The Emergence Of Critical Social Theory In American Jurisprudence: An Introduction To Professor Rosenberg's Perspective

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Here in good old God-Save-America
The home of the brave and the free
We are all hopelessly oppressed cowards
Of some duality
Of reckless multiplicity. . . .
Joni Mitchell, "Don Juan's Reckless Daughter"[1]

In periods when there is little self-consciousness
about the artificial character of *all* categories,
even a legal thinker who knows she is engaged
in a major effort to redefine the structure
may have no idea how much choice is
implicit in her activity.
Duncan Kennedy, *The Structure of Blackstone's Commentaries*[2]

Norman Rosenberg's treatment of Thomas Cooley, liberal jurisprudence, and the law of libel[3] exemplifies both a difficulty with and an opportunity for traditional law review scholarship. The difficulty arises from the failure of many legal writers to identify and explain the jurisprudential perspectives that define their substantive approach. This problem is particularly acute when, as in Professor Rosenberg's article, the jurisprudential perspective deviates from the mainstream. The opportunity lies in bringing the problem of perspective out of the closet and legitimating its critical treatment as an integral element of *all* legal scholarship — most especially that scholarship which

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2. Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 216 (1979).

3. Rosenberg, *Thomas M. Cooley, Liberal Jurisprudence, and the Law of Libel, 1868-1884*, 4 U. PUGET SD. L. REV. 49 (1980).

engages in substantive analysis rather than that which delves into jurisprudence as some distinct and distant luxury.

This opportunity is especially alluring today, as we witness "a major jurisprudential paradigm shift [away] from the legal realist-legal positivist paradigm of the legal official as a managerial technocrat ideally seeking the utilitarian goal of the greatest happiness of the greatest number."[4] Rejection of the positivist model, which has influenced American legal thought since its inception[5] and dominated American jurisprudence during this century,[6] carries profound implications. What is occurring is not merely the evolution of one movement into the next within the positivist tradition; we witness more than a reaction to Process Jurisprudence which reacted to Legal Realism which reacted to Sociological Jurisprudence which reacted to Mechanical Jurisprudence.[7] Rather, this rejection steps outside the very consciousness of positivism, compelling American legal thinkers to respond to the exciting and frankly scary need to reformulate their guiding conceptualizations of the law. We face a time of choice.

Some choose to respond by advocating a return to that consciousness which preceded positivism and competed with it during America's first century: the consciousness of natural law, a jurisprudence protective of individual human rights. Professor Richards' assertion of a "major jurisprudential paradigm shift" entailed not only a rejection of the positivist paradigm, but also his identification of the "natural law paradigm of rights" as the model to which legal philosophy is shifting.[8] Professor Richards is in good company. Other scholars who champion a normative, rights-oriented perspective of law include Ronald Dworkin and John Rawls.[9]

The goal of rebuilding a normative moral foundation for law

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4. Richards, *Human Rights as the Unwritten Constitution: The Problem of Change and Stability in Constitutional Interpretation*, 4 U. DAYTON L. REV. 295 (1979). *See also* Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828 (1979).

5. Hart, *The Shell Foundation Lectures, 1978-1979 Utilitarianism and Natural Rights*, 53 TUL. L. REV. 663 (1979).

6. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 184-205 (1977); E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY 74-94, 158-78 (1973).

7. *See* Feinman, *The Role of Ideas in Legal History*, Book Review, 78 MICH. L. REV. 722, 723 (1980) (G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT).

8. Richards, *supra* note 4, at 295.

9. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); J. RAWLS, A THEORY OF JUSTICE (1971).

is admirable, but a return to the natural law paradigm smacks of retreat. As H.L.A. Hart has observed: "I do not think a satisfactory foundation for a theory of rights will be found as long as the search is conducted in the shadow of utilitarianism."[10] Hart's observation forces us to question whether, in our rejection of positivism, we can ignore the similar rejection of natural law that originally led to positivism. Can we simply erase the criticisms of natural law that have embedded themselves in our legal consciousness?[11] An increasing number of American legal thinkers think not. Eschewing the rigidity of an unrealistic natural law orientation as well as the moral corruption of positivism, a discernible group of scholars has turned to a third sort of legal epistemology.[12] Professor Rosenberg belongs to this third group, and his treatment of Thomas Cooley should be read with a recognition of its perspective.

The emergence of this perspective in a growing body of literature is characterized by a self-conscious reliance on the methods of the European social theorists to demonstrate both the death of classical liberalism, especially as manifested in the Western capitalist state, and the requisites for any epistemology designed to replace liberalism.[13] Social theory may be described as:

> the study of society whose characteristic features began to appear in the writings of Montesquieu, his contemporaries, and successors and which reached a sort of culmination in the

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10. Hart, *supra* note 4, at 846.

11. Can we, for instance, return to a consciousness that accepts pre-Revolutionary English common law as dispositive of most questions not governed by legislation?

> This [view] was, of course, a natural consequence of the belief, firmly held by all colonial legal theorists, that the English common law was declaratory of the law of nature. As it was put by Joseph Quincy, common law rules were "'*founded in principles, that are permanent,* uniform *and* universal.'"

McClain, *Legal Change and Class Interests: A Review Essay on Morton Horwitz's* The Transformation of American Law, 68 CALIF. L. REV. 382, 383-84 (1980).

12. Many of these scholars may be identified as members of the Conference on Critical Legal Studies. *See* Lavine, *Legal Scholars with a Social Conscience,* Nat'l L.J., Jan. 7, 1980, at 13. Lavine's description posits a relationship between the Conference and legal realism; to the extent that both the members of the Conference and many New Deal realists exemplify a social reform orientation, the relationship may exist, but the empirical methods of the latter certainly differ from the social theory approaches of the former. *Compare* E. PURCELL, *supra* note 6, *with* text accompanying notes 12-14 *infra* (description of social theory). *See also* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

13. *See, e.g.,* Kennedy, *supra* note 2, at 209-21; R. UNGER, LAW IN MODERN SOCIETY 192-223 (1976).

> works of Marx, Durkheim, and Weber. It first established its identity by contrast to the political thought of the ancients and the Schoolmen. Two features chiefly distinguish it from the earlier tradition: one has to do with its conception of its own aim and method; and the other with a view of the relation between human nature and history. . . .
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> The political philosophy of the ancients was at once descriptive and prescriptive. . . . [T]he method employed by the traditional theory was one to which the distinction between fact and value, descriptive and evaluation, was largely, though not wholly, alien.
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> The contrasts of fact and value, of science and moral judgment, and therefore also of law in the descriptive and the prescriptive sense are among the main themes in the tradition of social theory. . . .
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> . . . A [second] major feature of the outlook against which the classical social theorists rebelled was the notion that there is a universal human nature, common to all men, regardless of their place in history. . . .
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> . . . [S]ocial theory is engaged in a quest for an understanding of the different forms that people's awareness of each other, of nature, and of themselves assume in each kind of social life.
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> . . . If classical social theory has a unity, it is the unity of a common predicament rather than that of a shared doctrine, an agenda of puzzles raised and left partly unresolved.[14]

Among the variants of social theory reflected in current American legal scholarship, two related and frequently overlapping methods seem to dominate. One analyzes fundamental contradictions or antinomies in a dialectic fashion; the other studies structural relationships and their transformations into new configurations.

Duncan Kennedy's recent dissection of Blackstone's Commentaries, for example, is built around a dialectic analysis of the "fundamental contradiction" inherent in the belief "that the

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14. R. UNGER, *supra* note 13, at 3-7. While positivism similarly posits a distinction between fact and value, and generally recognizes no universal human nature, its descriptive focus evades issues of prescriptive substantive justice as well as the relationships among values, history, and the different forms of social organization. *Compare, e.g.*, J. AUSTIN, LECTURES ON JURISPRUDENCE 5-32 (1977), *with* Tushnet, *A Marxist Analysis of American Law*, 1978 MARXIST PERSPECTIVES 96 *and* UNGER, *supra* note 13, at 203-16.

goal of the individual freedom is at the same time dependent upon and incompatible with the communal coercive action that is necessary to achieve it."[15] Roberto Unger's brilliant works similarly analyze a myriad of conflicting visions of reason and desire, rules and purposes, formality and solidarity, objectivity and subjectivity.[16] Professor Rosenberg's treatment of Thomas Cooley's libel decisions likewise traces the dilemmas faced by that jurist to "contradictions within the liberal marketplace view of free expression."[17] Each of these authors employs a dialectic analysis of binary opposites to demonstrate the unsatisfactory nature of the dualistic positions they are studying as well as set the conditions for appropriate alternatives.

The transformation of binary oppositions is also central to structuralism,[18] the other dominant strain of social theory found in the new American jurisprudence.

> Structuralism . . . represents an attempt to discover the elements and relationship of elements which provide the bases for some practice or expression that is under study. The structuralist theorist observes variations in the relationship of these elements of expression and practice, which he attempts to explain by specifying rules by which one element can be transformed into another. Structural analysis, in seeking to discover patterns of regularity in what seem to be incommensurable particular phenomena, thus seeks to simplify the mass of data that constitutes experience and at the same time to confirm the existence of laws governing the variety of experience under examination.[19]

Leading European structuralists include Jean Piaget, a French psychologist, and Claude Levi-Strauss, a French anthropologist.[20] Reliance on structural analysis also may be found in the legal history of Morton Horwitz,[21] the constitutional law of Lawrence Tribe,[22] and the labor law of Karl Klare.[23]

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15. Kennedy, *supra* note 2, at 211. *See also* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

16. *See generally* R. UNGER, LAW IN MODERN SOCIETY (1976); R. UNGER, KNOWLEDGE AND POLITICS (1975).

17. Rosenberg, *supra* note 3, at 50.

18. *See* Hermann, *Structuralist Approach to Legal Reasoning*, 48 S. CAL. L. REV. 1131, 1145, 1150-60 (1975).

19. *Id.* at 1143.

20. *Id.* at 1133.

21. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

22. *See* Tribe, *Toward a Metatheory of Free Speech*, 10 SW. U. L. REV. 237 (1978);

The close relationship between the dialectic study of contradictions and the structural analysis of transformation is apparent in the writings of Mark Tushnet, an organizer of the Conference on Critical Legal Studies[24] whose approach displays a reliance on both.[25] Similarly, Duncan Kennedy's critique of Blackstone borrows from the second tradition as much as the first.[26] Moreover, both strains of social theory, in their identification and use of legal paradigms, may claim a kinship with philosophies of thought that reach beyond the social sciences to include the natural sciences.[27]

Despite this apparent unity of social theory in both the social and natural sciences, "it is difficult to discover even the outline of a single doctrine in the writings of the classical social theorists. . . . [O]ne finds disagreement among the moderns on almost every decisive point."[28] Nowhere is such divergence more apparent than in the writings of American legal thinkers who rely on the methods of social theory. The lack of consistency results chiefly from dramatically differing approaches to the interplay between law and economics. The question appears to be whether reliance on the social theory tradition entails open acceptance of Marxist economics.

Although the American social theorists seem united in their unwillingness to be tied to Western capitalism, they diverge on the degree with which they embrace alternate economic systems in their jurisprudence. Professor Tushnet's use of social theory cannot be divorced from his advocacy of Marxist economics.[29] By contrast, Professors Kennedy and Horwitz employ Marxist methodologies as tools of critical analysis without openly

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Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L.L. REV. 269 (1975).

23. *See* Klare, *Judicial Deradicalization of the Wagner Act and the Origins of the Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

24. *See* note 12 *supra*.

25. *See* Tushnet, *supra* note 14; Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979).

26. Aside from Professor Kennedy's obvious reference to structuralism in his title, and his tribute to both traditions in the list of works that influenced him most, one should compare his use of the concept of mediation with Professor Hermann's description of structuralism. *Compare* Kennedy, *supra* note 2, at 210 n.2, 217-19, 256-72, 368-72, 379-82, *with* Hermann, *supra* note 18, at 1153-59.

27. For one use of legal paradigms, see Kennedy, *supra* note 2, at 363-72. For a brilliant description of the role of paradigms in modern scientific epistemology, see T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

28. R. Unger, *supra* note 13, at 7.

29. *See* Tushnet, *supra* note 14.

embracing utopian Marxist economics as a prescriptive vision.[30]

Professor Tribe's reliance on structural analysis is even further removed from endorsement of Marxist economics. In fact, he counsels against tying law to *any* form of economics when he articulates the premises for his "metatheory of free speech":

> It should be clear that no satisfactory theory of free speech can presuppose or guarantee the permanent existence of any particular social system. For example, a free speech theory must permit evolution from a society built on the ideals of liberal individualism to a society aspiring to more communitarian visions — just as it must permit evolution from communitarianism to individualism. It is of course possible, and indeed it may be common, to disregard the dangers of excessive parochialism and to design theories slanted toward favored conceptions of society; and surely *some* less than universal social vision must underlie *any* theory of law. But any free speech theory too narrowly conceived must either admit of its own self-destruction, as the evolution triggered by speech itself undermines the social forms the theory presupposes; or it must contain boundaries of a highly troublesome sort: boundaries that proscribe as beyond the pale communicative acts that threaten to transform society beyond the limits of its starting premises.
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> As a corollary of this criterion of breadth, it follows that a theory of free speech should not be too confined by the assumptions of any particular form of economic life. . . . Any theory built exclusively on the assumptions of capitalism — or of any other economic system — must therefore be rejected as too narrow.
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> . . . [A] limit on the criterion of *breadth* to which a free speech theory must be held is the criterion of *reality*. One who believes that it would be desirable to break down the capitalist structure of profit and exploitation cannot pretend, in the course of constructing a theory of free speech, that the structure has already been broken down. . . .
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> More generally, a theorist who aspires to a less coercive form of social and economic life than ours must avoid the mistake of wishing coercion out of existence in designing a body of first amendment theory. Paradoxically, the voice of the exploiter must be heard before the transformation to a less coercive

30. *See generally* Kennedy, *supra* note 2; M. HORWITZ, *supra* note 21.

society may occur.[31]

The distance Professor Tribe accordingly puts between himself and the economic systems frequently associated with European social theory pique Professor Tushnet's ire. His recent critique of Tribe's well-known constitutional law treatise[32] is aptly entitled *Dia-Tribe;*[33] in it Tushnet points his dialectic cannon at the treatise "with the aim of showing that its premises are hopelessly contradictory."[34] Labeling Tribe a Burkean conservative,[35] Tushnet engages in self-proclaimed "Tribe-trashing."[36] If his conclusion, which attacks Tribe's "ambition" and brands his treatise as a "corruption,"[37] seems unduly personal, then it only reinforces Unger's observations concerning the lack of consensus among social theorists.[38]

Indeed, given Professor Unger's devastating criticism of both the welfare-corporate state and the revolutionary socialist state in postliberal society,[39] the admiration Tushnet displays for Unger is somewhat puzzling.[40] Unger's treatment of postliberal socialism unmasks its "unwillingness to subject society and nature to ruthless and radical manipulation,"[41] reveals its "assertion of the primacy of collective bonds over individual interests,"[42] and notes its demand of "complete devotion to one's role in present society."[43] This treatment of socialism's attempt "to reconcile industrialism, bureaucratization, and national power with the achievement of an ideal of fraternal or equalitarian community"[44] demonstrates the "schizophrenia" of revolutionary socialism as constantly fluctuating "between participation and centralism," torn "between the trials of its present and the image of its future."[45]

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31. Tribe, *Metatheory, supra* note 22, at 239-41.
32. L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978).
33. Tushnet, *Dia-Tribe,* Book Review, 78 MICH. L. REV. 694 (1980) (L. TRIBE, AMERICAN CONSTITUTIONAL LAW).
34. *Id.*
35. *See id.* at 695, 705, 707-08.
36. *Id.* at 709.
37. *Id.* at 710.
38. *See* text accompanying note 28 *supra.*
39. *See* R. Unger, *supra* note 13, at 193-203, 231-34.
40. *See* Tushnet, *supra* note 14, at 103.
41. R. Unger, *supra* note 13, at 231.
42. *Id.*
43. *Id.* at 231-32.
44. *Id.* at 231.
45. *Id.* at 232-33.

Perhaps Tushnet's esteem for Unger stems from a recognition of the latter's rather unique role among the new social theorists. Professor Unger's *Knowledge and Politics* and *Law in Modern Society* avoid parochialism and achieve a breadth of perspective that transcends both law and economics, enabling the author to present a comprehensive application of social theory to the legal order. Yet its breadth is not what distinguishes Unger's work; rather, what makes his work unique is his willingness to turn the critique of social theory against itself. Using the tools of critical analysis first developed by the Europeans, Professor Unger asserts that a resolution of the problems those methods are designed to answer requires "a redefinition of the very premises upon which social theory asserted its independence"[46] from previous traditions of thought: "the contrast of understanding and evaluation and the denial of a suprahistorical human nature."[47] This assertion relies not only upon a dialectic treatment of antinomies, but also recognizes the inevitable role that the individual structuralist plays in the analysis of contradictory structures. In essence, Unger *sees* that the analyst's consciousness is an important determinant of and limitation upon the analysis itself. He concludes: "To carry out its own program, social theory must destroy itself."[48]

Whether social theory in fact will self-destruct when its methods are employed to analyze specific substantive issues remains to be seen. This brief introduction to Professor Rosenberg's article obviously was intended neither as a description nor an evaluation of its contents,[49] but instead as a mechanism to facilitate the reader's evaluation of an analysis performed in the

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46. *Id.* at 8.

47. *Id.*

48. *Id.*

49. Despite this disclaimer, I commend Professor Rosenberg for his willingness to engage in the analysis of a specific substantive area; too many of the works relying on social theory avoid rigorous treatment of particular areas of the law, leaving the reader stimulated on a theoretical level but unsatisfied with respect to the applicability of social theory to the more focused disputes facing practicing lawyers on an everyday basis. The dialogue between theory and technique, generality and specificity, plays a role in social theory that is perhaps even more important than the role it played in the previous traditions of positivism and natural law. Indeed, if a "new jurisprudence" is the goal of critical social theorists, then they must move even further beyond the descriptive character of the bulk of their work and begin to generate specific prescriptions. *Cf.* Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1344-45 (1979); Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601 (1977).

tradition of the social theorists. Placing that analysis in an epistemological context hopefully brings the question of jurisprudential perspective out of the closet while familiarizing the reader with the emergence of an important trend in American legal thought. The future of that trend presents exciting prospects for those of us left unconvinced by past traditions. Our obligation to respond to the various crises posited by the new American social theorists requires us to fashion a new legal order utilizing better tools for analysis.

It is an obligation not to be taken lightly. As novelist Tom Robbins recently wrote:

> In terms of hazardous vectors released, the transformation of ideas into dogma rivals the transformation of hydrogen into helium, uranium into lead, or innocence into corruption. And it is nearly as relentless.
>
> The problem starts at the secondary level, not with the originator or developer of the idea but with the people who are attracted by it, who adopt it, who cling to it until their last nail breaks, and who invariably lack the overview, flexibility, imagination, and, most importantly, sense of humor, to maintain it in the spirit in which it was hatched. Ideas are made by masters, dogma by disciples, and the Buddha is always killed on the road.[50]

Let us avoid the novelist's trap and remain masters of our ideas as we transform them into realities.

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50. T. ROBBINS, STILL LIFE WITH WOODPECKER 85-86 (1980).