivist paradigm manifested in the functional and psychopathological models of crime and deviance that dominated criminology during this period.<sup>62</sup>

While not rejecting the necessity of reform for the criminal justice system, Radical Criminology called for the replacement of the traditional liberal approach to crime control with one that was linked to an analysis of the political economy and the exploitative social relations associated with the existence of criminal conduct.<sup>63</sup> Once these exploitative conditions were established, the necessary political activity to bring about change would be forthcoming.<sup>64</sup> For radical criminologists, the unity of theory and practice were necessary to create a more humane and egalitarian society.<sup>65</sup> Unlike traditional criminology, the distinguishing characteristic of Radical Criminology "is its emphasis on praxis (human action) as a means of bringing about changes in society and ascertaining the 'adequacy' (i.e. 'truth') of radical criminological theories upon which the changes in society are based."<sup>66</sup> This commitment to practice which is continually reaffirmed through the writings of Radical Criminology and CLS takes on added significance with the incorporation of Marxist ideas in establishing a theoretical base.<sup>67</sup> Because the Marxian notion of praxis is believed to be inseparable from theory, for radical criminologists "the struggle or praxis to change society . . . will be revolutionary."<sup>68</sup> Such explicit and definitive commitment to praxis must not be treated lightly. It was a significant factor in the sometimes heated reactions by traditional criminologists and sociologists because they viewed their work as being largely value-free, or at the least value-neutral, in its content.

This is especially evident in the now familiar proclamation by Daniel Bell on the "end of ideology" in the West.<sup>69</sup> In his analysis,

<sup>61</sup> Platt, *supra* note 40, at 6.

<sup>62</sup> For an overview of the models dominating traditional American Criminology, see Walter C. Reckless, *American Criminology*, 8 CRIMINOLOGY 4 (1970).

<sup>63</sup> Editorial, 4 CRIME & SOC. JUST. 1, 2 (1975).

<sup>64</sup> Platt, *supra* note 40, at 5-7.

<sup>65</sup> Bohm, *supra* note 10, at 578-80; Hunt, *supra* note 23, at 39.

<sup>66</sup> Bohm, *supra* note 10, at 578.

<sup>67</sup> Trubek, *supra* note 10, at 606.

<sup>68</sup> Bohm, *supra* note 10, at 579.

<sup>69</sup> See DANIEL BELL, *THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES* (rev. ed. 1962).

Bell argued that the ideologies which emerged from the nineteenth century were exhausted; that change itself no longer had philosophical roots.<sup>70</sup> For Bell, the end of ideology marked the close of an era dominated by a leftist formula for social change. According to Lasch, even radicals shared Bell's view of capitalism as achieving "a remarkable stability."<sup>71</sup> The events of the last three decades, especially those in Eastern Europe, have, however, shown the futility inherent in any attempt to predict the burial of deeply seated beliefs and ideologies.<sup>72</sup> Ironically, Bell's promise of an empirical "ladder to the City of Heaven" as being society's best hope for achieving utopia, has been given the burial he so wanted for ideology.<sup>73</sup> Throughout the decade following Bell's work, the arguments against a "value-free" sociology grew, both in their scope and acceptance, and exposed for observation the underlying conflict existing in all social orders.<sup>74</sup>

Like Radical Criminology, CLS rejected the liberal justification and explanation of the way things were. Despite the enormous social changes of the 1960s, the theory of law remained focused on traditional nineteenth century issues such as the relationship between law and morality or the nature of legal obligation. Modern legal theory reflected the complacency and comfort of an earlier time when institutional competence could have been thought to settle matters about the interaction of law, politics and society.<sup>75</sup> In contrast, CLS argued that the dominant interpretive model of law as a neutral medium for the accommodation of competing interests "represents the status quo and acts as a mask for exploitation and injustice."<sup>76</sup> For CLS, a major goal was to expose the contradictions and incoherence of liberal legalism,<sup>77</sup> whose "apparently rational discourse" conceals "social power."<sup>78</sup> Legal reasoning was said to be political and ideological exactly in the way it differentiated itself from both politics and ordinary talk by representing legal relations as if they were the same as social relations. The result was to ex-

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<sup>70</sup> *Id.* at 393.

<sup>71</sup> CHRISTOPHER LASCH, *THE AGONY OF THE AMERICAN LEFT* 172 (1969).

<sup>72</sup> See ALVIN W. GOULDNER, *THE COMING CRISIS OF WESTERN SOCIOLOGY* (1970).

<sup>73</sup> BELL, *supra* note 69, at 405.

<sup>74</sup> Gouldner, *supra* note 57, at 199.

<sup>75</sup> See Gary Peller, *Neutral Principles in the 1950s*, 21 J. L. REFORM 561, 569 (1988); Richard Parker, *The Past of Constitutional Theory and Its Future*, 42 OHIO ST. L.J. 223, 257 (1981).

<sup>76</sup> Russell, *supra* note 10, at 10.

<sup>77</sup> Alan Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. L. STUDIES 1, 4-7 (1986); UNGER, *supra* note 10, at 15-42.

<sup>78</sup> James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 688 (1985).

clude the personal, subjective and experienced world and to affirm an objective, formal and value-free discourse from which similar political influence was supposedly excluded.<sup>79</sup>

This deep structural critique and phenomenological enlightenment proceeded primarily by way of an analysis of how law represented itself to be in its own texts; that is, cases and materials themselves, rather than in the manner in which law was experienced. This approach was consistent with CLS's mission, which focused on legal thinking and education in the nation's elite law schools. It attacked "formalism," whereby legal technicians apply pure legal reasoning to reach conclusions independent of personal values and political choices,<sup>80</sup> as well as "objectivism," which is the belief that "the sources of law embody and sustain a defensible scheme of human association" while displaying "an intelligible moral order."<sup>81</sup> As a result, "[t]he Critical Legal Studies Movement . . . undermined the central ideas of modern legal thought and put another conception of law in their place. This conception implies a view of society and informs a practice of politics."<sup>82</sup> The plasticity of categories, fluidity of social contexts, and contingency of all given premises with which such a politics begin are all derived from the same vision as is the critique of legal reasoning.<sup>83</sup> It is the indeterminacy of concepts that permits "the purely instrumental use of legal practice and legal doctrine to advance leftist aims."<sup>84</sup> Indeterminacy became the key that unlocked the liberal paradigm of law and its supposed separateness from politics and society.<sup>85</sup> CLS used the premises of traditional legal theory against itself to demonstrate that legal indeterminacy was proportionate, in fact, to political and social incoherence.<sup>86</sup>

Therefore, like Radical Criminology, the challenge of CLS, while specific to its academic discipline, reached into the very heart of modern America. For CLS, the incoherence of liberalism lay in "its inability to resolve the fundamental contradiction between individual and community."<sup>87</sup> The experience of belonging and the

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<sup>79</sup> Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1152, 1156 (1985).

<sup>80</sup> UNGER, *supra* note 10, at 1; Russell, *supra* note 10, at 8, 18.

<sup>81</sup> Trubek, *supra* note 10, at 591.

<sup>82</sup> UNGER, *supra* note 10, at 1.

<sup>83</sup> ROBERTO M. UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 1 (1987).

<sup>84</sup> Trubek, *supra* note 10, at 591.

<sup>85</sup> See Russell, *supra* note 10, at 8; Tushnet, *supra* note 9, at 1524; UNGER, *supra* note 10, at 1-4; Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 10-14 (1984).

<sup>86</sup> Hunt, *supra* note 77, at 33.

<sup>87</sup> *Id.* See also GOLDFARB, *supra* note 1, at 127.



claim of obedience were not reciprocated. Indeed, liberalism was not only just an ideology for CLS; it was a false one at that. Thus, according to CLS, the process by which "world-views" such as liberalism give meaning to members of society and become embedded in legal consciousness has to be grasped before social change can begin.<sup>88</sup> The critical thrust of CLS revolves around the view that "legal scholarship can be a kind of transformative political action."<sup>89</sup> This assumes that political theories such as liberalism derive their meaning and constitutive power by claiming to be true, which in the case of liberalism meant neutral, determinate, objective and fair. It also assumes that such theories or "world views" can be undermined by refuting their claims to truth.<sup>90</sup> This placed a heavy burden on CLS to provide "evidence that legal consciousness does affect what goes on in society . . . . [and this means] . . . that the project of Critical understanding must be extended to studies of the construction of meaning and its relationship to action at all levels."<sup>91</sup>

Radical scholars in legal theory and criminology shared a deep commitment to the transformation of prevailing discourse and political practice through an alternative scholarship rooted in praxis, whereby the social construction of meaning is vulnerable to change once its assumptions are brought to light.<sup>92</sup> For Radical Criminology and CLS, the assumptions of consensus, value-neutrality and scientific rationality not only minimized the alienation and disaffection of many; they also masked the use of law to maintain the economic advantages of those in power, as well as the coercive power of the state. Both movements purported to reveal not only how liberalism fails society by its own terms to meet expectations, but how it is used by certain forces to create the illusion that it is the best of all possible systems. Together, these two movements comprised a crashing wave of radicalism against the dike of liberty, equality and rights erected to protect the haves from the have-nots. Drawing upon Marxism and neo-Marxism, the Frankfurt School, structuralism and phenomenology, these movements constructed bridges between the visions of the traditional left and the possibilities in

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<sup>88</sup> Trubek, *supra* note 10, at 591-92.

<sup>89</sup> *Id.* at 591.

<sup>90</sup> *Id.* at 592.

<sup>91</sup> *Id.* at 612.

<sup>92</sup> For a thorough analysis of this project and the qualification that "the indeterminacy critique cannot really dissolve someone's belief in legal authority . . . so long as this critique remains only at the rational or manifest level," see Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 *Tex. L. Rev.* 1563, 1585 (1984).

achieving civil rights and political change after the apparent success of protest movements throughout the 1960s.<sup>93</sup>

### C. TOWARD A THEORETICAL FOUNDATION

At the outset of our analysis, it is essential to note that neither Radical Criminology nor CLS can be identified with a unitary body of scholarship.<sup>94</sup> Diverse viewpoints are readily distinguishable throughout the writings of both schools of thought. As with any intellectual movement, as new ideas are raised, discussed and challenged, it is all the more likely that alternative theoretical perspectives will emerge to be challenged themselves.<sup>95</sup> Neither Radical Criminology nor CLS has been immune to this dynamic. Thus, for Radical Criminology, the rejection of traditional classical and positivistic paradigms necessitated a search for theoretical structures to support the call for a more humanistic and historical criminology.<sup>96</sup>

#### 1. *Radical Criminology and the Revolt Against Positivism*

A major effort in this direction resulted from the much discussed 1973 work of Taylor, Walton and Young, entitled "The New Criminology."<sup>97</sup> In their proposal for a "social theory of deviance," the authors argued for a criminology that would "be able to bring politics back into the discussion of what were previously technical issues" and address the "need to deal with society as a totality."<sup>98</sup> The authors were especially critical of the role that biological and psychological perspectives played in the explanation of criminal behavior, and advocated a political economy of criminal action that emphasized the social nature of deviance.<sup>99</sup> In criticizing traditional criminology for its failure to incorporate the political economy into

<sup>93</sup> See, e.g., Donald H.J. Hermann, *Phenomenology, Structuralism, Hermeneutics, and Legal Study: Applications of Contemporary Continental Thought to Legal Phenomena*, 36 U. MIAMI L. REV. 379 (1982).

<sup>94</sup> See Russell, *supra* note 10, at 4; Tushnet, *supra* note 10, at 510; see generally RADICAL CRIMINOLOGY: THE COMING CRISIS, *supra* note 10.

<sup>95</sup> See Henry & Milovanovic, *supra* note 8, at 294.

<sup>96</sup> See Robert F. Meier, *The New Criminology: Continuity in Criminological Theory*, 67 J. CRIM. L. & CRIMINOLOGY 461, 462-63 (1977). Schwendinger & Schwendinger, *supra* note 46, at 142-49.

<sup>97</sup> See TAYLOR ET AL., *supra* note 57.

<sup>98</sup> *Id.* at 278.

<sup>99</sup> *Id.* at 268-71. For critical reviews of "New Criminology," see Elliott Currie, *The New Criminology*, CRIME & SOC. JUST. 109-13 (1974) (book review); Jeff Coulter, *What's Wrong with the New Criminology*, 22 SOCIAL REV. 119-35 (1974) (book review); Charles E. Reasons, *The "Old" and the "New" Criminology*, 65 J. CRIM. L. & CRIMINOLOGY 560-64 (1975) (book review); David Schichor, *The New Criminology: Some Critical Issues*, 20 BRIT. J. CRIMINOLOGY 1, 1-19 (1980); Denis Szabo, *Some Thoughts on the New Criminology*, 65 J. CRIM. L. & CRIMINOLOGY 554-59 (1975) (book review).

the dominant explanatory models of criminal behavior, Taylor and his co-authors became part of a growing number of criminologists who were incorporating Marxist and conflict theory in their conceptual approaches to crime and criminal justice.<sup>100</sup>

Because of the historical importance of Marx's writings to sociology, from which most criminologists traced their intellectual roots, Marxist theory offered a readily available basis for interpreting the social order. By turning to Marxism, radical criminologists rejected the consensus theories that had long dominated sociology and criminology. The resort to a Marxist framework was underscored by an editorial in the 1975 issue of *Crime and Social Justice: A Journal of Radical Criminology*, where several scholars argued that the Journal was committed to a "search for socialist solutions to the problem characterized as 'crime' in the U.S. [and] theoretically, we view a Marxist analysis as the most promising framework for study."<sup>101</sup> The move toward a Marxist framework was especially evident in the work of Richard Quinney, long associated with Radical Criminology.

Marxist theory and practice provide the necessary basis for a socialist criminology . . . [and] Marxism is the most suitable and all-embracing philosophy in which to produce our criminology. We will produce a criminology that takes us beyond capitalist ideology and practice to the everyday reality of the class struggle. As this takes place we are creating the theory and practice for the transition to socialism and for the essential transition to communism.<sup>102</sup>

According to Bohm, radical criminologists focused not only on the political economy of crime. Even more importantly, they held that "it is the class struggle both between and among those who own and control the means of production and distribution and those who do not that is the source of *all* crime in capitalist societies."<sup>103</sup> Further, because Marxism focuses on the inter-relationships between the state, law, crime and the capitalist mode of production, it provided radical criminologists with a critical framework for examining the underlying processes by which the state defines some behavior as criminal, while excluding from criminal sanctions that which is destructive of society.<sup>104</sup> Since the economy

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<sup>100</sup> See Bernard, *supra* note 8, at 363-66.

<sup>101</sup> Editorial, *supra* note 63, at 1.

<sup>102</sup> Richard Quinney, *The Production of a Marxist Criminology*, 2 CONTEMP. CRISES 277, 289 (1978).

<sup>103</sup> Bohm, *supra* note 10, at 570.

<sup>104</sup> For further explanation of Marxist Criminology, see generally Quinney, *supra* note 102; Bohm, *supra* note 10; Pat O'Mally, *Marxist Theory and Marxist Criminology*, 29 CRIME & SOC. JUSTICE 70 (1987). See also Ronald Hinch, *Marxist Criminology in the 1970s: Clarifying the Clutter*, 19 CRIME & SOC. JUSTICE 65 (1983).

and its organizing principles are considered to be heavily entwined with the institutions of law and criminal justice, Marxist-based theories that view structural contradictions as central to society provided radical scholars with a viable point of departure from the traditional theories that dominated the social sciences.<sup>105</sup>

The importance of Marxist writings to Radical Criminology should not, however, overshadow the fact that many Radical Criminologists did not view themselves as "Marxists." Radical Criminology was both diverse and fragmented; no one body of theory guided the work of those committed to a more humanistic criminology. In this respect, Friedrichs in his interpretation of Radical Criminology, notes that "[o]ne suspects that most radical criminologists were 'radicalized' by the historical events and circumstances [of the 1960s] and only then turned to Marx for a theoretical framework through which their radicalism could be expressed."<sup>106</sup> Friedrichs' insight points to the fact that collective movements can arise before a well-established theoretical foundation is agreed upon by the members of such movements. The same can be said of CLS. More important, perhaps, is an agreed upon political perspective from which discourse will emanate. Once a movement gathers momentum, the search for a theoretical perspective to support the ideological thrust is all the more likely. This is especially true for those who are committed to the theory-praxis framework for achieving social change. However, the fact that alternative theoretical perspectives are likely, regardless of the ideological thrust of the movement, exemplifies our argument that radical theory will be influenced by the historical circumstances that it attempts to confront and interpret.

At the same time that radical criminologists were arguing for a transcendence of liberalism and positivism, a growing interest in the "critical theory" of society was generated by the Frankfurt School of German social theory.<sup>107</sup> Because the Frankfurt School had given a pre-eminent place to the rejection of positivism/empiricism, while emphasizing the vital connection between theory and praxis, it was natural that critical theory would be applied to criminology even though it implicated much more.<sup>108</sup> Groves and Sampson have argued that critical theory can assist criminology by offering a critical interpretation of the relationship between structural characteristics and criminal behavior.<sup>109</sup> For critical theorists, crime represents an

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<sup>105</sup> ALAN A. BLOCK & WILLIAM J. CHAMBLISS, *ORGANIZING CRIME* 12 (1981).

<sup>106</sup> Friedrichs, *supra* note 43, at 38.

<sup>107</sup> See Groves & Sampson, *supra* note 8 *passim*.

<sup>108</sup> *Id.* at 67-68.

<sup>109</sup> *Id.* at 68.

example of the cultural and structural irrationalities which typify social relations under capitalism.<sup>110</sup>

At the time of their analysis in 1986, Groves and Sampson commented on the rather few attempts to apply "critical theory" to criminology. They noted that "[w]hat is surprising is the scant attention paid to the Frankfurt tradition by radical and critical criminologists, especially given the enormous amount of scholarship devoted to Habermas in recent years."<sup>111</sup> Perhaps this can be explained in part by the Frankfurt School's growing departure from Marxist theory.<sup>112</sup> This is not to diminish the influence of critical theory, but rather to point out that it "was only one current of thought in a very broad critical renewal of Marxist and radical theories" that were in dominance during this same period.<sup>113</sup> Perhaps, also, the scant attention paid to critical theory by American criminologists derived in part from a lack of familiarity with the works of the Frankfurt School, many of which were not translated into English until the early 1970s. A further reason, no doubt, derives from the confusion associated with the seemingly indiscriminate use of the terms "radical," "conflict" and "critical" to describe both theory and criminology throughout the period.<sup>114</sup> Thus, even while Critical Criminology became closely associated with the work of Taylor, Walton and Young, there is no reference to the critical theory of the Frankfurt School in their call for a "new criminology."<sup>115</sup> The confusion is further illustrated in a critique of Radical Criminology by Gresham Sykes, who argues for the replacement of "radical" with the term "critical" to describe the growing criticism by radical criminologists. The "critical criminology" of which Sykes writes, however, has little in common with the critical theory of the Frankfurt School.<sup>116</sup> Part of the confusion stems from the fact that critical theory has itself changed over time, both in its meaning and objectives. Beginning with Horkheimer and Adorno between the World Wars, and ending perhaps with Marcuse in the 1960s, critical theory cannot be identified with a particular social theory or ideology, or even a specific criminology. Whatever the reasons for confusion, radical

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<sup>110</sup> *Id.* at 72-75.

<sup>111</sup> *Id.* at 58 n.1.

<sup>112</sup> See TOM BOTTOMORE, *THE FRANKFURT SCHOOL* 55 (1984); Groves & Sampson, *supra* note 8, at 75.

<sup>113</sup> BOTTOMORE, *supra* note 112, at 49.

<sup>114</sup> For a general idea of the many words used to refer to Radical Criminology and theory, see Bohm, *supra* note 10, at 565; Bernard, *supra* note 8, at 362-63; Sykes, *supra* note 57, at 208; Friedrichs, *supra* note 43, at 35.

<sup>115</sup> See TAYLOR ET AL., *supra* note 57, at 278-282.

<sup>116</sup> Sykes, *supra* note 57, at 208-09.

criminologists continued to challenge traditional ideas about crime and criminal justice throughout the 1970s and 1980s, while seeking to establish an alternative paradigm for understanding the existence of crime in society.

In a recent analysis of some of the issues associated with criminology and critical theory, Thomas and O'Maolchata argue that critical criminology should not be viewed as a theory but as "a different construction of reality, which applies an alternative discourse and perspective to interpretations of social control."<sup>117</sup> It is, they argue, a method or approach to inquiry that rejects the metaphor of traditional criminology with its emphasis on positivism, and adopts instead a metaphor of "critique" which "requires the capability to explore alternative meanings without constraint."<sup>118</sup> In distinguishing traditional criminology from critical criminology along the dimension of metaphor, the authors argue that the debate between each centers "on what shall count as knowledge, and on whether traditional objectivistic science can claim to be the only approach to 'theory' and 'knowledge.'"<sup>119</sup> For critical criminologists, the answer is obvious: theory is just one aspect of knowledge, and there is nothing incompatible between critical thought and empiricism.<sup>120</sup>

Based on this premise, critical criminology has recently been viewed as an "umbrella" term which includes several perspectives that continue to undergo revision.<sup>121</sup> These perspectives include "left-realism", whose advocates (mostly British) "attempt to reconcile radical theory with realistic social policy";<sup>122</sup> "peacemaking" criminology, which calls for justice and mercy through the empowerment of the disadvantaged;<sup>123</sup> and "feminist" criminology, with its focus on gender, which argues that the criminal justice system plays a significant role in maintaining the place of women in a male dominated society.<sup>124</sup> Also included is "postmodernist" criminology, in-

<sup>117</sup> Thomas & O'Maolchata, *supra* note 8, at 145.

<sup>118</sup> *Id.* at 147, 154.

<sup>119</sup> *Id.* at 156-57.

<sup>120</sup> *Id.* at 157.

<sup>121</sup> Henry & Milovanovic, *supra* note 8, at 294.

<sup>122</sup> Thomas & O'Maolchata, *supra* note 8, at 159. See generally Jock Young, *The Tasks Facing a Realist Criminology*, 11 CONTEMP. CRISES 337 (1987); John Lea, *Left Realism: A Defense*, 11 CONTEMP. CRISES 357 (1987); REALIST CRIMINOLOGY: CRIME CONTROL AND POLICING IN THE 1990s (John W. Lowman & Brian D. MacLean eds., 1992).

<sup>123</sup> Thomas & O'Maolchata, *supra* note 8, at 160-61. See generally CRIMINOLOGY AS PEACEMAKING (Harold E. Pepinsky & Richard Quinney eds., 1991).

<sup>124</sup> Thomas & O'Maolchata, *supra* note 8, at 162. See generally Meda Chesney-Lind, *Doing Feminist Criminology*, 13 CRIMINOLOGIST 1 (1988); Sally S. Simpson, *Feminist Theory, Crime and Justice*, 27 CRIMINOLOGY 605 (1989); Kathleen Daly & Meda Chesney-Lind, *Feminism and Criminology*, 5 JUST. Q. 497 (1988); Maureen Cain, *Towards Transgression: New*

cluding those perspectives emphasizing semiotics and post-structuralism.<sup>125</sup> While there may be no agreed upon meaning for the concept "postmodernism," the primary focus is on the changes taking place in contemporary culture. Such changes are interpreted through the process of "deconstruction" which attempts to decipher how the rules upon which the social order is structured "shape hierarchical power relationships both in the social structure and in interaction."<sup>126</sup>

In a similar fashion to CLS, as we will soon note, class, gender and multi-culturalism, once subsumed under the ideological umbrella of Radical Criminology, appear now to have developed into separate schools of thought, each with its own agenda. Like Critical Criminology, there is also a Division on Women and Crime within the American Society of Criminology (ASC). And, while it can be argued that such divisions do not of themselves preclude intellectual discourse, they provide a further example of the move toward specialization and potential fragmentation.

These diverse schools of criminology are said to derive their unity from adherence to "social critique" or "critical thinking," which argues that one can change his or her "subjective interpretations [and] objective conditions by thinking about and then acting on the world."<sup>127</sup> Whether critical thinking will continue to provide a sense of unity in an increasingly therapeutic culture remains in question.<sup>128</sup> What is evident, however, is the continuing influence of critical theory in terms of its concern with the political significance of social class and its critique of ideology. These concerns remain a fundamental focus of Radical Criminology (now Critical Criminology),<sup>129</sup> and also underlie much of the agenda of CLS.

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*Directions in Feminist Criminology*, 18 INT. J. SOC. L. 1 (1990); Special Issue, *Women and Criminal Justice Education*, 3 J. CRIM. JUST. EDUC. 165 (1992).

<sup>125</sup> Thomas & O'Maolchata, *supra* note 8, at 163.

<sup>126</sup> *Id.* at 164.

<sup>127</sup> *Id.* at 147.

<sup>128</sup> For a critical interpretation of this concept, see PHILIP RIEFF, *THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD* 232 (1966).

<sup>129</sup> The changes in the designated names that radical members use to describe their movements sometimes shows the transformation of those radical movements. In 1977, for example, when the journal *CRIME AND JUSTICE* merged with *ISSUES AND CRIMINOLOGY*, the subtitle "A Journal of Radical Criminology" was eliminated. A similar experience took place at the East Coast Socialist Sociology Conference in 1974; at the conference, radical scholars "overwhelmingly agreed" not to use the terms "Marxist" or "radical" in the title of the organization, reasoning that these terms were too narrow and potentially divisive. See Ted Goertzel, *Report on the East Coast Socialist Sociology Conference*, in *IV THE INSURGENT SOCIOLOGIST* 61-62 (1974).

## 2. *CLS and the Challenge to Legal Reasoning*

It has been said that CLS is interpretive scholarship with both a particular subject and a distinct intent—"the interpretation of the legal consciousness of *capitalist* societies, to the end of social transformation."<sup>130</sup> As modern as this sounds, and indeed the origins of CLS lie in the 1970s, the roots of CLS reach back into the early twentieth century.<sup>131</sup> American legal theory has always had a distinct radical wing, beginning with Holmes' attack on formalism in 1905 in *Lochner v. New York*<sup>132</sup> and Roscoe Pound's call in the following years for a Sociological Jurisprudence, based on the human condition, not assumed first principles.<sup>133</sup> In the 1930s, Legal Realism found a home in some law schools for its critique of conceptual reasoning—that is, law's dogmatic reliance on rules as objective and given, not tools for instrumentally chosen policies—and most importantly for its critique of the idea that law could be neutral and separate from social purposes and ends.<sup>134</sup> Just as Sociological Jurisprudence found favor with those reformers who made up the Progressive Movement and "criticized judges for being unresponsive to social and economic conditions," so too were the Realists politically wedded to the New Deal. They shared the era's belief that it was possible to identify a coherent public interest from which policies to further this interest could be extrapolated.<sup>135</sup>

This combination of theories about judicial activism, policy analysis, and the relationship between the political and judicial branches of government sustained much thinking about law until the civil rights movement transformed its deep complacency.<sup>136</sup>

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<sup>130</sup> Trubek, *supra* note 10, at 606.

<sup>131</sup> Tushnet, *supra* note 9, at 1515, 1523, 1533.

<sup>132</sup> 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

<sup>133</sup> See generally MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* 103, 108 (1957); G. EDWARD WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* 104-115 (1978) [hereinafter *PATTERNS*].

<sup>134</sup> See WILLIAM TWining, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 376-87 (1985). For commentary on the unity of sociological jurisprudence and legal realism, see ROBERT S. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 36 (1982). For an introduction to the dispute between Pound and Llewellyn, see *PATTERNS*, *supra* note 133, at 121, 124-132.

<sup>135</sup> See Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1674 (1982); ALAN HUNT, *THE SOCIOLOGICAL MOVEMENT IN LAW* 39 (1978).

<sup>136</sup> G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 Sw. L.J. 819, 825-830 (1986). It is interesting to note that, for Tushnet and others, parental influence greatly affected their legal philosophy. Tushnet, for example, explains that one of his "formative legal experience[s]" was "the law's half-hearted defense of civil liberties against McCarthyism, not the civil rights movement." Tushnet, *supra* note 9, at 1535.



The challenge came in the form of the Law and Society Movement's empirical description of the gap between the law in the books and the law in action.<sup>137</sup> Like Radical Criminology, the movement viewed the law as not serving the whole of society very well. It is worth bearing in mind, therefore, that CLS is another in the line of radical legal philosophies to shake up such complacency, even though it claims to be an heir of Legal Realism in particular.<sup>138</sup> Tushnet has said that CLS is "the direct descendant of [Legal] Realism and the Law-and-Society Movement" of the 1960s, at least in that it denies the autonomy of law.<sup>139</sup> He suggests that CLS "is best understood as a return to the primary intellectual insights of Realism unaffected by the political diversions that led many Realists to the New Deal and its aftermath."<sup>140</sup> For CLS, these insights show the rules of law to be indeterminate, contradictory and contingent.<sup>141</sup> CLS has furthered this realism by invoking the idea that rationality itself might be problematic, so that the role of "the rule of law" in affirming the political neutrality of law may be a mythic one of maintaining a belief in the naturalness of the social world.<sup>142</sup>

This highlights an important difference between CLS and Legal Realism. "The Realist disenchantment with legal formalism was pragmatic . . . . [It] provided no guidance for legal practitioners . . . nor a framework for the policy concerns of legislators."<sup>143</sup> In contrast, "critical scholars are motivated by a much broader political objective within which it is 'the law' itself that is 'the problem'."<sup>144</sup> In framing this broader objective, CLS has drawn upon many different theories, each strand perhaps tending to cultivate a separate dimension of the critical project. In this respect, CLS has identified itself as a movement or conference but disavowed any program or

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<sup>137</sup> See HUNT, *supra* note 135, at 44; White, *supra* note 136, at 830-38. Tushnet has claimed that the Law and Society Movement "ignored the ideological functions of law" and treated law as if it were or should be simply molded by society. Mark Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's 'A History of American Law'*, 1977 WIS. L. REV. 81, 83 (reviewing LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW (1973)).

<sup>138</sup> For a list of such explicit statements connecting CLS and Legal Realism, see White, *supra* note 136, at 820. White's article analyzes this connection, finds a missing link, and questions why CLS should claim to be the heir of any movement lest it become "domesticated" as did Legal Realism. *Id.* at 843.

<sup>139</sup> Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 626 (1984).

<sup>140</sup> *Id.* at 628. See also Tushnet, *supra* note 9, at 505, 507.

<sup>141</sup> Peller, *supra* note 79, at 1151, 1222.

<sup>142</sup> Robert W. Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281, 288 (David Kairys ed., 1982); Boyle, *supra* note 78, 706.

<sup>143</sup> See Hunt, *supra* note 77, at 43.

<sup>144</sup> *Id.*; see also MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 12-14 (1987).

key beliefs, except insofar as its separate dimensions intersect—arguably most often at the point of “the indeterminacy of law.”<sup>145</sup> Further, CLS’ cultural radicals, neo-Marxists, and post-structuralists offer different emphases of this indeterminacy, relative to social organization, liberalism and legal reasoning.

Thus, there are those within CLS whose work builds upon the theories of Marx and Weber, combining an emphasis upon economics and power with a functionalist analysis of ideology and hegemony to make sense of the notion of the “relative” autonomy of law.<sup>146</sup> The point of departure for this view hinges on the thesis that “law and legal doctrine reflect, confirm and reshape the social divisions and hierarchies inherent in a type or stage of social organization such as ‘capitalism.’”<sup>147</sup> The central problem is to elucidate how law is legitimate—because it is merely the framework of the state in the form of the rule of law, which balances competing interests—yet not also illegitimate because it is also captured by some of these same interests.<sup>148</sup> The law, therefore, cannot be fully determined by economic interests or power as if merely superstructure, but neither is it functionally neutral and autonomous. Rather, it is “relatively autonomous.”<sup>149</sup>

Not only does this mean that law is political in part; it also means that it is socially constituted, and thus plays a role itself in the constitution of social consciousness about law. In between these two extremes lies “the collective consciousness of the interpreting community.”<sup>150</sup> For Trubek, the concept of “meaning” plays a central role in CLS, in that “consciousness, culture and social organization are mutually interrelated and reinforcing systems about man and society. Together they constitute a meaningful whole. Individuals understand the world in terms of these structures of meaning and this understanding affects their actions.”<sup>151</sup> There is an important shift here in focus from the law to society as a whole.<sup>152</sup> Difficult questions remain, however, especially as to the extent to which legal consciousness shapes beliefs as well as the locus of the origin

<sup>145</sup> Singer, *supra* note 85, at 5.

<sup>146</sup> Hunt, *supra* note 77, at 8-10; Tushnet, *supra* note 9, at 1525. See also, Donald F. Brosnan, *Serious But Not Critical*, 60 S. CAL. L. REV. 259, 317 (1987).

<sup>147</sup> UNGER, *supra* note 10, at 21.

<sup>148</sup> For commentary on the problems with instrumental Marxism from CLS’ point of view and the resulting need for law to appear fair and equal, see Gordon, *supra* note 142, at 285-86.

<sup>149</sup> Isaac D. Balbus, *Commodity Form and Legal Form: An Essay on the ‘Relative Autonomy’ of the Law*, 11 L. & SOC. REV. 571, 585 (1976).

<sup>150</sup> Boyle, *supra* note 78, at 728.

<sup>151</sup> Trubek, *supra* note 10, at 604.

<sup>152</sup> Hunt, *supra* note 77, at 11.

of the dominant legal consciousness.<sup>153</sup> The early impulse towards bringing to light consciousness or experience, in the sense of our lived-through meaning, was central to the phenomenology of Gabel.<sup>154</sup> This different focus brings to the fore the relationship of self to others, and especially the alienation experienced by the modern subject.<sup>155</sup> Such an analysis of legal experience rests upon another key CLS concept: the fundamental contradiction between polarities and incommensurable values, especially self and others, which arises because "relations with others are both necessary to and incompatible with our freedom."<sup>156</sup> The fundamental contradiction concept, which has since been recanted by CLS scholars, allows "an account of the contingency and indeterminacy of the legal process."<sup>157</sup>

This leads in two directions. One is toward indeterminacy which draws upon the method of immanent critique of the Frankfurt School, and upon linguistic theory from Saussure to Derrida, via Wittgenstein.<sup>158</sup> The other direction leans toward a reconstitution of ethical life and a reordering of society so that all may participate in its flourishing.<sup>159</sup> Unger in particular has explored the personal experience of living in the liberal political system critiqued by CLS and has attempted to develop a general theory that allows an understanding of the dynamic interrelatedness of self, others, society and human nature.<sup>160</sup>

The more precarious the bonds of common existence and belief among men as minds, the less are they able to express their consciousness through the social medium of symbols, and therefore, the less are they secure in the experience of individuality that arises from consciousness. [Yet] the more intimate the similarity of experience and reflection among individuals, the less of a basis does individual identity seem to have.<sup>161</sup>

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<sup>153</sup> *Id.* See also Peter Gabel, *Reification in Legal Reasoning*, 3 RES. L. & Soc. 25, 26 (1980).

<sup>154</sup> See generally Peter Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601 (1977); Gabel, *supra* note 92.

<sup>155</sup> ROBERTO M. UNGER, *PASSION: AN ESSAY ON PERSONALITY* 91-273 (1984); Gabel, *supra* note 92, at 1566-99.

<sup>156</sup> Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 286 BUFF. L. REV. 205, 211-17 (1979). See also Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 14, 36-45 (1984); Hunt, *supra* note 77, at 24.

<sup>157</sup> Hunt, *supra* note 77, at 21.

<sup>158</sup> See Brosnan, *supra* note 146, at 308, 332, 360; Boyle, *supra* note 78, at 708, 756; Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 451, 457, 464, 489, 491 (1987).

<sup>159</sup> See, e.g., Drucilla Cornell, *Towards a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 300, 327, 341-48, 365 (1985).

<sup>160</sup> UNGER, *supra* note 155, at vii; ROBERTO M. UNGER, *POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987).

<sup>161</sup> ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* 215 (1975).

Not everyone in CLS subscribes to Unger's vision or his program, and this may reflect both a general uncertainty about his role as spokesman, mentor and prophet, as well as doubt over whether CLS has a program.<sup>162</sup>

What connects Unger's vision of empowered citizens and the indeterminacy of the law is the view that CLS can shatter "congealed forms of life by showing that they have no particular integrity. And whatever makes that demonstration effective—utopian yearnings, close analysis of legal texts, concrete proposals—is part of the program."<sup>163</sup> Social contexts, no more than the pedagogy of the case-method or deductive reasoning, do not constrain all alternatives and thus cannot determine outcomes. It is only in this sense that law is indeterminate; it is not arbitrary nor is it unpredictable; rather it refers beyond itself. "[W]e can explain judicial decisions only by reference to criteria outside the scope of the judge's formal justification."<sup>164</sup> Whatever regularities exist are not "necessary consequences of the adoption of a given regime of rules."<sup>165</sup> Therefore, it becomes a matter of critical urgency to break out of the constraints of traditional legal reasoning.<sup>166</sup> The origin of this lies in the application of critical theory's immanent critique to law; that is, confronting what exists with its social conception or with the values it claims to realize.<sup>167</sup> In this sense, it becomes an empirical claim that legal liberalism is incoherent by its own terms.<sup>168</sup> It fails to deliver liberty, equality and rights and is not neutral or apolitical.<sup>169</sup>

The substantiation of indeterminacy by immanent critique draws upon many arguments and many philosophies—for example, from those of Wittgenstein, Derrida, and Foucault—as well as from phenomenology, structuralism and post-structuralism, even though there is no necessary coherence among all of these sources.<sup>170</sup> A

<sup>162</sup> See Jefferson Powell, *The Gospel According to Roberto: A Theological Polemic*, 1988 DUKE L.J. 1013, 1015-16; Jonathan Turley, *The Hitchhiker's Guide to CLS, Unger and Deep Thought*, 81 NW. U. L. REV. 593, 607 (1987); Hugh Collins, *Roberto Unger and the Critical Legal Studies Movement*, 14 J. L. & Soc'y. 387, 402 (1987); Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 201, 225-27 (1984).

<sup>163</sup> Tushnet, *supra* note 10, at 517.

<sup>164</sup> Singer, *supra* note 85, at 20.

<sup>165</sup> Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 125 (1984).

<sup>166</sup> See Gabel, *supra* note 154, at 46.

<sup>167</sup> See DAVID HELD, INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS 183-89 (1980); Brosnan, *supra* note 146, at 333.

<sup>168</sup> Singer, *supra* note 85, at 10.

<sup>169</sup> Hunt, *supra* note 77, at 33.

<sup>170</sup> For a list of different sources and meanings of indeterminacy, see Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1683 (1991). See generally Brosnan, *supra*

key assumption of CLS is that "our form of life" is groundless, in which case any of its given assumptions or premises must be questioned but cannot be replaced.<sup>171</sup> In effect, what determines the assumptions or premises about culture and its artifacts is simply power, not necessarily conceived of as in anyone's hands but deployed through systems of signification.<sup>172</sup> Just as this power has no center or even locus, neither does the discourse about it, nor the interpretation of it. For CLS, all of our uses of language have a radical contingency, such that there are no core meanings, fixed uses or definitions apart from the texts in which words exist and the intentions of those who put them there, but meaning nonetheless always escapes the speaker, the text and time.<sup>173</sup> More generally, all meanings are bound up with all others, including our sense of ourselves and each other, because of the hermeneutic circle in which meaning is based on assumptions, themselves dependent upon the meaning of the first enquiry, and so on.<sup>174</sup>

Obviously, however, the disconcerting reality for such extreme critical insight is that, as much as arguments may be turned inside out, hierarchies inverted and all webs of meaning reconfigured, the world still goes on. So it seems that these local activities, whether legal or not, only take place on the back of conventional practices or within interpretive communities.<sup>175</sup> The question, then, is whether such a world is really interpreted all the way through, and if so, how normativity becomes established, so that law can exist in the face of the infinite deferral of meaning without involving the presence of some objective reality or returning to the stability of conventionalism and established practices.<sup>176</sup> This takes us beyond CLS and into

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note 146; Boyle, *supra* note 78; Williams, *supra* note 158, at 482 (discussing the incompatibility of Derrida and Structuralism).

<sup>171</sup> Stephen Brainerd, *The Groundless Assault: A Wittgensteinian Look at Language, Structuralism and Critical Legal Theory*, 34 AM. U. L. REV. 1231, 1240 (1985).

<sup>172</sup> Allan C. Hutchinson, *Part of An Essay on Power and Interpretation (with Suggestions on How to Make Bouillabaisse)*, 60 N.Y.U. L. REV. 850, 874 (1985).

<sup>173</sup> J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 757, 759-60 (1987).

<sup>174</sup> See Teresa Godwin Phelps & Jenny Ann Pitts, *Questioning the Text: The Significance of Philosophical Hermeneutics for Legal Interpretation*, 29 ST. LOUIS U. L.J. 353, 361 (1985).

<sup>175</sup> This is where CLS meets other luminaries such as Dworkin and Fish. See J.M. Balkin, *Taking Ideology Seriously: Ronald Dworkin and the CLS Critique*, 55 UMKC L. REV. 393, 408 (1987); Drucilla Cornell, "Convention" and Critique, 7 CARDOZO L. REV. 679, 681-91 (1986).

<sup>176</sup> RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 21-22 (1989). For an attack on the way Rorty has been interpreted by CLS in general, see Singer, *supra* note 85, at 7-70, and in particular, see John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 343 (1986). For the argument that there are normative consequences from interpretation deconstructively practiced, see generally Drucilla Cornell, *Two Lectures on the Normative Dimensions of Community in the Law*, 54 TENN. L. REV. 327 (1987).

the post-modernism critique of the enlightenment project itself and the reactions to the theoretical thrust of CLS, which may be summarized as an attack upon the ideology of liberalism and the legal reasoning that articulates it.<sup>177</sup> Basically, the CLS attack attempts to deconstruct the privileges enjoyed by certain poles or hierarchies within liberalism's antinomies or contradictions that operate at every level and which, from the point of view of law, are unresolvable and ultimately incoherent. There are no reasons, other than mere faith or superstition, for the priority of rules, objective knowledge and human will in a system that accommodates conflicting interests through the neutral application of rules to facts.<sup>178</sup> The question that remains, however, is whether CLS has sufficient theoretical integrity rather than diversity to do more than reveal this criticism.<sup>179</sup> This is best considered by putting CLS' theoretical agenda back into the context of the Academy's reactions to radicalism generally, so that the effects of movements such as CLS and Radical Criminology may come to light.

### III. DEBATE AND CONTROVERSY WITHIN THE ACADEMY

The challenges mounted by CLS and Radical Criminology, and the counter challenges that were soon evident, provide an important framework for understanding the future of "radical" challenges within the Academy. Further, while these challenges were mostly confined to the theoretical and ideological levels, they were not without controversy at the institutional and social levels as well. Because many of the proponents of CLS and Radical Criminology supported leftist politics, political considerations became a dominating influence in decisions regarding tenure and promotions at several universities and law schools.

#### A. AGAINST RADICALISM: THE COUNTER REACTION TO RADICAL CRIMINOLOGY

The challenges raised by Radical and Marxist Criminology have had a profound and continuing impact. Throughout the past two decades, debate has continued on the relevance and meaning of a

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<sup>177</sup> It may be said that CLS' critique of liberalism began with Unger. See UNGER, *supra* note 160, at 29-190. For the view that CLS' liberalism is a "straw-man," see Williams, *supra* note 158, at 485.

<sup>178</sup> For these antinomies, see KELMAN, *supra* note 144, at 3. For an attack on the reliance of self-evidence by modern jurisprudence, see Costas Douzinas & Ronnie Warrington, *On the Deconstruction of Jurisprudence: Fin(n)is Philosophiae*, 14 J. LAW & SOC'Y 33 (1987).

<sup>179</sup> This is Hunt's basic criticism. See Alan Hunt, *The Critique of Law: What is 'Critical' About Critical Legal Theory?*, 14 J. LAW & SOC'Y 5, 6, 18 (1987).

radical approach to the study of crime and criminal justice. At times acerbic and hostile, the response to Radical Criminology provides an illuminating perspective for understanding what is likely to occur when challenges are made to the established orthodoxy upon which a discipline is founded.<sup>180</sup>

Initially, much confusion resulted from the description of Radical Criminology by some proponents as "new," after the thesis of Taylor, Walton and Young;<sup>181</sup> and by others as "conflict," even while conflict theorists like Vold and Turk saw their work not only as non-Marxist, but non-partisan in content.<sup>182</sup> Turk's position is supported by Bernard, who writes that "[t]he primary purpose of conflict criminology is objective, nonpartisan analysis of the law enactment and enforcement process."<sup>183</sup>

In challenging Bernard's thesis, radical criminologists argue that an understanding of crime and the methods of control can only come about by relating both the law enactment and enforcement process to the economic structure. Thus, from the Marxist perspective of Radical Criminology, it is impossible to separate the capitalist economy from the institution and agents of criminal justice and the law. Because the capitalist economy is seen as exploitative, the development of a radical theoretical perspective must by implication carry with it radical politics. Properly understood, the Marxist notion of praxis is inseparable from the notions of theory and science—they are interdependent.<sup>184</sup>

Compounding the early confusion, Sykes argued in his discussion of Radical Criminology that the term itself "is misleading since it suggests a particular ideological underpinning that *probably does not exist*," and called instead for the use of the term "critical criminology" without reference to the already established Frankfurt School of Critical Theory.<sup>185</sup> While admitting that "Radical Criminology" was related to the political and cultural changes of the 1960s, Sykes doubted that it could be linked to any special political position. In spite of all the evidence to the contrary, he argued that there was

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<sup>180</sup> See, e.g., Carl B. Klockars, *The Contemporary Crisis of Marxist Criminology*, 16 CRIMINOLOGY 447, 478-80, 501-08 (1979); Jackson Toby, *The New Criminology is the Old Sentimentality*, 16 CRIMINOLOGY 516, 516-26 (1979).

<sup>181</sup> TAYLOR ET AL., *supra* note 57.

<sup>182</sup> Austin T. Turk, *Analyzing Official Deviance: For Nonpartisan Conflict Analyses in Criminology*, 16 CRIMINOLOGY 459, 464-75 (1979); GEORGE VOLD, *THEORETICAL CRIMINOLOGY* (1958).

<sup>183</sup> Bernard, *supra* note 8, at 377.

<sup>184</sup> See Elmer H. Johnson, *Praxis and Radical Criminology*, in *RADICAL CRIMINOLOGY: THE COMING CRISIS* 161 (James A. Inciardi ed., 1980).

<sup>185</sup> Sykes, *supra* note 57, at 208 (emphasis added).

“no iron necessity that ties [radical criminologists] to either a liberal or conservative stance.”<sup>186</sup>

A more important challenge by Sykes came from his insistence on calling Radical Criminology a “perspective” or “orientation” rather than a theoretical approach involving a body of systematic propositions.<sup>187</sup> In raising this criticism, Sykes was challenging radical criminologists from the traditional positivist perspective that they already had rejected. Such criticism, was of course not unexpected: disagreement and discourse regarding the intellectual and empirical thrusts of any new school of thought are central components of the Academy and usually welcomed by scholars in the forefront of new ideas or theories. What were unexpected, however, were the institutional responses to radical criminologists, as well as the heightened invective of some academic criminologists.

Evidence of this conflict is especially apparent in the reaction of several criminologists to a special issue devoted to Radical Criminology by *Criminology*, the official journal of the American Society of Criminology. Published with the intent of offering “a variety of perspectives on radical criminology,” the contents provide only minimal explication of the ideas of radical criminologists.<sup>188</sup> Of the six leading articles, only the one by Richard Quinney can be considered as falling within the paradigm of Radical Criminology.<sup>189</sup> By all accounts, it was and remains an unbalanced issue that provided little understanding of the ideas and views being developed by those scholars who sought to establish a radical alternative to the dominant paradigms of criminology.<sup>190</sup>

The controversy surrounding the special issue on Radical Criminology resulted in heated debate at the annual meetings of the ASC in 1979, and was not helped by the membership’s rejection of a proposal that the journal *Criminology* devote a second issue to the same theme. While the new issue was not forthcoming, all of the articles except Quinney’s were included in a published work edited by the same editor of the original controversial issue. Much more extensive in content, the collection of articles provided a more-balanced view of the nature of Radical Criminology in the United States and

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<sup>186</sup> *Id.* at 211 n.15.

<sup>187</sup> *Id.* at 212.

<sup>188</sup> See Special Issue, *Radical Criminology*, 16 *CRIMINOLOGY* 445 (1979).

<sup>189</sup> Richard Quinney’s article in the symposium, *The Production of Criminology*, 16 *CRIMINOLOGY* 445 (1979), is in fact a revision of his article published a year earlier. See Quinney, *supra* note 102.

<sup>190</sup> Letter from James Garofalo et al. to the American Society of Criminology President and to the Editor of *Criminology*, in Tony Platt & Paul Takagi, *The American Society of Criminology: A Continuing Debate*, 12 *CRIME & SOC. JUST.* 52, 53-4 (1979).



included insightful commentary on both Radical Criminology and its critics.<sup>191</sup>

In addition to the rejection of Marxist and Radical Criminology on theoretical and ideological grounds, one of the major criticisms directed at both perspectives revolves around the level of empirical research generated by adherents of these positions.<sup>192</sup> Given that radical criminologists rejected the positivist paradigm associated with traditional criminology, it is not surprising that the counterattack would focus on the level of empirical inquiry dominant among Marxist and Radical Criminology.<sup>193</sup> In his 1975 Presidential Address to the Society for the Study of Social Problems, Stanton Wheeler raised this criticism by claiming that "whatever their value in changing our conception of crime, they have not led to new and fresh empirical inquiry."<sup>194</sup>

While Marxists have been generally hostile to positivism, they have not necessarily viewed quantitative analysis as counterproductive.<sup>195</sup> In meeting the objection of a neglect of empirical research, a number of criminologists have sought to apply a radical approach to the emergence of criminal activities,<sup>196</sup> as well as to the existence of disparity in judicial processing.<sup>197</sup> Whether these studies provide the empirical evidence to support a Marxist and/or radical perspective is not the intention of this paper. Rather, it is to point out that a major element of the counter challenge to Radical Criminology involved a critical assessment of the conceptual framework along empirical lines.

At the institutional level, controversy and conflict were also evi-

<sup>191</sup> See RADICAL CRIMINOLOGY: THE COMING CRISIS, *supra* note 10.

<sup>192</sup> See Piers Beirne, *Empiricism and the Critique of Marxism on Law and Crime*, 26 SOC. PROBS. 373, 373-74, 382-83 (1979) [hereinafter *Empiricism*]; David Jacobs, *Marxism and the Critique of Empiricism: A Comment on Beirne*, 27 SOC. PROBS. 467, 467-69 (1980); Piers Beirne, *Some More on Empiricism in the Study of Law: A Reply to Jacobs*, 27 SOC. PROBS. 471 (1981).

<sup>193</sup> See Michael J. Lynch, *Quantitative Analysis and Marxist Criminology: Some Old Answers to a Dilemma in Marxist Criminology*, 29 CRIME & SOC. JUST. 110, 110-19 (1987); Schichor, *supra* note 99, at 12-14.

<sup>194</sup> Stanton Wheeler, Address to the Society for the Study of Social Problems (1975), quoted in *Empiricism*, *supra* note 192, at 373.

<sup>195</sup> See Lynch, *supra* note 193, at 110-112.

<sup>196</sup> See, e.g., Judith Blau & Peter Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 AM. SOC. REV. 114, 116-27 (1982); Mark Calvin & John Pauly, *A Critique of Criminology: Toward an Integrated Structural Marxist Theory of Delinquency Production*, 89 AM. J. SOC. 513, 513-51 (1983); Allan J. Lizotte, *Extra-Legal Factors in Chicago's Criminal Courts: Testing the Conflict Model of Criminal Justice*, 25 SOC. PROBS. 564, 564-580 (1978).

<sup>197</sup> See, e.g., Lynch & Groves, *supra* note 10, at 86-89 for a review of these works. See also Jeffrey H. Reiman & Sue Headlee, *Marxism and Criminal Justice Policy*, 27 CRIME & DELINQ. 24, 40-46 (1981); Christopher Adamson, *Toward a Marxian Penology: Captive Criminal Populations as Economic Threats and Resources*, 31 SOC. PROBS. 435, 437-454 (1984).

dent in the response to "leftist" and Marxist criminologists. During the 1970s, radical criminologists were not only denied tenure because of their political views, but also saw the dismantling of the School of Criminology at Berkeley, largely because of its "leftist" or radical orientation toward criminal justice.<sup>198</sup> The closing of the School of Criminology was seen by students at Berkeley as a major assault on the process of radicalization that began at the University in the late 1960s.<sup>199</sup> According to Platt, the School of Criminology was intensely involved in political activity "generated by the broader social conditions of revolt and resistance, and nourished by specific experiences in Berkeley."<sup>200</sup> It was this political activity that led to the closing of the School, which for Platt was "not an isolated example of academic repression but rather part of systematic efforts by the authorities to eliminate the gains of the student movement and shift the current fiscal crisis onto the backs of working class and minority students."<sup>201</sup> Having seen the closing of Berkeley and the production of an unbalanced analysis of Radical Criminology in the special issue of *Criminology*, it is understandable that radical criminologists were concerned about what they called "a growing shift to the right in professional criminology."<sup>202</sup> To what extent this shift in criminology materialized is subject to discussion. There is, however, some irony in the fact that Ronald Reagan, who was Governor of California during much of the crisis at Berkeley, was to become President of the United States and establish a government largely conservative in nature—a fact not lost on many criminologists concerned with the role of law and justice in American society.

It is not that legitimate theoretical and methodological criticisms associated with Radical/Marxist Criminology do not exist; such criticisms are readily acknowledged by those most closely associated with the attempts to incorporate Marxist theory into criminology.<sup>203</sup> Rather, the challenge to criminology is to develop a body of theory more powerful than that proposed by radical scholars—a theory that can explain, without resorting to a Marxian analysis of capitalism, the relationships between the disruptions in the social and cultural structures and the varieties of crime and injustices that exist because of these disruptions. In this respect, Sykes was correct to

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<sup>198</sup> *Editorial: Berkeley's School of Criminology, 1950-1976*, 6 CRIME & SOC. JUST. 1 (1976) [hereinafter *Editorial*]. Tony Platt is acknowledged as the predominant author.

<sup>199</sup> Richard Schaufliker & Michael Hannigan, *Struggles for Justice, Criminology at Berkeley: Resisting Academic Repression*, 2 CRIME & SOC. JUST. 42, 43 (1974).

<sup>200</sup> *Editorial*, *supra* note 198, at 2.

<sup>201</sup> *Id.* at 3.

<sup>202</sup> Platt & Takagi, *supra* note 190, at 53.

<sup>203</sup> See, e.g., Lynch, *supra* note 193, at 111.

conclude that Radical Criminology "forces an inquiry into precisely how the normative content of the criminal law is internalized in different segments of society, and how norm-holding is actually related to behavior."<sup>204</sup>

#### B. AGAINST INDETERMINACY: THE LEGAL ACADEMY RESPONDS TO CLS

A very similar pattern of reaction to CLS has produced similar effects. The professional response to CLS was both intellectual and institutional, while the social response was built up out of the publicity surrounding various events at different institutions. Intellectually CLS was taken seriously. It introduced a new kind of scholarship, novel resources and a passion hitherto lacking in legal academia since perhaps the famous Hart-Fuller debate of the sixties.<sup>205</sup> The responses were, however, quite varied due to the difficulty in pinning down a CLS agenda or program.<sup>206</sup> They ranged from dismissal because of a lack of scientific or empirical rigor, to defensiveness because of the expropriation of philosophy for legal purposes.<sup>207</sup> But in a very important way, all such intellectual responses were beside the point from CLS' claimed legitimate perspective. In attacking the mystifying effect of legal reason as a tool of liberal politics it was also attacking legal theory and legal education as a whole. Therefore, any internal intellectual critique would be bound to reveal both the transcendent quality of the attack and the self-referential quality of the defense. That people argued with CLS was the victory it sought, even if intellectually they were convinced that CLS was in error with reference to its position on liberal politics.

While CLS scholars flooded the law reviews with articles, they provoked little academic refutation or confirmation for a long time, other than at conferences or symposia. Rather, the fundamental nature of the CLS agenda became evident at the professional and institutional level, not the intellectual level. Indeed, it has been said CLS should be seen as an episode in the history of legal educa-

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<sup>204</sup> Sykes, *supra* note 57, at 213.

<sup>205</sup> Brosnan, *supra* note 146, at 262-63; LORD LLOYD, LLOYD'S INTRODUCTION TO JURISPRUDENCE 716 (1985).

<sup>206</sup> Anthony Chase, *What Should a Law Teacher Believe?*, 10 NOVA L. REV. 403, 409-14 (1986); ALTMAN, *supra* note 10, at 3.

<sup>207</sup> As to "dismissal," see David M. Trubek & John Esser, 'Critical Empiricism' in *American Legal Studies: Paradox, Program or Pandora's Box?*, 14 LAW & SOC. INQUIRY 3, 9, 34 (1989); Schlegal, *supra* note 40, at 408; Trubek, *supra* note 10, at 585. As to "defensiveness," see Williams, *supra* note 158, at 391, on CLS' overuse of internal critique.

tion.<sup>208</sup> The site of the manufacture of mystification was said to be the law school, not the office, courtroom, legislature or work place. In short, the immediate aim of CLS was to politicize legal education, empower students to undermine hierarchy and false consciousness and subvert the role of law in upholding an unjust political system.<sup>209</sup> Behind much of CLS's substantive attacks on legal reasoning, case-law, doctrine, and judicial and political trends was an attack on the pedagogy of legal education. Not only did CLS accept the premise that law remained unexamined by modern critical theory, despite being a cornerstone of the status quo, but it also claimed that legal education's professionalization process was a form of induction into the mysteries of the Rule of Law and an indoctrination into the ideology of liberal neutrality, doctrinal purity and institutional integrity.

Not surprisingly, since CLS overtly preached the destabilization of existing professional practices, it was considered a threat to the vested interests of legal education. In particular, especially as reflection on the sources of critical theory began to crystalize, it was characterized by some as nihilistic, from which certain implications followed.<sup>210</sup> It was said to be self-contradictory to practice law or teach future lawyers that law does not matter; if law does not express a public morality, then law is dead.<sup>211</sup> First aired publicly in a symposium on professional responsibility and legal education,<sup>212</sup> this viewpoint inaugurated the most sustained and perhaps most central confrontation about the role of the CLS.<sup>213</sup> Interestingly enough, the reaction of the legal academy to this symposium parallels the earlier events surrounding the publication of the special issue on Radical Criminology by the American Society of Criminology. The key point of the debate was that, because of the special value of law and the intimate connection between one's be-

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<sup>208</sup> Robert W. Gordon, *Critical Legal Studies as a Teaching Method*, 35 LOY. L. REV. 383, 385 (1989).

<sup>209</sup> *Id.* at 407. See also KENNEDY, *supra* note 50, at 33; Robert Coles, *Hierarchy and Transcendence*, 97 HARV. L. REV. 1487 (1984) (reviewing DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983)).

<sup>210</sup> Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984); see also Singer, *supra* note 85, at 47-56; Daniel C.K. Chow, *Trashing Nihilism*, 65 TUL. L. REV. 221, 258-98 (1990); Stick, *supra* note 176, at 395.

<sup>211</sup> Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 14 (1986).

<sup>212</sup> Symposium, *Ethics in Academia: Power and Responsibility in Legal Education*, 34 J. LEGAL EDUC. 222 (1984).

<sup>213</sup> For examples of this CLS viewpoint, see Symposium, "*Of Law and the River*," and of *Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985) [hereinafter *Nihilism and Academic Freedom*]; Symposium, *Professing Law: A Colloquy on CLS*, 31 ST. LOUIS U. L.J. 1 (1986); Owen M. Fiss, *The Law Regained*, 74 CORNELL L. REV. 245 (1989) (Fiss' own rejoinder to himself).

liefs and a subject taught, a teacher of law could not doubt law's real role in expressing social values and still teach law without driving students away from the struggle for law to do justice. Such nihilists, it was argued, should leave the Academy.<sup>214</sup>

The reactions to this challenge were revealing. Some scholars disagreed, and asserted that members of the Academy are paid to discover and teach what they find.<sup>215</sup> Others claimed that the real nihilists are the burned-out liberals whose despair is concealed behind the podium.<sup>216</sup> Similarly, proponents of CLS replied that those who deny the effects of power and ideology are the real nihilists, because in fact student disenchantment comes from passively portraying conventional practices as good, not from challenging them.<sup>217</sup> Notably absent at the time were voices in agreement with those who characterized CLS as nihilistic. If there was a community of scholars, it rallied around the cause of academic freedom—a result which was no doubt gratifying to the CLS movement, since it had hitherto experienced itself as peripheral and isolated. Nevertheless, although the Academy absorbed the defense of academic freedom, the innuendo of subversiveness overshadowed the idealism of CLS for quite some time.<sup>218</sup>

In contrast to CLS' critique of legal education, the Academy legitimized CLS' claim that it was the inheritor of a particular kind of realistic agenda unfulfilled since 1945 by accepting the inconsistencies and contradictions hard won by CLS as if they were obvious and commonplace. For example, learning that law was a tool of class interests or a vehicle of power was not likely to corrupt students.<sup>219</sup> In fact, CLS members were not cynics lacking in faith in the Rule of Law but rather they were prophets assailing the worn-out dogmas of an establishment.<sup>220</sup> Moreover, many traditional scholars accepted the unmasking of the hypocrisy of neutral principles as the basis of

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<sup>214</sup> Ted Finman, *Critical Legal Studies, Professionalism, and Academic Freedom: Exploring the Tributaries of Carrington's River*, 35 J. LEGAL EDUC. 180, 183 (1985).

<sup>215</sup> Letter from Owen M. Fiss to Paul D. Carrington, reprinted in *Nihilism and Academic Freedom*, *supra* note 213, at 26 [hereinafter Fiss Letter].

<sup>216</sup> Letter from Robert W. Gordon to Paul D. Carrington, reprinted in *Nihilism and Academic Freedom*, *supra* note 213, at 13 [hereinafter Gordon Letter].

<sup>217</sup> Sanford Levinson, *Professing Law: Commitment of Faith or Detached Analysis*, 31 ST. LOUIS U. L.J. 3, 13, 21 (1986); see also Gary Minda, *The Politics of Professing Law*, 31 ST. LOUIS U. L.J. 61, 71 (1986).

<sup>218</sup> Paul Bator has said that "CLS . . . had an absolutely disastrous effect on the intellectual and institutional life of Harvard Law School." Michael Sturm, *Bator to Take Chicago Post*, 81 HARV. L. RECORD 14 (1985).

<sup>219</sup> Gordon Letter, *supra* note 216, at 3.

<sup>220</sup> *Id.* at 9; see also Jay M. Feinman, *Priests and Prophets*, 31 ST. LOUIS U. L.J. 53, 59 (1986).

constitutional adjudication.<sup>221</sup> In the end, even the idea of nihilism and CLS' practice of trashing became subject to apologetic revisionism.<sup>222</sup> Thus, indeterminism did not mean that outcomes were the result of whim or that law did not matter; rather, it meant only that legal rules were open-ended.<sup>223</sup> One interpretation of the effect of this conclusion was that the traditional constraints of legal and judicial reason masked power and class, because equally logical arguments could be derived from the same premises when applied to facts to produce various outcomes. A major question was whether there was something objective to which law could refer or whether this belief masked hierarchy and exploitation. CLS affirmed the former by participating in its discourse, as well as affirming the latter by trashing the former. Therefore, CLS advocates could rationally and reasonably be seen and think of themselves as "ironic conformists."<sup>224</sup>

The defense of CLS against the attack of nihilism in terms of professional authenticity, however, turned out to be a high price to pay. It took the edge off CLS' rhetoric, focused CLS on legal education, not social theory, and crystallized the forces of reaction. McCarthyism has lurked in the background to this ongoing debate.<sup>225</sup> The limits of academic freedom were debated;<sup>226</sup> the implications of the suggestion that such nihilists ought to depart the Academy were thrashed out.<sup>227</sup> But this was only the front line of the battle. Behind the scenes, the silence of support for the forces of reaction became complicit in faculty politics. Professors left law schools because of hostile work environments, law schools became factionalized, and hiring and tenure appointments turned into rear-guard

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<sup>221</sup> See, e.g., John E. Dunsford, *Nihilism and Legal Education—A Response to Sanford Levinson*, 31 ST. LOUIS U. L.J. 27, 29 (1986) (explaining Dunsford's acceptance).

<sup>222</sup> Trashing colloquially means ruining, destroying, randomly laying waste. This is not what CLS actually meant, though at first CLS was quite happy to be thought of as relentlessly running amok through "middle-of-the-road" legal culture, revealing contradictions and exposing ambiguity. See Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 297, 321 (1984). Although Kelman had other things in mind when he wrote *Trashing*, as is evident from his book, KELMAN, *supra* note 144, at 8, trashing is at one point in his article associated with the critical analysis of legal argumentation as indeterminate. Kelman, *supra*, at 305. Unlike CLS, the concept of trashing has not been part of Radical Criminology's lexicon. But see William Chambliss, *On Trashing Marxist Criminology*, 27 CRIMINOLOGY 231, 235 (1989).

<sup>223</sup> For such a "soft" or "revisionistic" interpretation of indeterminacy in relation to nihilism, see Finman, *supra* note 214, at 197-99.

<sup>224</sup> Minda, *supra* note 217, at 68.

<sup>225</sup> Gordon Letter, *supra* note 216, at 6; Letter from Paul Brest to Phillip Johnson, reprinted in *Nihilism and Academic Freedom*, *supra* note 213, at 17.

<sup>226</sup> Levinson, *supra* note 217, at 20; Finman, *supra* note 214, at 192.

<sup>227</sup> See, e.g., Fiss Letter, *supra* note 215, at 16-23; Finman, *supra* note 214, at 184-87 (Finman's response).

skirmishes.<sup>228</sup> While the fear of McCarthyism became a nightmare, it was short-lived, at least in such a public form. By 1989, CLS was declared to be "less threatening."<sup>229</sup> However, the cycle that began with a flood of radically different scholarship in the late 1970s, culminating in Unger's speech at Harvard in 1979, had been completed, arguably, with the Stanford Law Review issue of 1984—and even then it was apparent to many that the future would belong to feminism, postmodernism and race theory.<sup>230</sup>

That CLS should have become party to something much larger is not surprising because its origins lie also in something larger than law, legal theory and legal education: namely, the cultural shifts which became manifest during the 1960s. This is the key to understanding the external or social reaction to CLS. Its advocates were seen as ideologues intent on destroying the legal tradition they refused to carry forth, which made them suspect, if not irrelevant, to issues-oriented activists working in the mine-fields of race relations, environmentalism, consumer protection and even gender equality.<sup>231</sup> In fact, CLS can be said to have played a part in raising consciousness in the Academy about the possibilities of law's role in social change. But the perception was that CLS either meant revolution or was merely a fad.<sup>232</sup> Of course, the seriousness of the former denies the superficiality of the latter, but the public or social reaction to CLS held these two contradictory perceptions simultaneously. Certainly, many CLS members were playing out forces first tapped into in the sixties. They were part of the opening up of the universities and its impact on law schools, and they were part of the emergent awareness of dramatic social change that had taken place after 1945.<sup>233</sup> They were graduate radicals taking on the legal establishment and confronting the past with their present and their vision of the future.

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<sup>228</sup> The details of this dimension to CLS' confrontation with mainstream legal culture are yet to be gathered. See Tushnet, *supra* note 9, at 1530.

<sup>229</sup> Fiss, *supra* note 213, at 250.

<sup>230</sup> David Cole, *Getting There: Reflections on Trashing from Feminist Jurisprudence and Critical Theory*, 8 HARV. WOMEN'S L.J. 59, 81, 88, 90 (1985).

<sup>231</sup> CLS, on the other hand, saw confrontation politics, not litigation or lobbying, as the means to social change. See Guyora Binder, *On Critical Legal Studies as Guerrilla Warfare*, 76 GEO. L.J. 1, 31 (1987). For a discussion of the conflict among radicals on the use of the law instrumentally for social change, see Alan Hunt, *The Radical Critique of Law: An Assessment*, 8 INT. J. SOC. L. 32 (1980).

<sup>232</sup> This resulted from the confrontational style of politics called trashing and the overabundance of European philosophers cited as authorities for premises and background.

<sup>233</sup> See generally Martin Shapiro, *Lawyers, Corporations and Knowledge*, 38 AM. J. COMP. L. 683 (1990).

The misapprehension that CLS was a fad comes in part from denying the importance of the sixties as a watershed in the internationalization of American culture and in part from mistaking theatrical flair for a lack of substance. Further, the idea of the social construction of reality signified not only that all is politics but that all is art too. Hence, the blurring of lines between creativity and intellect, role-playing and responsibility was exploited by CLS. But the compromise in the 1970s of the earlier vision of a Great Society deepened the serious concern with the unravelling consensus about America's future. Its style of activism hid a commitment to justice driven by the critical insight that theory informs practice according to the culture surrounding it.<sup>234</sup>

### C. ROUTINIZATION OF RADICALISM WITHIN THE ACADEMY

It would seem that once revolutionary forces in the Academy enter the public realm, as CLS did with its response to the nihilism charge, they are transformed and spent as forces acting from within, exactly to the extent that the Academy is insulated from society. Despite the commercialization of the university, the Academy within it remains to some extent an ivory tower isolated from society at large. Thus, the only people outside academia who cared about the trials and tribulations of the appointment and tenure process at Berkeley and Harvard were its alumnae and alumni.<sup>235</sup> Even when the American Bar Association investigated charges that four teachers at the New England School of Law in Boston were denied tenure because of their involvement in CLS,<sup>236</sup> nothing came of it, and it remained a local incident. Although there were other such instances across the country, these too remained parochial in scale, and did not arouse the concern of the general public.<sup>237</sup> To the degree that radical movements are unable to invoke external social and cultural forces in their struggles, the debates are likely to be confined to the

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<sup>234</sup> Gordon, *supra* note 208, at 388.

<sup>235</sup> In retrospect, this is certainly an accurate representation, although it belittles the individuals involved. On the other hand, Leonard Minsky of the National Coalition for Universities in the Public Interest alleged that by 1988 some 100 people had claimed they were denied tenure for ideological reasons. Minsky was quoted as saying that "Reagan has penetrated universities in much the same way that he tried to penetrate the Supreme Court." Geoff Cowley & Sue Hutchinson, *Down and Out in Cambridge*, NEWSWEEK, Apr. 4, 1988, at 16.

<sup>236</sup> Ethan Bronner, *ABA to Probe Firing of 4 at N.E. Law School*, BOSTON GLOBE, Nov. 25, 1987, at 17, 38. An open letter was circulated to faculty in the Boston area dated May 11, 1987 with an enclosed copy of a letter from law faculty in the Boston area to the Board of Trustees of the New England School of Law expressing concern at the alleged threats to academic freedom and faculty autonomy. *Id.*

<sup>237</sup> See Tushnet, *supra* note 9, at 1519 nn.18-20.



Academy, with much effort directed toward legitimation under the principles of academic freedom. Such efforts are likely over time, however, to result in the transformation of radical movements to a stage in which radical ideas are incorporated into a traditional canon, or worse, tolerated in some benign fashion.

The transformation of radicalism is evident for both CLS and Radical Criminology, and indicates once again the importance of viewing radicalism within the historical context of intellectual ideas central to world views that are themselves continually evolving over time. Thus, for example, in light of the previously discussed controversy generated from the failure of the American Society of Criminology to publish a more balanced issue of "Radical Criminology" in the early 1980s, concern began to be voiced about the role of the Academy in the exclusion of ideas purely because they were threatening to the status quo of American Criminology.<sup>238</sup>

In the heat of battle, victors often exaggerate their successes. This is true for intellectual warfare as well. Whether one agrees with the point/counter-point arguments of the radical criminologists or their critics, the writings of both parties show a debate largely polemical in content, undoubtedly stemming in part from some of the more general and non-intellectual critiques and comments on both sides. Perhaps this is why there appears to have been a concerted effort to include criminologists identified as "radical" or "Marxist" in orientation in the decision-making process of the ASC.<sup>239</sup> This accommodation was further symbolized by the election of William Chambliss to the Presidency of ASC in 1988. The election of Chambliss, a respected scholar and researcher long associated with Radical Criminology, indicates to some extent the transformation that Radical Criminology underwent within the discipline of Criminology. From a traditional view of academic freedom, it also draws attention to the need for a more inclusive approach to dissenting opinions within the Academy. In this respect, it is not difficult to expect that challenges made to traditional orthodoxy will result in intellectual challenges and criticism; this should be the nature of the Academy, even if it no longer resembles a community of scholars.<sup>240</sup>

Finally, despite the confusion and controversy associated with

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<sup>238</sup> See Frank R. Scarpetti, *The Recent History of the American Society of Criminology*, 10 *CRIMINOLOGIST* 1, 2 (1985).

<sup>239</sup> *Id.*

<sup>240</sup> See generally BRUCE WILSHIRE, *THE MORAL COLLAPSE OF THE UNIVERSITY: PROFESSIONALISM, PURITY, AND ALIENATION* (1990); MICHAEL KATZ, *RECONSTRUCTING AMERICAN EDUCATION* (1987).

Marxist and Radical Criminology, both perspectives continued to develop throughout the past two decades. Criminology texts routinely include chapters by radical criminologists, whether writing from a critical or Marxist perspective, while the annual meetings of ASC generally include topical sessions that address crime and criminal justice from both perspectives.<sup>241</sup> The formal recognition of the Division of Critical Criminology by the ASC in 1990 further strengthens the legitimation of critical/radical criminology within the discipline. Whether this legitimation will influence scholars of crime and criminal justice to give more consideration to non-conventional crimes like terrorism, state criminality and international espionage is difficult to determine.<sup>242</sup> What is evident, however, is that the early call by the Schwendingers for criminology to give greater emphasis to "human rights" violations now seems hardly controversial in light of the events of the last decade.<sup>243</sup>

The process of routinization is also evident with CLS, although not nearly to the extent that seems to have taken place with Radical Criminology. In countering the charge of nihilism, CLS was transformed by its efforts to legitimate itself within the Legal Academy from a conference or movement to a valid theory. But as such its identity came at a price. At the same time CLS was legitimating its ideas and views of the law and legal theory, universities were becoming more embroiled in the larger issues of race, feminism and multiculturalism. This transformation, now so evident in American education, is in part the result of the growing priority in American society in recognizing the claims of inclusion and diversity, whereas CLS had been concerned with the injustices derivative from class, hierarchy and power. This shift in priorities forced CLS to narrow its focus to legal education and legal reasoning and to acquiesce in an identity appropriate to resisting the charges of nihilism continually directed to CLS, even though CLS had always self-consciously lacked an identity. The belief in the diversity of race, gender and culture, allegedly now so extreme a standard to some that its correctness has to be defended at the price even of truth or certainly the integrity of the western tradition, is consistent with the reaction of CLS to a unified and predominantly white, male legal profession and it reflects the generation of autonomous groups from CLS, each

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<sup>241</sup> For an overview of topics dealing with critical perspectives in crime and criminal justice, see the American Society of Criminology Program listings for 1991, 1992 and 1993. See also *NEW DIRECTIONS IN CRITICAL CRIMINOLOGY* (Brian D. MacLean & Dragan Milovanovic eds., 1991).

<sup>242</sup> Gregg Barak, *Resisting State Criminality and the Struggle for Justice*, in *CRIMES BY THE CAPITALIST STATE* 273, 273-81 (Gregg Barak ed., 1991).

<sup>243</sup> Schwendinger & Schwendinger, *supra* note 46, at 145.

with its own separate agendas. That the call for diversity has produced such a backlash as to be labeled "political correctness" shows both the fragmentation of CLS and the importance of its attack on traditional legal theory. While it can be said that CLS has become routinized or domesticated, and that it has failed to affect legal education, CLS can also be said to have legitimized itself with an agenda taken up by others both within and beyond the confines of the legal academy.

The "domestication" of CLS is of course part of its legitimation.<sup>244</sup> Not only has it established an alternative paradigm for thinking about law, there are now token representatives on faculties, and there are likely to be representatives of CLS on panels and at conferences.<sup>245</sup> CLS is now discussed in modern legal theory texts and courses around the country. Most agree that it has widened the conversation about law with radical theories of the legal subject, interpretation, rights, and the intellectual history of areas of doctrine.<sup>246</sup> However, more important has been the fragmentation of its theoretical agenda along the fault-lines of its challenges.

Part of this concerns the problematic relationship between CLS and substantive law, especially the criminal law; another part concerns the relationship between CLS and the sociology of law.<sup>247</sup> Some have argued that CLS' positive agenda ought to have been empirical studies.<sup>248</sup> On the other hand, the lack of rapprochement between CLS and empiricism reflects an uncertainty about method; namely, whether scholarship can be both critical and empirical.<sup>249</sup> For some, critical empiricism simply means either a description of law that is self-conscious of its values and assumptions, or it means selecting an agenda to be then described but doing so critically according to its under-representedness or its exclusion.<sup>250</sup> To CLS this remains unsatisfactory because it is ambiguous towards the relationship of knowledge and politics and thus uncommitted to change.<sup>251</sup> This key theme in CLS, that praxis necessitates understanding one's own complicity in the production and reproduction

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<sup>244</sup> White, *supra* note 136, at 840.

<sup>245</sup> Gordon, *supra* note 208, at 393.

<sup>246</sup> *Id.* at 393-94; Levinson, *supra* note 217, at 25; Fiss, *supra* note 213, at 250.

<sup>247</sup> Quite simply, it appears that CLS has devoted an article or two to each substantive area of law with the exception of constitutional law. KELMAN, *supra* note 144, at 325, 338, 340.

<sup>248</sup> John Conley & William O'Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. REV. 467, 469-70 (1988).

<sup>249</sup> This has been the subject of a recent symposium entitled *Critical Empiricism and Sociolegal Studies*, 14 LAW & SOC. INQUIRY 3 (1989).

<sup>250</sup> William Whitford, *Critical Empiricism*, 14 LAW & SOC. INQUIRY 61, 65 (1989).

<sup>251</sup> See Trubek & Esser, *supra* note 207, at 32.

of legal consciousness, has enabled CLS to distinguish itself from other social sciences. It has not, however, guaranteed an internal coherence to CLS.

There have always been divisions in CLS—between Unger and the rest, between the Marxists and Frankfurt scholars and between phenomenologists and non-phenomenologists.<sup>252</sup> CLS' unclear identity, evidenced by the all-inclusive bibliographies and the exclusive cell of masters, reflected its lack of dogma, if not a central theoretical basis.<sup>253</sup> The fragmentation into separate schools of critical race theorists and feminists revealed not only that the negative thrust of CLS lacks a positive agenda and may even be dominated by white males, but also that it has resulted in a vacuum.<sup>254</sup> Further, the negative effect of semiotics and deconstruction has led only to an endless process of the demystification of language, which reproduces an orthodoxy of legal education narcissistically focused on itself as the text.<sup>255</sup> As a result, the identification of praxis with repression in the social world was relinquished to feminists and race theorists. This is especially significant when CLS' relationship to Radical and Critical Criminology is considered, for CLS has hardly focused on criminal law as a prime locus of the deployment of class and power by way of liberal values.<sup>256</sup> The reasons for this are complex, not the least of which is that CLS draws upon philosophy rather than social sciences for its inspiration, unlike criminology and criminal law.<sup>257</sup> Nevertheless, despite the apparent emasculation of CLS' positive agenda by feminism and critical race theory, CLS remains productive in the analysis of the substantive content of doctrine in terms of recent intellectual history.<sup>258</sup> CLS' historical revisionism may turn out to be its most enduring contribution.

To conclude, therefore, CLS was radical not reflexive; it brought something new to law, legal theory and legal education. It was avant-garde; as such, its role was defined.<sup>259</sup> Even as an end in itself, CLS could not become identified with the given and still survive.<sup>260</sup> Its domestication was the result of its self-identification with the legitimacy of the law profession; its fragmentation followed as its

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<sup>252</sup> See *supra* notes 158-62 and accompanying text.

<sup>253</sup> See Hunt, *supra* note 23, at 34.

<sup>254</sup> See Fiss, *supra* note 213, 251-55.

<sup>255</sup> Anthony Chase, *Who Needs Information when You're Working Underground? Legal Education, Social Context and the Public Interest*, 12 NOVA L. REV. 55, 67-69 (1987).

<sup>256</sup> David Nelken, *Critical Criminal Law*, 14 J. L. & Soc'y 105, 107 (1987).

<sup>257</sup> *Id.* at 111.

<sup>258</sup> Gordon, *supra* note 208, at 393. Gordon's real assertion about the value of CLS concerns its effectiveness in the classroom. *Id.* at 407.

<sup>259</sup> David Luban, *Legal Modernism*, 84 MICH. L. REV. 1656, 1657 (1986).

<sup>260</sup> Brosnan, *supra* note 146, at 396.

impact waned. In essence, CLS has been transformed but not transcended or transmuted.<sup>261</sup> Gone are the mythologies of Unger's post-modern Christian-liberal vision of political rejuvenation and the inversion of hierarchies by context-smashing. Gone also from public view are the rituals of crisis-provocation, counter-culture publications, footnotes of networked contacts, summer camps, and planning cells. What remains is CLS' utopian challenge that we can remake our social world despite the fact that law appears to be given, real, and unyielding. CLS has revitalized secular idealism in the wake of the loss of the religious foundations of western law, and it has resisted the alternative deification of the positive law.<sup>262</sup> This is no small achievement. Further, because it also rests upon faith in the possibility of transforming false consciousness through self-understanding, CLS has importantly linked law and legal theory to our therapeutic culture.<sup>263</sup> Hence, part of the alternative paradigm bequeathed by CLS consists of the inseparability of praxis from theory and application, as well as from process and content. Another part of the paradigm consists of CLS' ongoing demand for uncovering of exploitation and alienation as a side-effect of the struggle between enlightenment and false consciousness. Although feminism and race theory may have taken CLS' positive content away from it, its agenda of confrontation remains, as does the need for doctrinal analysis, structural surveys and immanent critique. It is as hard to imagine that CLS will cease to exist as it is to imagine that such strategies are passé. However, the fact remains that CLS, Unger notwithstanding, lacked a social theory that would allow it to make the transition from its critique of law to an understanding of the culture shifts dominating Western society. An analysis of the internal dynamics of these shifts is essential, we believe, to understanding the future of radicalism within the Academy.

#### IV. RADICALISM AND THE ACADEMY IN AN INDIVIDUALISTIC CULTURE

In the present analysis, our goal has been to examine the pat-

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<sup>261</sup> A conference entitled *Policy in the Nineties: A Crit Network Conference*, was held at Harvard Law School and Northeastern Law School on April 10-12, 1992. CLS' November 1991 newsletter was dedicated to the memory of Mary Joe Frug, who was murdered in April 1991. A posthumously published work by Frug was parodied by some members of the Harvard Law Review. The resulting debacle, which involved political correctness, trashing, feminism, and freedom of speech, drew out all the CLS positions anew. Anthony Flint, *Harvard Law Society Split in Parody's Wake*, BOSTON GLOBE, Apr. 16, 1992, at 1.

<sup>262</sup> Dunsford, *supra* note 221, at 34.

<sup>263</sup> Feinman, *supra* note 220, at 60; RIEFF, *supra* note 128, at 232.

terms of radical challenge in law and criminology that have been dominant in the Academy during the past three decades. We believe our analysis of the patterns of emergence, the targets of challenge, the theoretic thrust, and the counter challenges provides a sociology of knowledge analysis of the convergent patterns of radicalism possible within the historical context of the Academy. Radical Criminology and CLS were both reactions to the idealism of the old Left and its faith in communism and socialism, and to the compromise of modern liberalism between social welfare and individual liberty. Both movements challenged the scientific belief in value-free and neutral methods of law, policy and social theory for grasping the truth about ordinary reality. Both played an important part in unveiling hidden truths about the complexity and contingency of the social world at the end of the twentieth century, and by shattering illusions and complacency they provoked bitter reactions. More importantly, not only were they both in part responsible for making their respective professions rethink some fundamental assumptions, but in retrospect it appears that both movements were parts of some larger cultural shift in which are discernible the limits to their efficacy and perhaps the demise of radical academic movements as we know them now altogether.

Very briefly, the real insight of critical theory, upon which both Radical Criminology and CLS drew, was the constitutive nature of consciousness: its distortion as false consciousness and its surplus repression by capitalism.<sup>264</sup> The full understanding of this was optimistically elevated to an alchemical key for the transformation of modern, post-industrial society. Insofar as both radical movements were driven by such a revolutionary goal, they became overtaken by a post-modern attitude (which for the moment must be left undefined) that unmask such ideals. Closely connected to this is the fact that today our society achieves the common good, in all its varieties, through the political process. This process largely occurs beyond the influence of the academic community, which is now relegated to the role of commentator. The sociology of knowledge must now address the question of whether it is possible to effect radical change within society from an academic setting in a culture characterized by a primarily therapeutic nature, and a politics that is increasingly exclusive.

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<sup>264</sup> RAYMOND GEUSS, *THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* 58 (1981); HELD, *supra* note 165, at 317.

## A. THE ACADEMY IN PERIL?

There is much agreement today that the dramatic changes that have taken place in universities during the last thirty years have resulted in a state of crisis for academia that appears to be beyond the ability of universities to establish appropriate solutions.<sup>265</sup> In the early 1960s, the New Left not only challenged the liberalism of the Academy; it also mounted a serious and compelling challenge to the collusion of the universities with government, especially to academic research that supported the military-industrial complex. Universities were attacked both for their lack of relevance to an increasingly complex, moral and informational society, and for promoting a trend toward the multi-university, with its emphasis on academics as entrepreneurs.<sup>266</sup> A close analysis of these challenges provides evidence that the dominant public ideology of society plays a significant role in the manifestation and extent of radicalism within the university. The anti-communist ideology of the 1940s and 1950s restrained and stifled radical dissent in the Academy. In contrast, the upheaval of the 1960s supported and sustained radical dissent in the Academy and provided radical scholars the opportunity to raise to the public the issue of "what was wrong with America."

This attack was the first thrust of the democratization or opening up of academic opportunity. Today, that process has led to greater vocational relevance in curricula, more conservatism because students are consumers who can leave, and the separation of the responsibility to be independent and critical from the responsibility of teaching. Further, the decline of praxis caused by the routinization of radicalism in the Academy raises the issue of whether institutional norms can be transformed solely through critical analysis.

Today, universities, like everything else, are responding to the pressures of a free market by competing in a market place within a larger market directed to the consumption of ideas. They are increasingly governed by the laws of supply and demand in their courses, services, and a declining student population. Often, their direction is determined by having to compete for resources with general social and economic needs. Their own agendas are set by predictions of largesse and corporate support. In effect, university

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<sup>265</sup> Mark Tushnet, *Political Correctness, the Law and the Legal Academy*, 4 YALE J. L. & HUMAN. 127, 162-63 (1992).

<sup>266</sup> KATZ, *supra* note 240, at 173; Sol Stern, *A Deeper Disenchantment*, in THE AGE OF PROTEST 55, 55-66 (Walt Anderson ed., 1969). See generally KENNETH KENISTON, YOUNG RADICALS (1968); GITLIN, *supra* note 17; RICHARD FLACKS, YOUTH AND SOCIAL CHANGE (1971).

education is driven by whatever has economic power or governmental backing to become a service industry of the culture at large. More than 3000 colleges and universities in the United States are not only competing for a declining student population, but they are competing among themselves for the claim that they are centers of intellectual activity and research. One outcome of this activity is the continued proliferation of academic journals and articles so overwhelming in numbers that one is forced to define one's academic interests more narrowly than at any time in the past. In response to these changes, faculty pull away from the classroom and have closer ties to professional associations than to colleagues. One result of this transition is the decline of internal criticism once seen as vital to the role of the university. Further, because of the increased specialization and pluralism of disciplines, faculty must compete more, which mutes external criticism because of the burden of being an expert across boundaries. Finally, important public reflection is no longer produced at universities as such, but rather in separate governmental institutions, corporate research foundations, think-tanks, centers of policy, and so on. It is increasingly hard, therefore, to justify the role of social critic within an academic setting when that setting is neutral in the sense of answering to anyone, but not value-free in the sense of resisting those with power. The legitimacy of critics within academia, like CLS and Radical Criminology, is undermined by the changed roles of universities within culture as a whole. This is an important premise; but to understand the future role of radicalism within the Academy, more than the changing nature of the university environment must be considered. Scholars and critics must also examine the outlines of the cultural shifts that continue to influence the acceptance and rejection of radical ideas and beliefs within the culture at large. Since no culture is immutable, the potential success of any radical movement may depend more on its ability to address the controlling beliefs within any culture than on the strategies and ideologies underlying the emergent radicalism. The importance of addressing the internal dynamics of culture is evident in the works of Robert Bellah,<sup>267</sup> Christopher Lasch,<sup>268</sup> and especially Philip Rieff.<sup>269</sup>

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<sup>267</sup> See, e.g., ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985) [hereinafter *HABITS OF THE HEART*]; ROBERT BELLAH ET AL., *THE GOOD SOCIETY* (1991).

<sup>268</sup> See, e.g., CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* (1979).

<sup>269</sup> See, e.g., RIEFF, *supra* note 128; PHILIP RIEFF, *FELLOW TEACHERS* (1972) [hereinafter *FELLOW TEACHERS*]; PHILIP RIEFF, *THE FEELING INTELLECT: SELECTED WRITINGS* (Jonathan B. Imber ed., 1990) [hereinafter *THE FEELING INTELLECT*].



## B. RADICALISM WITHIN A THERAPEUTIC CULTURE

In an early and important analysis of change in Western culture, Philip Rieff argued that there was no longer a unitary system of belief but rather that there are "several systems of belief competing for primacy in the task of organizing personality in the West."<sup>270</sup> Among these belief systems is the "therapeutic" culture, which is seen by Rieff as revolutionary in the cultural sense, in contrast to revolutionary in the political sense, which is the usual focus when one talks of such movements.<sup>271</sup> To understand this shift, it is best to quote Rieff himself:

The therapeutics must be understood precisely in their efforts to go beyond the analytic attitude. . . . None of their doctrines promises an authentic therapy of commitment to communal purpose; rather in each the commitment is to the therapeutic effort itself. . . . The therapy of all therapies is not to attach oneself exclusively to any particular therapy, so that no illusion may survive of some end beyond an intensely private sense of well-being to be generated in the living of life itself.<sup>272</sup>

As the successor to early cultural belief systems organized around the sacred and its prohibitions, for Rieff the therapeutic culture is "the most revolutionary of all modern movements—toward a new world of nothing sacred."<sup>273</sup> The therapeutic "needs no criterion for conduct because he is willing and able to use all criteria."<sup>274</sup> Thus, he is a character type who "revalues his values whenever he grows displeased with them."<sup>275</sup>

Because the therapeutic revolution is being conducted from the top down, not from the bottom up, its members are largely drawn from the leisured, affluent and intelligent classes. Whether they are from the left or right, the abdication of their historic function to assert the authority of communal purpose signifies a major shift in Western culture, one that may be irreparable.<sup>276</sup> The significance of the therapeutic revolution is underscored when contrasted with the decline of Marxism, which for Rieff was the "last great institutional example in Western history of a creedal elite . . . which would prac-

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<sup>270</sup> RIEFF, *supra* note 128, at 2. See generally DANIEL SCHANAHAN, *TOWARD A GENEALOGY OF INDIVIDUALISM* (1992) and RALPH KETCHAM, *INDIVIDUALISM AND PUBLIC LIFE: A MODERN DILEMMA* (1987) for a discussion of the evolution of individualism and some alternatives to the individualistic paradigm.

<sup>271</sup> RIEFF, *supra* note 128, at 260.

<sup>272</sup> *Id.* at 261.

<sup>273</sup> *THE FEELING INTELLECT*, *supra* note 269, at 354.

<sup>274</sup> *Id.* at 356.

<sup>275</sup> *Id.* at 363.

<sup>276</sup> RIEFF, *supra* note 128, at 9.

tice what it preached and intended not to preach everything."<sup>277</sup> As a doctrinal movement espousing a common purpose, Marxism can be viewed as "culturally conservative," in contrast to that of the therapeutic system, with its "anti-creedal" philosophy, in which therapy is the modal experience of culture.<sup>278</sup> It is this parallel movement—the decline of Marxism as a creedal movement, and the triumph of the therapeutic, a largely anti-creedal philosophy—that has major implications for understanding the future of radicalism, in both the Academy and society at large.

Having despaired of the sacred interdicts of religion, the corruption of Marxism by Stalin and his later disciples, and the failure of leftists to solidify the theory-praxis connection, many former radicals and their less active but sympathetic cohorts have become major consumers, if not the dispensers, of the therapeutic culture.<sup>279</sup> The proliferation of the therapeutic culture is readily seen in the transformation of a significant part of professional activity into counseling, as is evident by the vast network of therapeutic enterprises in the urban centers of our country, in the never ending "self-help" publications advocating some type of twelve-step program to a healthy self, and in the continued effort to view criminal behavior as "sick" and/or "ill," in contrast to the early creedal sanctions of such behavior as immoral or sinful.<sup>280</sup> Even many of our religious elites are now more occupied in administering to the psychological needs of their parishioners rather than the traditional spiritual crises associated with sin and immorality. Whether the recent clamor by those on the right for a renewal of the old interdicts will have any success is difficult to foretell.<sup>281</sup> But, because the radical right is espousing a creedal movement that is at odds with the private lives of so many, the clarion call is likely to be resisted. Being "saved" for many Americans bears little resemblance to the moral code of the early and late Christians. To emphasize a community of authority in a decidedly therapeutic age is likely to be resisted; worse still, it might be seen as devoid of meaning and thereby doomed to failure. In the final analysis, radicals both in the university and its envi-

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<sup>277</sup> FELLOW TEACHERS, *supra* note 269, at 126.

<sup>278</sup> THE FEELING INTELLECT, *supra* note 269, at 356.

<sup>279</sup> See HABITS OF THE HEART, *supra* note 267, at 97, for examples of how therapy is utilized in life experiences. See also ROBERT CASTEL ET AL., THE PSYCHIATRIC SOCIETY 265-85 (Arthur Goldhammer trans., 1982).

<sup>280</sup> It is difficult to substantiate such a subjective perception, but the authors draw the reader's attention to the recent emergence of "self-help" sections in book stores and libraries.

<sup>281</sup> See HUNTER, *supra* note 15, at 43, for a discussion of the conflict between progressive and orthodox groups within the religious bodies of America.

rons, whether of the left or right, may find it necessary to couch their revolutionary messages in therapeutic language if they are to be heard with any conviction. The turn to literature in every discipline may be indicative of just such an awareness that simply reading or engaging in narrative has begun to overcome the need to learn and the right to teach well.

### C. A CONCLUDING STATEMENT

It is not that universities are no longer engines of change. They never were. In fact, part of the failure of the New Left to maintain its dynamic is that, for the most part, radicalism became centered in the universities to the exclusion of trade unions, city neighborhoods, and newspapers.<sup>282</sup> The early and important emphasis on theory and praxis appears to have been tenuous at best, as most of those in the New Left have either abandoned or been excluded from the public arena.<sup>283</sup> Whether the New Right's success in the 1980s is responsible for the Left's ideological failures is open to debate; what is evident, however, is that "[t]he ineffectiveness of the left supports the ascendancy of the right."<sup>284</sup>

The role of the Left in the Academy over the last three decades is acutely described by Diggins, a long-time observer of the Left in American society. In his most recent work, he comments on the endurance and perseverance of the Left in the United States:

What is striking about the Academic Left is its persistence despite historical developments and political realities. The intellectual staying power of the Left in the United States is matched by that in only one other European country, England, where Marxism retains some hold on the academic mind. Curiously, where Communist parties have traditionally been strong, as in France and Italy, Marxism fell on hard times in the eighties, but where Communism as a political force has been weak, as in England and the United States, Marxism as an ideology survives with some strength in the cloistered world of the academy. Perhaps this disparity only highlights the insights of Max Weber about the demise of movements and the inevitability of institutions. As an intellectual movement promoting itself in protests and publications, the Left had to compete on the open market; as an academic phenomenon presiding over a university, the tenured Left has less need to compete to survive, and it now has an ally in bureaucracy and its drive to expand. If Wall Street depends upon capital accumulation, the Academic Left depends upon cohort accumulation.<sup>285</sup>

Universities can still be a source of forces that provide an impe-

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<sup>282</sup> JACOBY, *supra* note 22, at 190.

<sup>283</sup> For an alternative view, see ATTEWELL, *supra* note 33, at 268.

<sup>284</sup> GOLDFARB, *supra* note 1, at 103.

<sup>285</sup> DIGGINS, *supra* note 1, at 294; *see also* FLACKS, *supra* note 23, at 237.

tus for change, but these forces must be pluralistic and liberal, not committed to any exclusive set of values.<sup>286</sup> In the past, to the degree universities were one-dimensional profiles of vested governmental and economic interests, they were met with similarly single-minded radicalism. Moreover, the more this phenomena prevailed, the more most academics remained committed to making the system work, being neither guardians of the independence of mind nor radical critics of that absence. In today's culture, however, there is a growing concern that the intellectual as critic or radical has been co-opted by the academic in the new culture of the university serving the Establishment.

Today, the role of the academic in society is largely informative rather than transformative.<sup>287</sup> Intellectuals are no longer able to articulate the boundaries of culture or its common purposes so as to generate a sense of social belonging. Because our culture, as a whole, espouses an ideology of individualism that is largely therapeutic, there is no need for specialists to perform what is now so largely a private enterprise. The intellectual's creativity in redeeming lost causes and providing new symbols for their replacement has passed to other social actors. As a result, the role of the radical or the intellectual in the Academy has become redundant. Academics are merely the medium of the maintenance of the status quo through the important role that universities now have in the institutionalization of politics. Post-modernism recognizes this and passes it by. Law and politics are now situated in the landscape of culture. Radical movements in the Academy, henceforth, will have to begin not with false consciousness or class exploitation but with the changing configuration of moral demands that provide meaning to the everyday events of people's lives.

In summary, our historical analysis suggests that the limited success of radical movements within the United States during the last thirty years can be attributed, in part, to overlooking the importance of culture to revolutionary change. Because the present culture has become so thoroughly therapeutic, it has become much more difficult to define and articulate what is in the public's interest.<sup>288</sup> In the future, if radical movements are to be successful in establishing social change, they must not only be able to understand

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<sup>286</sup> See GOLDFARB, *supra* note 1, at 118-31, for a discussion of the threat of ideology and cynicism to American education. See also THOMAS BENDER, *INTELLECT AND PUBLIC LIFE: ESSAYS ON THE SOCIAL HISTORY OF ACADEMIC INTELLECTUALS IN THE UNITED STATES* (1993).

<sup>287</sup> RIEFF, *supra* note 128, at 73. See also Bender, *supra* note 286, at 141.

<sup>288</sup> ANDREW J. POLSKY, *THE RISE OF THE THERAPEUTIC STATE* (1991). See also MIMI WHITE, *TELE-ADVISING: THERAPEUTIC DISCOURSE IN AMERICAN TELEVISION* (1992) for

the cultural shifts that are taking place, but more importantly, must also be able to draw upon the internal dynamics of the culture to raise to observation the desired need for social and political change.<sup>289</sup> Given the historical resistance of radicalism to the individualization of consciousness and its practical consequences, such as a foreshortening of visionary ends, this appears unlikely.

In the final analysis, the continuing centralization of power in university administrations, the specialization and fragmentation of academic disciplines, and the demands associated with academic tenure and promotion make it increasingly difficult for members of today's Academy to engage in a radical politics outside the university. Whether the Academy, in a decidedly individualistic culture, can reignite the dormant idealism of American society is difficult to determine.<sup>290</sup> For the present historical moment at least, radicalism may be a luxury few academics can afford to pursue.

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an analysis of the impact of therapeutic discourse on family construction and consumer culture. See ALASDAIR MACINTYRE, *AFTER VIRTUE* 30 (1981).

<sup>289</sup> Dick Flacks, *Making History and Making Theory: Notes on How Intellectuals Seek Relevance*, in *INTELLECTUALS AND POLITICS: SOCIAL THEORY IN A CHANGING WORLD* 3, 13-18 (Charles C. Lemert ed., 1991); BREINES, *supra* note 1, at 151.

<sup>290</sup> The reduced potential for radical politics need not preclude the much needed role of academics to bring a rich theoretical perspective to public life. Bellah in his work argues that we need to reconstruct a public philosophy tied to an elaboration of the conditions necessary for a full democracy, and that social scientists must be part of this effort. *HABITS OF THE HEART*, *supra* note 267, at 297-307. See also BENDER, *supra* note 286, at 145.