Where the Action Is: Critical Legal Studies and Empiricism

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Critical Legal Studies (CLS), a scholarly project of recent vintage, has attracted wide interest. But the nature of the project is not fully understood, and the implications of a "Critical" approach to legal studies have not been fully realized even by those who participate in the movement. The ideas upon which CLS rests—notions about relationships among the ideas we hold about law and society, the structures of social life we are engaged in, and the actions we take—present a challenge to current legal scholarship as well as to the organization of American society. These ideas derive from a variety of sources in legal and social theory, and not all of them are fully worked out or easily understood. This essay is an effort to clarify some of these ideas and to draw out some of their implications for research on the history, meaning, and impact of law.

* B.A. 1957, University of Wisconsin; LL.B. 1961, Yale University. Professor of Law, University of Wisconsin. This essay attempts to resolve some of the questions I left unanswered in an earlier article entitled Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law. 11 LAW & SOC'S REV. 529 (1977). This essay was inspired by debates with several of my colleagues in the Conference on Critical Legal Studies and by discussions with Lawrence Friedman, Joel Handler, Austin Sarat, and Bill Whitford about the relationship between the Conference and the "law and society" movement. Many people provided helpful comments on earlier drafts, including Richard Abel, Andrew Altman, Kristin Bumiller, Willard Hurst, Leonard Kaplan, Duncan Kennedy, Karl Klare, Mark Lazerson, Deborah Rhode, Austin Sarat, John Henry Schlegel, Ted Schneyer, Gunther Teubner, and Mark Tushnet. I am especially indebted to Stewart Macaulay, with whom I exchanged ideas at every stage of the project, and Joel Rogers, who read the manuscript with painstaking care and provided numerous critical comments and suggestions. Carroll Seron and Frank Munger, who are engaged in a parallel investigation of the relationship between Critical Legal Studies and empiricism, provided many helpful suggestions. My undertaking of the issue involved was enhanced by an opportunity to debate these issues with them and to read drafts of their paper on this topic. Opportunities to present tentative versions of this essay to the University of Wisconsin Interdisciplinary Legal Studies Colloquium and 1983 Summer Legal History Workshop, the Center for European Legal Policy (Bremen), the European University Institute (Florence), and the University of California-Berkeley Program in Jurisprudence and Social Policy, helped me clarify the ideas. Lee Karlin assisted in the early stage of the research. Mark Cammack participated throughout the project and provided invaluable assistance both in formulating issues and in conducting the research. No one but me is to blame for what resulted from all this interaction.
Part of the dispute within and about CLS involves what appear to be questions of method.\footnote{While there is a lively debate about the relationship between CLS and empiricism, it is extremely difficult to document the various positions that have emerged. This is largely because very little has been written and nothing has as yet been published which explicitly deals with the questions canvassed here: People talk about these matters extensively, but rarely write about them. For one important exception, see F. Munger & C. Seron, Critical Legal Studies versus Critical Legal Theory: An Examination of the Role of Empirical Research in the Conference on Critical Legal Studies (July 21, 1983) (unpublished paper). In this paper, Munger and Seron argue that the method chosen by Critical legal scholars—critique of doctrine—undercuts their message that doctrine is the product of social, economic, and political forces. This very recent and unpublished draft is the only text available on these issues. Partly because of the paucity of texts, but also because of the nature of the issues, I have relied very heavily on extended conversations with proponents and opponents of CLS to develop the ideas presented here, but I make no attempt to document these discussions. Scholars in Great Britain have considered these questions more explicitly, and readers interested in these issues will find a useful analysis in Cain & Finch, \textit{Towards a Rehabilitation of Data}, in \textit{Practice and Progress: British Sociology 1950–80}, at 105 (1981). For one Critical scholar’s views of “social science” in American Legal Studies, see Tushnet, \textit{Post-Realist Legal Scholarship}, 1980 Wis. L. Rev. 1383, 1397.} Some dissenters question whether Critical scholarship can produce valid knowledge about law in society because the method Critical scholars employ stresses the study of appellate cases and other indicia of legal doctrine, but overlooks “empirical” evidence of the social “impact” of law or the behavior of legal actors. On the other hand, people within the CLS movement sometimes attack research that focuses on attitudes, behavior, and impact as a form of “social science mystification” that hides the true nature of social relations and the real importance of law in society. Participants in this debate seem to be arguing about method, and particularly about the value of “empiricism” in legal studies.

Although one could construct a full latter-day \textit{methodenstreit} out of these debates and find echoes of the arguments that have split the German social science community from Max Weber’s day to the present,\footnote{See generally T. Adorno, J. Habermas, H. Pilot & K. Popper, \textit{The Positivist Debate in German Sociology} (G. Adey & D. Frisby trans. 1976).} my purpose is different. Behind the current discussion of method lies a much more interesting set of questions about the nature and function of law in modern society and the relationship between legal ideas and social action. CLS has contributed to the eternal debate on these matters, and one can learn something about that contribution by starting with what appear to be questions of method.
I. The Critique of Legal Order

I shall argue in this essay that CLS both continues and challenges an older tradition in legal studies. This tradition, which I call the "critique of legal order," is an outgrowth of American Legal Realism and one of the sources of the "law and society" movement that has produced so many valuable studies of what actually occurs in our legal life.

The idea of a legal order, a central concept in the Western tradition of social thought about law, has been given many names. As I use the term "legal order," it is similar to Weber's concept of formally rational modern law,¹ Mensch and Kennedy's classical legal consciousness, ² and Selznick and Nonet's autonomous law.³ Following Unger, I use the term to describe the view that four conditions prevail in a society.⁴ First, the law is in some sense a system, that is, a body of concepts ("doctrine") that, properly interpreted, provides an answer to all questions about social behavior (including the answer that the law does not affect that behavior). Second, a form of reasoning exists that can be employed by specialists to generate necessary answers from doctrine. Third, this doctrine reflects a coherent view about the basic relations between persons and about the nature of society; Unger calls this a "defensible scheme of human association."⁵ Finally, to a significant degree, social action reflects norms generated by the legal system, either because the actors internalize these legal norms, or because threats or actual coercion forces the actors to abide by them.

The critique of legal order challenges the idea that a legal order exists in any society.⁶ The critique is based on four principles: inde-
terminacy, antiformalism, contradiction, and marginality. First, the critics assert that while there is clearly a body of stuff that we can call legal doctrine, it is not a "system." The doctrine neither provides a determinant answer to questions nor covers all conceivable situations. This is the principle of indeterminacy. Second, the critics reject the idea that there is an autonomous and neutral mode of "legal" reasoning and rationality through which legal specialists apply doctrine in concrete cases to reach results that are independent of the specialists' ethical ideals and political purposes. This is the principle of antiformalism. Third, the critics reject the view that the doctrine contains a single, coherent, and justifiable view of human relations; rather, they see the doctrine as reflecting two or even more different and often competing views, no one of which is either coherent or pervasive enough to be called dominant. This is the principle of contradiction. Finally, the critics note that even under those circumstances in which a consensus can be formed about the norms of the law, there is no reason to believe that the law as such often or even frequently is a decisive factor in social behavior. This is the principle of marginality.

The critique of legal order presents a challenge to legal scholarship. If law is indeterminate, all scholarship on what the law is becomes a form of advocacy rather than a "neutral" or "scientific" activity. If there is no distinct form of legal reasoning, scholarly argumentation about the law blends into political and ideological debate. If the stuff of legal doctrine is, by its nature, contradictory, then legal argumentation can find no grounding in the materials of law itself. Given good advocates and argumentation limited to material in the doctrine, all lawsuits and scholarly debates about the law should end in a tie. And if law is marginal, then whatever normative arrangements govern social life must be worked out extralegally, or, at best, "in the shadow of the law." Moreover, since law is indeter-

10. Unger, supra note 7.
minate, contradictory, and a part of political and ideological debate and struggle, "law" itself is not something hard but rather an obscure and vague source of normative guidance. The law, in whose shadow we bargain, is itself a shadow.

Those who accept the critique of legal order can find it either paralyzing or exhilarating. Although the critique seems to deny the validity of some kinds of legal scholarship, it opens up many possibilities for new scholarly directions. This essay explores some possibilities and considers the relationships among them. One of its themes is the importance of holding all the elements of the critique together as one pursues its implications. I fear that many in the Critical movement have latched onto one or two of these ideas and forgotten the rest. To do that would, in my view, be to go down a dead end. So this essay is really about what it would mean seriously to follow out the full implications of indeterminacy, antiformalism, contradiction, and marginality all at once.

II. WHAT IS THE MEANING OF "EMPIRICISM" IN THE DEBATE OVER CRITICAL LEGAL STUDIES?

Whatever meanings "empiricism" may have to outsiders, it has taken on particular—and often polemic—meanings in the arguments among Critical scholars and between them and others who work within the broad framework set by the critique of legal order. Moreover, as we look more closely at the debate itself, we can see that "empiricism" is used in distinct ways. The first task is to sort out these various meanings.

The debate involves people who are studying the law; one can imagine that when they talk about "empiricism" they are referring to certain techniques such as surveys, interviews, and multivariate analyses to be used in this effort. That is, to be sure, at least in part what they are doing. But the debate seems to be about something else as well: Something larger seems to be at stake.

This is clear when we look at the way some people in CLS think about the techniques of empirical inquiry. These people express hostility towards empiricism because they think it is associated with determinism and positivism.

Determinism is the view that fundamental laws govern the social world. Social life, like the interaction of molecules and the rotation of planets, obeys certain laws. These laws give society its deep logic and exist irrespective of our wills. Social science, in this view, reveals the objective conditions which determine our fate.
Positivism is the view that statements about facts differ radically from other statements and that empirical social science can consist only of statements about facts.\textsuperscript{13} Positivists include those who favor grand theory as well as those who set their sights on more modest propositions of the middle range.\textsuperscript{14} They may include those who style themselves as structural functionists and those who espouse some version of Marxism.\textsuperscript{15}

For positivists, scientific knowledge is a set of generalizations about facts. The ultimate arbiter of any theory is the facts: Knowledge evolves through an iterative process by which we test general statements against what we can demonstrate to be the case. Methods of empirical inquiry allow us to determine if the laws we hypothesize adequately describe the facts we can apprehend. Theory and method are defined in this context. We must state laws in ways that allow them to be falsified by factual inquiry (theory), and we must have ways to measure the facts against the relationships posited by the theory (method).

The task of empirical social science thus defined is demanding. The first challenge is getting the right facts: We always must decide whether something we know about social life is central and representative or is merely peripheral and unusual. We must also separate what the observer wants to believe (bias) from the real facts. A second challenge is to set forth knowledge of the facts sparingly; we must reduce the information we receive about empirical reality to a comprehensible and testable set of propositions.

Some people in CLS who attack what they call “empiricism” believe they are challenging both positivism and determinism. They think that the search for the facts and the use of various methods to get the facts reveals a commitment to reduce all knowledge to statements about an empirical world and an acceptance of some form of determinism. This is the first sense in which the term “empiricism” is used.

Many who defend the search for facts and the use of “empirical” methods in legal scholarship would give a very different account of what they are doing. They would claim that their interest in factual inquiry derives from practical concerns, not from an epistemological commitment to positivism or a belief in determinism. For these

\textsuperscript{13} See generally J. Alexander, Theoretical Logic in Sociology (1982).
\textsuperscript{14} Id. at 5-15.
\textsuperscript{15} For a critique of positivism in Marxist thought, see A. Wellmer, Critical Theory of Society (J. Cummings trans. 1971).
scholars, factual inquiry in legal studies is necessary because law cannot be defined other than by the difference it makes in society, and empirical inquiry is necessary to determine what that is. This account of the reasons for empirical inquiry should be called “pragmatism.”

Pragmatists reject the notion that the goal of knowledge is to represent reality. Where positivists search for a method that will put us in touch with the way things “really” are, pragmatists look for ways to talk about the world that are useful for specific purposes. And pragmatism is the antithesis of determinism, for it assumes that we can construct the world we want. On the pragmatic account, knowledge means understanding the consequences of holding the views we have and recognizing what it takes to achieve the goals we espouse. While positivists look for the facts because they are the “true” reality and determinists think the facts represent the “only” reality, pragmatists seek to explore the way our provisional worlds work so that they can determine the consequences of the concepts we employ and the projects in which we are engaged.

As an example of the pragmatic approach, assume that I want to be sure that my faculty hires more women. To further this interest, I will try to learn how the appointments process really works by conducting what we should properly call an “empirical” inquiry. I will listen to debates, identify various coalitions, understand how they react to various arguments, and plan my strategy accordingly. I do not hope to develop any “iron law of faculty politics,” but if I get my candidate appointed, who cares?

For a second example, assume that I favor broad access to the courts by social movements that seek to advance what I consider to be worthy aims. Someone comes along and claims that our litigation rates are soaring and are now the highest in the world, that our

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16. The idea that this rationale for empiricism should be called “pragmatism” was first suggested by conversations with my colleague Bill Whitford, who insisted that empirical inquiry is a necessary part of deciding what to do. Kenneth Casebeer reminded me that the turn toward empiricism in legal studies was influenced by the Legal Realists’ adherence to pragmatism as a philosophical position. For the Realists, law could only be assessed in its operation. See generally Casebeer, Escape from Liberalism: Fact and Value in Karl Llewellyn, 1977 Duke L.J. 671. Richard Rorty has characterized pragmatism as antiessentialism: For pragmatists, the truth of concepts can be defined only in terms of the practical implications of holding them. R. RORTY, THE CONSEQUENCES OF PRAGMATISM 162-63 (1982). Pragmatists reject the fact-value dichotomy underlying positivism, id., and the notion of an overarching ahistorical structure underlying determinism, id. at 204. “For the pragmatists, the pattern of all inquiry—scientific as well as moral—is deliberation concerning the relative attraction of various concrete alternatives.” Id. at 164.

17. See note 16 supra.
courts are being called on to handle issues never before resolved in litigation and beyond their inherent capabilities, and that therefore we should discourage various litigants from using the courts. I will want to use whatever evidence I can gather to test these claims. I may analyze litigation statistics over time and compare them with statistics from other nations; I may look for historical precedents for the kinds of litigation I support; and I may interview judges, lawyers, and court administrators to see how they interpret what is going on. All this "empirical" inquiry may produce a counterpicture of what is going on that I can use to defend policies I favor.\textsuperscript{18}

Finally, assume I find it distasteful that sometimes sellers bilk consumers, and someone suggests passing a consumer protection law such as the one in force in Alabama. Before I sign on, I may want to go to Alabama and investigate. I will want to talk to lawyers, people in the Attorney General's office, and consumers. To be sure that consumers can and do use the law, I may want to conduct a statistically valid survey of Alabama consumers. If I discover that no one knows about the law, that it is too expensive to use, or that lawyers dissuade consumers who want to sue local merchants, I will decide that this law does not foster the interest I favor.\textsuperscript{19} In all these examples, I have used empirical methods pragmatically to advance a chosen goal. This, then, is the second sense in which the term "empiricism" can be used.

It is, however, necessary to introduce yet a third way in which "empiricism" is being used in the debate about Critical Legal Studies. This third sense uses the term to refer generally to nondoctrinal study of the law. The doctrinal tradition, which goes back at least to Langdell's reforms at the Harvard Law School, rests on the premise that the proper study of law consists in the analysis of legal concepts, rules, and principles, mainly through cases.\textsuperscript{20} For generations, scholars have struggled to overcome the limits of doctrinal purism in legal studies and to "decenter" the study of cases, rules, and principles. Some who argued for nondoctrinal studies probably wanted to

\textsuperscript{18} See Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society, 31 U.C.L.A. L. REV. 4 (1983).

\textsuperscript{19} This example is modeled on Macaulay, Lawyers and Consumer Protection Laws, 14 LAW & SOC'Y REV. 115 (1979).

eliminate doctrinal research altogether, while others sought to add studies of the law in action to the doctrinal tradition of studying law in the books.  

Whether the nondoctrinalists wanted to replace or merely supplant the older tradition, many tended to think of the new scholarship they espoused as "empirical" and to believe that this term defined a bright line between their activities and those of the doctrinal purists against whom they were rebelling. This use of the term may have created some confusion since nondoctrinal studies included a wide range of research methods, so that the term "empirical" was probably used more in a negative sense (not rule-centered and doctrinal) than to delineate a particular approach to law or knowledge.

I can only speculate on why empiricism and nondoctrinal studies were equated. Three factors probably explain the attraction of the label "empirical." First, there was the influence of pragmatism on the Legal Realists' definition of law. Legal Realism was the major inspiration for the nondoctrinal tradition in legal studies and the legal Realist conception of law pointed to the need to understand law "in action"—as it was actually applied and affected people's lives.  

Second, there was the recognition that legal norms often only affected social life indirectly and that doctrine affected what goes on in society in an indirect and uncertain fashion. Those scholars who grasped this principle of legal marginality felt that it was necessary to leave the library and get "the facts" about what really goes on in areas allegedly affected by legal rules. It is part of the folklore of the University of Wisconsin Law School, where this tradition has flourished, that Frank Remington argued that criminal law should be studied in the patrol car and that Stewart Macaulay echoed him by claiming that business contract law should be looked at in the offices of corporate purchasing agents. Riding in the patrol car or visiting the GM purchasing agent was empirical; parsing cases on the *Miranda* rule or analyzing the doctrine of consideration was not.

A third factor that could explain the equation of empiricism with

21. For an example of this effort to delineate an alternative nondoctrinal tradition, see Abel, Book Review, 26 Stan. L. Rev. 175 (1973). The purpose of what Abel calls "law books" is to rationalize (in the Weberian sense) legal doctrine, that is, to state, explain, organize, and criticize legal rules according to currently acceptable legal criteria. Such legal rationalization is a part of the professional legal enterprise. Law books are legal scholarship produced to meet the demands of the functioning legal system.

By contrast, the common feature of all "books about law" is their detachment from the professional enterprise; their objectives lie outside the legal system. Books about law are a reflection upon the whole activity of which law books are a part.

22. Casebeer, supra note 16.
the nondoctrinal tradition in legal studies lies in the historical circumstances under which this newer approach to legal studies emerged. In the doctrinal tradition, the "science" of law was defined as the study of rules and principles, largely through analysis of cases. As John Henry Schlegel has pointed out, this definition of the province of legal study gave the law professor a clear and exclusive domain within the university for his work: No other field could claim competence to study "pure law." Moreover, this move identified the new "science" of law with a methodology (case analysis) with which lawyers were thoroughly familiar.\textsuperscript{23} It is only natural that when the nondoctrinal rebels sought to escape from this approach, they had to seek a new definition of their domain of study and develop an alternative set of methods. An alliance with the social sciences offered one solution to this problem. If the study of law no longer could be the study of doctrine, it had to be part of the study of society. The interest of the Legal Realists and their progeny in social science is well known; in the heyday of Realism there was great interest in merging law and social science.\textsuperscript{24} When this alliance was being forged the social sciences in America were already moving in a positivist direction, and by the time the nondoctrinal tradition began to take definitive shape after the Second World War, the positivist orientation in the social sciences had reached a zenith.\textsuperscript{25} In this approach, theory was defined as statements concerning factual regularities, and method as techniques to validate theory by testing it against the facts. The alliance with the social sciences provided the nondoctrinalists with an answer to the problem of domain and method, but it was a positivist answer which defined the new science of law as empirical.\textsuperscript{26}

\textsuperscript{23} Schlegel, supra note 20.

\textsuperscript{24} John Henry Schlegel has provided us with a fascinating account of the early years of the alliance between lawyers and social scientists. See Schlegel, American Legal Realism and Empirical Social Science: From the Yale Experience, 28 Buffalo L. Rev. 459 (1979).

\textsuperscript{25} For a discussion of positivism in American social science in the postwar period, see J. Alexander, supra note 13, at 5-15.

\textsuperscript{26} Part of the appeal of the positivist definition of science may have been that it offers a new definition of "objectivity" lost when the reformers jettisoned the objectivity of legal formalism. Munger and Seron argue that one of the reasons early nondoctrinalists found positivist social science attractive was that this brand of thought seemed to promise that there would be scientific and thus objective solutions to the social problems the law dealt with. In this account, the alliance with social science served as a way to avoid the politicization of legal scholarship, which some feared was a necessary implication of the Realists' rejection of legal formalism. F. Munger & C. Seron, supra note 1, at 14-16. If this is true, then it might be possible to see the Critical Legal Studies movement as the first time post-Realist legal scholars have been able fully to accept the implications one must draw from Realism, namely that no clear line can be drawn between legal scholarship and politics. It also allows us to speculate
It is not surprising, therefore, that the nondoctrinalists, influenced by a pragmatic concept of law, aware of the fact that legal rules often were only of marginal impact in daily life, and affected by positivist concepts of knowledge imbibed through contact with their social science allies, tended to think of themselves as "empiricists" and to champion empirical legal studies. It is in this way, I suggest, that this third sense of the term "empirical," as a particular approach to the study of law, entered into the vocabulary of legal scholarship and thus into the debate about Critical Legal Studies.

In addition to emphasizing the principle of marginality, the creators of the nondoctrinal tradition adopted the techniques and perspectives of the American social scientists with whom they formed an initial alliance. Then, as today, many social scientists who became interested in the study of law accepted some version of the positivist account of social knowledge. They defined "theory" as empirical theory in the positivist sense, and they placed great emphasis on standard "empirical" methods (surveys, interviews, analyses of statistics) for validating theory. So at least some scholars came to equate the term "empirical legal studies" with the nondoctrinal tradition. Thus, this third sense of the term has entered into the debate over CLS.

III. CONFUSION IN THE DISCUSSION OF EMPIRICISM IN LEGAL STUDIES

The debate over empiricism and CLS is confused, in part, because these three meanings of empiricism get mixed up. Some who don't like Critical Legal Studies and do like "empiricism" in the third (legal studies) sense note that Critical scholars seem to be study-

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27. It would be misleading to suggest that the "nondoctrinal" revolution ever swept the law schools, or that the "empirical" tradition has flourished in the legal academy. On the contrary, the struggle to "decenter" legal rules has been an uphill fight, with only modest gains to date. Numerous scholars have lamented the failure of the law schools to develop a nondoctrinal approach. Robert Gordon notes that legal scholarship is particularly resistant to what he calls "historicism," the idea that legal ideas, institutions, and structures are changeable. See Gordon, supra note 8. Recently, scholars as diverse as Stewart Macaulay and Richard Posner have lamented the continuing hostility of the law schools to the empirical and social scientific temperament. See Macaulay, Law Schools and the World Outside Their Doors II: Some Notes on Two Recent Studies of the Chicago Bar, 32 J. LEGAL EDUC. 506 (1982); Posner, The Present Situation in Legal Scholarship, 90 YALE L.J. 1113 (1981). For a proposal to deal with the problems, see Trubek, A Strategy for Legal Studies: Getting Back to Work, 33 J. LEGAL EDUC. 586 (1984).

28. For a cogent example, see Abel, supra note 21.
ing legal doctrine, as, in a sense, they are. Since by definition empirical legal studies excludes the study of doctrine, these people feel they can reject the CLS movement as "nonempirical" and therefore incapable of providing an adequate account of law in society. Others who like CLS but dislike positivism and determinism conclude that all people who interview, analyze statistics, conduct surveys, code records, and so on must be positivist determinists. Since these people see the reductionist view of knowledge as a mystification of social life and the determinist account of society as a barrier to transformative politics, they reject what they take to be empirical legal studies.

Most of this argumentation is simply wrong. On the one hand, there is no reason to identify nondoctrinal methods of research in legal studies with positivist determinism. Although positivists do exist, and some people who analyze litigation rates may believe they are in touch with unalterable aspects of reality, most scholars who do such research probably are aware of the limited, provisional, and pragmatic nature of the knowledge that it yields. On the other hand, it is silly to charge that CLS is doctrinal in the sense in which that term is used in the debate. This argument confuses the object of study with the purpose of study. Critical legal scholars spend much of their time reading doctrinal materials and writing about cases and statutes, but they do not try to discover what the law "is." Nothing, I submit, is further from either their intentions or the results of their work. To suggest that somehow Duncan Kennedy and Karl Klare are doing the same thing that Langdell and Williston did is just nuts.

On the contrary, if we classify the Critical scholars according to criteria employed by the debate over legal scholarship, they clearly fall on the empirical side of the line. That is, if we define empirical

29. Donald Black, a leading practitioner of empirical Legal Studies, identifies himself as "an uncompromising adherent of the positivist approach." Black, Book Review, 78 Am. J. Soc. 709 (1972). Black asserts that "law can be seen as a thing like any other in the empirical world." Black, The Boundaries of Legal Sociology, 81 Yale L.J. 1086, 1091 (1972). He lists three basic principles of a positivist social science of law. First, "science can know only phenomena and never essences. The quest for the one correct concept of law or for anything else 'distinctively legal' is therefore inherently unscientific." Id. at 1092 (footnote omitted). Second, "every scientific idea requires a concrete empirical referent of some kind . . . . Accordingly, insofar as such ideals as justice, the rule of law, and due process are without a grounding in experience, they have no place in the sociology of law." Id. (footnote omitted). And finally, "value judgments cannot be discovered in the empirical world and for that reason are without cognitive meaning in science. . . . Science is incapable of an evaluation of the reality it confronts." Id. (footnote omitted). The aim of sociology of law should be to develop a general theory of governmental social control, "a theory that would predict and explain every instance of legal behavior." Id. at 1087. Black himself offered such a general theory in D. Black, The Behavior of Law (1976).
legal studies as research on what the law does in society rather than what the law "is," then Critical scholars are doing empirical research. Later, I will question the doctrinal-empirical dichotomy itself, but first I want to defend the claim that, at least in terms of the distinction used in these debates, CLS is empirical.

What is the basis for differentiating between doctrinal and empirical legal studies? The distinction is similar to that between theology and the sociology of religion. Theologians develop ideas about the world and humanity from within an authoritative tradition. Sociologists of religion look at theological production from the outside, attempt to account for it, and try to trace its impact on society. Similarly, while doctrinalists try to define what the law is and should be, empiricists look at the operations of the law from the outside, asking what causes the law to develop as it does and what impact the law has. Moreover, empiricists, like sociologists of religion, have a potentially subversive effect on their object of study. Remember that one source of the interest in empirical research in law was the pragmatic view that to-speak of a legal rule in isolation, as opposed to in application, or as a factor in social relations, was to speak nonsense; and certainly the sociology of religion only flourishes when religious absolutism has waned. Because both enterprises question the self-understanding of the activity they study, they may appear to threaten it.

Empiricists not only look at the law from the outside, but also make problematic what is taken for granted by those whose activities they study. Stewart Macaulay's *Non-Contractual Relations in Business: A Preliminary Study*, one of the classics of the empirical legal studies tradition, juxtaposes the assumptions built into the law of contracts with an empirical investigation of what businessmen do. While the law of contracts presupposed that commercial relations are established explicitly in advance, Macaulay found that businessmen rarely plan in advance for the long term implications of their transactions. Where the law of contracts presupposed that breakdowns in business relations will be resolved in courts through the application of the rules of contract law, Macaulay found that courts were rarely used by businessmen with disputes.

CLS follows this tradition: Analyzing the law from the outside, it

30. See, e.g., 2 M. Weber, supra note 3, at 399-634 ("The Sociology of Religion").
32. Id. at 56-60.
33. Id. at 60-62.
makes problematic the fundamental assumptions of the object of study, and it examines the relationship between legal ideas and social action. The focus of these studies, however, is rather different from much of the "empirical" work done heretofore. This difference of focus helps explain the confusion over the appropriate label for this newer tradition.

IV. THE CRITIQUE OF LEGAL THOUGHT

Critical studies in the United States include a wide range of scholarly activity. Despite this diversity, much of the writing produced by CLS focuses on the ideas in legal doctrine or legal scholarship. Since it is this work—the critique of legal thought, if you will—that has generated the debate I am analyzing, I shall focus on it. Critical scholars have written articles about major legal decisions in areas such as labor and antidiscrimination law, about doctrinal concepts in tort, contract, and public law, and on the presuppositions of legal scholarship itself. Unlike the judges and scholars whose work they study, those who critique legal thought do not try to determine, for example, the appropriate rules for wildcat strikes or whether it is necessary to prove discriminatory intent as a condition of liability under antidiscrimination laws. Rather, the Critical legal scholars seek to expose the assumptions that underlie judicial and scholarly resolution of such issues, to question the presuppositions


38. See, e.g., Frug, The City as a Legal Concept, 93 HARV. L. REV. 1057 (1980); Tushnet, supra note 11.

39. Gabel, Reification in Legal Reasoning, 3 RESEARCH L. & SOC. 25 (1980); Kennedy, supra note 11; Tushnet, supra note 8; Tushnet, supra note 1.
about law and society of those whose intellectual product is being analyzed, and to examine the subtle effects these products have in shaping legal and social consciousness.

While Critical legal scholars take doctrine seriously, they also think they are examining the social role of law. The Critical scholars clearly believe that when they conduct a critique of legal thought, they are not doing doctrinal research, but rather are looking at law from the outside and tracing relationships between law and social action. Moreover, they see themselves as working out the implications of indeterminacy, antiformalism, contradiction, and marginality.

This type of critique puzzles those who visualize a clear boundary between doctrinal and empirical legal studies. All legal empiricists can see is that the Critical scholars have abandoned the patrol car for the library. Instead of studying the gap between the law in the books and the law in action\textsuperscript{40} or looking for extralegal sources of normative order,\textsuperscript{41} the Critical scholars simply study the law (or worse, they study studies of the law). Given this approach, how can the Critical legal scholars claim to be part of the nondoctrinal tradition?

A. Law, Meaning, and the Construction of Society

The answer lies in a view of social relations. For those who engage in the critique of legal thought, ideas in some strong sense can be said to "constitute" society. That is, social order depends in a nontrivial way on society's shared "world views." Those world views are basic notions about human and social relations that give meaning to the lives of the society's members. Ideas about the law—what it is, what it does, and why it exists—are part of the world view of any complex society. These ideas form the legal consciousness of society. The critique of legal thought is the analysis of the world views embedded in modern legal consciousness.

Karl Klare states this program with clarity. He describes capitalist society as a "constructed totality" in which ideas, institutions, and power relations interact in complex ways. Looking at his own speciality, American labor law, Klare describes this area of the law as the embodiment of a "moral and political vision," which contains a "powerfully integrated set of beliefs, values, and political assumptions" (i.e., a world view) and which serves as a "legitimating ideol-

\textsuperscript{40} See Abel, Redirecting Social Studies of Law, 14 LAW & SOC'Y REV. 805 (1980).
\textsuperscript{41} See, e.g., Galanter, Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law, 19 J. LEGAL PLURALISM 1 (1981).
ogy that reinforces the dominant institutions and hegemonic culture of our society."42 The task of "Critical labor law," he suggests, is to expose the world view encoded in labor law doctrine.43

Klare and other Critical legal scholars define their work largely as the analysis of ideology.44 By studying legal doctrine from this perspective, the Critical scholars are examining the ways in which lawyers produce ideological pictures and the ways in which these pictures influence social relations. Seeing the critique of doctrine as the study of ideology should clear up, for those who haven't been able to work it out, the difference between Corpus Juris Secundum and The Politics of Law.45 It might even lead one to conclude that CLS is really in the mainstream of social science, for ideology is a traditional field of social research.

CLS, however, is not merely the study of ideology. There are significant differences between the typical product of CLS and much of the sociological research on ideology. Take as an example of the latter Max Weber's classical study of the relations between world views and domination in his monograph The Religion of China.46 Weber analyzed the relationship between the world views of Confucianism and Chinese political and economic structures. Weber accepted the view that societies are held together by constructed realities of meaning. In The Religion of China, he showed that the basic religious and ethical ideals of Confucianism created a world of social meaning in which the domination of the gentry or mandarin class was seen as both self-evident and necessary. To put it in the language of CLS, Weber saw Confucianism as a "moral and political vision" and demonstrated how it "legitimated the hegemony" of the gentry who were the dominant "class" in Imperial China. But while Weber's analysis helps us to understand traditional Chinese society,

42. Klare, Critical Theory, supra note 34.
43. Id. at 76.
44. See, e.g., Freeman, Antidiscrimination Law, supra note 35, at 110–84 (antidiscrimination law as legitimation of the reality and ideology of class society); Gabel, Reification in Legal Reasoning, 3 Research L. & Soc. 25, 44–46 (1980) (legal reasoning creates a false and ideological picture of social relations); Kennedy, Legal Education as Training for Hierarchy, in The Politics of Law, supra note 4, at 40, 44–46 (analyzing the ideological content of legal education). For a general discussion of Critical Legal Studies and the analysis of ideology, see A. Hunt, The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law (September 1983) (unpublished lecture delivered at Amherst College, Amherst, Mass.).
he was obviously uninterested in criticizing Confucianism's cosmology or its related ideas concerning social structure and the state.

The project of CLS is quite different: While Critical legal scholars seek to show relationships between the world views embedded in modern legal consciousness and domination in capitalist society, they also want to change that consciousness and those relationships. That is the Critical dimension in Critical legal scholarship. In this scholarly tradition, the analysis of legal consciousness is part of a transformative politics. This is what distinguishes CLS from traditional social science.

B. The Critique of Legal Consciousness and the Transformation of Society

The idea that legal scholarship can be a kind of transformative political action is central to what I have called the critique of legal thought. It represents an important part of the CLS tradition. But it is an idea that is not well understood. And the views it rests on have not been fully worked out, even by those who engage in this practice.

In this section, I shall set out a provisional account of the views that underlie Critical legal scholarship. This account is provisional for two reasons. First, although it is based on a study of the work of the Critical scholars, it is strictly my own, not a collective view to which all currently subscribe. More important, the account leaves many issues unresolved. But it does help us see how the Critical analysis of legal thought might contribute to social change.

It will be useful to start with a more familiar notion of the relationship between legal scholarship and politics. There is an old tradition of instrumental radicalism in the law schools; legal scholars who sympathize with specific social movements (unions, blacks, or women) have helped foster the goals of these movements by lending their legal talents to specific struggles. These radical instrumentalists may participate in litigation or write doctrinal articles justifying results thought to provide instrumental gains for the movements they support.

Critical legal scholars do not reject radical instrumentalism; indeed, many engage in it. But the movement also involves a very different set of practices that are designed to change society through the transformation of legal consciousness.

47. For an extended discussion of the relationship between CLS and transformative politics, see Unger, supra note 7.
48. See notes 35–41 supra and accompanying text.
The consciousness of any society rests on its set of world views, on basic (and sometimes implicit) notions about what is natural, necessary, just, and desirable. These world views lie behind all specific justifications of unequal power, social hierarchies, and differences in opportunity. They provide an explanation for what would otherwise be inexplicable or intolerable. They give to society what is most fundamental: meaning. The worlds of meaning that we construct in turn shape and channel what we do and do not do. In this view, social relations and world views become inseparable. That is why Critical scholars sometimes say that consciousness constitutes society, rather than merely mirroring or distorting social relations.49

Legal consciousness is that aspect of the consciousness of any society which explains and helps justify its legal institutions. The legal consciousness of a society is the way in which that society integrates understanding of legal order with other ideas which give meaning to its social world. Taken most broadly, legal consciousness includes all the ideas about the nature, function, and operation of law held by anyone in society at a given time. Legal consciousness incorporates and is largely shaped by, but is not limited to, the ideas held by the legal profession: Public understanding and evaluation of law is as much a part of our legal consciousness as are the most refined views of the most eminent scholars or the most comprehensive decisions of the Supreme Court.

If society is in some sense constituted by the world views that give meaning to social interaction, then to change consciousness is to change society itself. This is the central tenet of the CLS creed, the grounding for its belief that scholarship is politics. For if scholarship can change consciousness, it is not merely a move towards an ultimate transformation: It is the real thing.

But how can scholarship affect consciousness? What can scholars hope to do to change the way we see and value the world? Critical scholars base their answers to these questions on two assumptions. First, world views are given meaning and constitutive power by a claim to be true. Second, because every world view is hostage to its claim to be true, its constitutive force can be undermined if this claim can be refuted. Because there is a kernel of truth in any world view that has become dominant in any society, the refutation can take place within terms partially set by the existing tradition itself.

49. For a general statement of this perspective on consciousness and society, see Gordon, New Developments in Legal Theory, in The Politics of Law, supra note 4, at 281.
As Albrecht Wellmer, a leading exponent of the Frankfurt School’s Critical theory of society, has argued:

Critical theory is derivable from a notion of the “good life” already available to it as part of the socio-historical situation it subjects to analysis; which, as the notion of an acknowledgement of each individual as a person by every other individual, and as the idea of a noncoercive communal human life of dialogue, is a draft meaning of history already fragmentarily embodied in a society’s traditions and institutions: a draft meaning which it applies critically in opposing a society and its dominant forms of self-understanding.\(^{50}\)

If one examines the work of the Critical legal scholars, one can find evidence that they adopt this view of the relationship between scholarship and transformation. Karl Klare is most explicit when he argues for Critical examination of the ideological (i.e., false) aspects of labor law doctrine:

The mission of all Critical social thought is to free us from the illusion of the necessity of existing social arrangements. The more total the criticism, the greater the emancipation. . . . The critique of labor law as ideology is therefore an indispensable component of the utopian project of experiencing in thought and in social life the radical disintegration of the intellectual and institutional constraints of capitalist society.\(^{51}\)

Klare and others share the view that scholarship can bring to light the world views encoded in modern legal consciousness and expose that which is false. When this is done, the blinders will fall from our eyes, and we will be free to create new systems of meaning and thus new relationships.

A good example of this sort of research is the collective effort by people in the Conference on Critical Legal Studies to describe the rise and fall of a “classical legal consciousness” in America. This project was initiated by Duncan Kennedy, who has contributed several major published\(^{52}\) and unpublished works to the effort. It is ably summarized by Elizabeth Mensch in a recent essay, *The History of Mainstream Legal Thought*.\(^{53}\) Mensch’s essay tells the story of the rise and fall of a coherent set of ideas about law and society that, Mensch asserts, dominated legal thought in the latter part of the nineteenth century. As Mensch describes it, this “classical legal consciousness” provided answers to basic questions about the relationship between

\(^{50}\) A. Wellmer, supra note 15, at 40-41; see also Unger, supra note 7.

\(^{51}\) Klare, *Labor Law as Ideology*, supra note 34, at 482.

\(^{52}\) Kennedy, supra note 4; Kennedy, supra note 11.

\(^{53}\) Mensch, supra note 4.
individuals and society, the relationship between the state and private actors, and the nature and operation of the law.  

Classical legal consciousness, like Confucianism in Imperial China, legitimated a structure of hierarchy and domination, in part by justifying it and in part by deflecting attention from its nature and operation. The story Mensch tells is of the rise of a series of challenges to the world views encoded in this mode of legal thought, launched largely by the American Legal Realist movement, followed by a series of counterattacks to these challenges by other post-Realist legal movements (e.g., law and economics, legal process) each of which sought to contain the Realist critique and to preserve the dominant features of the classical synthesis. Although these post-Realist movements are quite diverse, they do share a common ideological intent, namely to blunt challenges to the world view of classical legal thought.  

In her effort to unmask the ideological nature of the post-Realist "counterreformation," Mensch uses an analytical device that appears in other Critical scholarship—the examination of the incoherence found in particular legal ideas or views. Critical scholars have devoted substantial effort to demonstrating the existence of contradictory ideas in modern legal doctrine. One of the movement’s major scholarly contributions has been to expand and deepen the insight, first expressed by writers in the Realist tradition such as Karl Llewel-

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54. In this view, the distinguishing feature of elite legal thinking from roughly 1885 until 1935 was its ardent faith in the possibility of a rational ordering of the entire legal universe. During this classical age, jurists presumed to transcend the uncertainty of philosophical speculation for the perceived certainty of science. Their basic premise was that a unique legal structure corresponds to a market economy and a republican form of government. It was the task of the jurist to discover and elaborate that conceptual structure.

Fully developed, the theory conceived the world not as a multitude of particularized social relationships but as instances of a single general legal relationship. The relations of private parties to each other and to the state, and of the states to each other and to the federal government, were all analogous. The theory viewed the legal world as a structure of distinct and bounded spheres of protected rights and powers that were absolute within their protected domain. Disputes arose only over the contours of the bounded spheres. Thus, the judicial task was to define and police boundaries. Moreover, the precise limits of a legal actor's powers were thought to be discoverable through the application of an objective methodology.

55. See, e.g., Mensch, supra note 4; Tushnet, supra note 1.

56. Thus, Mensch describes the period from 1940 to the present as a series of “efforts to reconstruct American legal thought”; however, all of these, she asserts, contain fairly obvious “intellectual incoherencies.” Mensch, supra note 4, at 37.
lyn\textsuperscript{57} and Stewart Macaulay,\textsuperscript{58} that legal doctrine contains radically contradictory principles and to work out the implications of these contradictions. For example, in \textit{Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law}, Klare identifies contradictory principles in labor law doctrine.\textsuperscript{59} These include ambivalence in the use of the distinction between what is public and private,\textsuperscript{60} and contradictions in the conceptualization of workers' rights, which are alternatively treated as individual or collective, inalienable or waivable.\textsuperscript{61} “The decisional law of collective bargaining,” he says, “has generated a number of frameworks and hierarchies of workplace rights, each of which is so ambiguous and internally contradictory that the courts may, and do, brutally manipulate these rights frameworks in particular cases.”\textsuperscript{62}

C. Legitimation and Truth

The amount of energy Critical legal scholars devote to demonstrating that liberal legal doctrine is “incoherent” suggests that they intend to more than merely repeat the insights of Legal Realism. They believe that by demonstrating the \textit{internal} inadequacies of liberal legal thought, their critique will undermine its power over our minds. Therefore, it is not enough for them to develop a general “proof” of doctrinal incoherence: Manifestations of the contradictions in liberal legal doctrine must be studied in detail, so that we can come to see that the doctrine contains no immanent legal or social rationality. Rather, it merely cloaks power in the garb of right.

It is no surprise that this approach worries some on the left, who see liberal rights theory as a possible source of instrumental support for left social movements.\textsuperscript{63} Although Critical scholars recognize this concern, most in the end take the position reflected in the work of Klare, Kennedy, and Mensch. Why is this so? The scholars who take this position are politically sophisticated; they recognize the force of the arguments of those who see rights theory as a shield for left social movements. But this does not stop the critics, who insist on

\textsuperscript{58} See Macaulay, Duty to Read, supra note 8.
\textsuperscript{59} See Klare, Labor Law as Ideology, supra note 34. Other examples include Kennedy, supra note 8; Kennedy, supra note 11.
\textsuperscript{60} Id., Labor Law as Ideology, supra note 34, at 470–73.
\textsuperscript{61} Id. at 473–80.
\textsuperscript{62} Id. at 469.
the importance of exposing the incoherence of liberal rights theories. Thus Duncan Kennedy brushes instrumental concerns aside: "[T]he argument that there will be bad consequences for the left if liberal rights theory loses its plausibility is a weak one. The point is that the theory is wrong and incoherent. This is just true, as far as I can tell, and no amount of lamenting the consequences of his fall will put Humpty together again."\(^4^4\) In their decision to continue the critique of rights despite political risks, the Critical scholars reveal a key tenet of their creed: belief in the liberating and transformative value of the truth. The critics are confident that when they have succeeded in demystifying legal consciousness, things will get better.

The decision to critique such key ideas in American legal consciousness as liberal rights theory does not mean that the critics wish to jettison liberal rights theory altogether: To the contrary, Critical scholars see it as the essential starting point for Critical work precisely because a vital core of truth exists within this complex and contradictory body of thought. Commenting on this issue, Duncan Kennedy has written,

> Embedded in the rights notion is a liberating accomplishment of our culture: the affirmation of free human subjectivity against the constraints of group life, along with the paradoxical countervision of a group life that creates and nurtures individuals capable of freedom. We need to work at the slow transformation of rights rhetoric . . . rather than simply junking it.\(^5^5\)

At this point it should be clear how CLS diverges from the conventional social science study of ideology. Because conventional research on ideology accepts the radical distinction between the objective and the normative, the concept of "truth value" appears alien to conventional social science practitioners, and the notion that demonstrating "falseness" would lead to social change seems to them curious, to say the least.

The recognition that Critical studies rejects the radical separation of what is and what ought to be also indicates that the critics could not accept the distinction which I drew earlier between doctrinal legal research and empirical studies of law.\(^6^6\) This distinction, introduced provisionally for the purpose of exposition, is incoherent to anyone who accepts, as I do, the vision of knowledge and politics on which CLS is based. The idea that a bright line can be drawn between the study of legal doctrine and the study of social behavior


\(^5^5\) Id.

\(^6^6\) See notes 20–28 supra and accompanying text.
rests on positivist assumptions that the critics reject. In the first place, the distinction suggests that law can be studied independently of the difference it makes in society: Critical studies, like Legal Realism, rejects this notion altogether. Moreover, the doctrinal/empirical dichotomy also assumes the radical separation of a normative realm (legal doctrine) and a factual realm of social behavior (empirical reality): Such a separation is part of the positivist heritage that the critics seek to overturn.

The difference between critics and positivists can be clearly demonstrated by looking more closely at the concept of "legitimation." This is a concept that critics and positivists use, but in very different ways. Critical legal scholars believe that the world views embedded in legal consciousness "legitimate" unjust social relations by making these relations seem either necessary or desirable. "Every stabilized social world," Roberto Unger writes, "depends for its serenity, upon the redefinition of power and precondition as legal right or practical necessity." 67 Beginning with that insight, Critical studies research seeks to discover the false but legitimating world views hidden in complex bodies of rules and doctrines and in legal consciousness in general.

Positivist social scientists, like critical legal scholars, employ a concept of legitimation. Weber, who first introduced legitimation as a central concept in social theory, wrote that all forms of domination (i.e., the power to issue commands that will be obeyed) rest in part on the "legitimacy" of that power. But while he classified legitimation as based on traditional, legal-rational, or charismatic grounds, 68 he never really explains the legitimation process itself. He asserted that the degree of legitimation will depend on the extent to which the beliefs are held in a society, 69 but he did not tell us what brings about these beliefs or how they change. Though no one would classify Weber as a positivist tout court, his concept of legitimacy is basically positivist, in that legitimacy is treated as nothing more than an empirical fact to be measured.

In the Critical theory of society, originally developed by the Frankfurt School and currently represented by the work of Jurgen Habermas, one finds a different view of legitimation. Raymond Geuss defines the meaning of legitimation in this theory:

To say that the members of the society take a basic social insti-
tution to be “legitimate” is to say that they take it to “follow” from a system of norms they all accept; agents think the norm-system capable of conferring legitimacy because they accept a set of general beliefs (normative beliefs and other kinds of beliefs) which are organized into a world-picture which they assume all members of the society hold. So a social institution is considered legitimate if it can be shown to stand in the right relation to the basic world-pi-
ture of the group.70

Habermas’ use of legitimation in Critical theory contrasts with Weber’s concept. Habermas argues that, for Weber, legitimation is an “empirical phenomenon without an immanent relation to the truth, grounded in human psychology.”71 In contrast, Habermas wants to hold on to the idea that world views by their nature make claims to truth and are in a sense hostage to these claims.72

It is Habermas’ view that relates the Critical theory of society to the process of social transformation. If world views define social rela-
tions in some sense, and their influence depends on “truth value,” then it is possible to change world views, and thus society, by subject-
ning world views to Critical analysis. A world view legitimates a given social institution by presenting it as a necessary or efficient way of satisfying interests actors know they have. Once actors understand
that the institution is unnecessary and does not foster their interests,
then their attitudes towards it will change. Geuss suggests that if actors are suffering from this sort of “ideological delusion,” they can
be enlightened by the “self reflection” which Critical theory sets off.
In the initial state their wants and desires were seriously frustrated by a social institution they thought they had an interest in maintain-
ing. Reflection shows them that this is a mistake and that they actually have a real interest in abolishing the social institution in question, which not only frustrates perfectly legitimate wants and preferences, but prevents free communication and discussion.73

My provisional account of CLS suggests that the critics employ some version of this approach. They intend to challenge the legitimacy of our current legal consciousness, thus setting in motion processes of self-reflection and social change.74

72. See generally id. at 94–97.
73. R. GEUSS, supra note 70, at 73.
74. While these clear parallels exist between American critiques and the ideas of those who first introduced “Critical theory,” I do not mean to suggest that the Critical legal scholars have tried consciously to follow in the footsteps of the European Critical social theorists. Despite appropriating the label “Critical,” the Americans have paid scant attention to the Frankfurt School tradition or to the work of its contemporary interpreters like Habermas. One finds scant reference to Habermas in the writings of the American Critical scholars. For
To the extent that my description of the current practices of the Critical scholars is descriptively valid, it leaves many questions unanswered. As presented, their practices rely on a very strong "cultural" view of social relations, one in which society is in some real sense "constituted" by systems of meaning—what Habermas has called "world-maintaining interpretive systems."\(^{75}\) Assuming such a strong cultural view, the efficacy of critique as a tool of social transformation depends on the continued significance of world-maintaining interpretive systems in modern society. Yet it is the Critical theorists of society themselves who have raised the spectre of the gradual destruction of such systems of meaning under conditions of modernity.\(^{76}\)

Furthermore, the nature of "truth" in Critical legal theory is problematic. The Critical scholars certainly have not mastered Habermas’ complex notion of the truth value of Critical theory and undoubtedly would not accept its transcendental elements if they did. Yet they have not produced their own theory of truth value. Moreover, there is some tension between the strong "cultural" view of society, in which society is constituted by its existing world views, and the notion that Critical theory can demonstrate the falseness in current world views.\(^{77}\) The idea that the critique of legal thought

\(^{75}\) See J. HABERMAS, supra note 71, at 118.

\(^{76}\) The idea that the process of capitalist modernization destroys symbolic systems that give life meaning goes back at least to Max Weber, who described modernization as a process of increasing rationalization and "disenchantment of the world." M. WEBER, Science as a Vocation, in FROM MAX WEBER, ESSAYS IN SOCIOLOGY 155 (H. Gerth & C.W. Mills eds. 1946). Weber understood the increasing rationalization of modern life as a process by which mechanical and impersonal systems come to replace symbolically mediated structures of meaning. Wellmer describes these as processes which "tend to depersonalize social relationships, to desiccate symbolic communication and to subject human life to the impersonal logic of rationalized, anonymous administrative systems; historical processes, in short, which tend to make human life mechanized, unfree and meaningless." A. Wellmer, Reason, Utopia and the Dialectic of Enlightenment 13 (April 1983) (unpublished lecture, New School for Social Research). Wellmer argues that the Weberian notion that the capitalist modernization process leads to a "closed system of instrumental and administrative rationality" and threatens to destroy the "life world" of symbolically structured meaning was incorporated into the Critical theory of society as the "Negative Dialectics of Enlightenment." Id. at 10. The classical Frankfurt School statement is M. HORKHEIMER & T. ADORNO, DIALECTIC OF ENLIGHTENMENT (1972). For a discussion of the relationship between this work and Weber, see M. JAY, THE DIALECTICAL IMAGINATION, A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH 259–66 (1973). Habermas has taken up this theme as well. See, e.g., J. HABERMAS, supra note 71, at 117–30.

\(^{77}\) This point was suggested to me by Joel Rogers.
can itself be transformative politics depends on a concept of truth, but the Critical legal scholars have yet to fully explore this concept.

V. CRITICAL LEGAL STUDIES AND INTERPRETIVIST SCHOLARSHIP

I have argued that CLS can be perceived as part of a continuous tradition of nondoctrinal research on law and thus as a kind of empirical research. Furthermore, I have suggested that CLS and some other forms of nondoctrinal research on law share a common tradition, which I have called the critique of legal order. In making these claims, I have tried to answer some of the shallower criticisms of CLS and to stress the continuity in the nondoctrinal tradition, in contrast to the view of those who only see rupture and division. But this effort is only a preliminary one: While there are continuities and areas of agreement between the Critical legal scholars and others in that capacious mansion I have called the nondoctrinal tradition, there are profound differences as well.

It is obvious that if Critical Legal Studies is a form of "empiricism," it rests on a very different conception of that term than is usually employed by many who have urged more research on the behavior of legal actors or the actual operation of the legal system. My effort to characterize Critical Legal Studies as "empirical research on law" will sound strange to those for whom that term derives from a bright line between the realms of doctrine and behavior and between values and facts. For it is true that CLS, properly understood, represents a strong challenge to the self-understanding of many who think of themselves as practitioners of "empirical legal studies."  

To explore this more fully, I have constructed two polar models of social knowledge about law. I call one of them "behaviorist" and the other "interpretivist" legal studies. These models are "ideal types"—one-sided depictions of views that highlight salient dimensions of scholarly belief and practice. I do not suggest that anyone holds either of these views as a whole, or that the scholarly community is made up of two neatly delimited camps that stand, like teams on a field, separately labelled and in struggle with one another. Rather, these constructs are useful only to sort out issues and initiate more detailed and contextual studies of research traditions and categories of scholarly self-understanding.

To create these constructs, I sought to identify contrasting presuppositions on what seemed to me to be the basic issues for any body of social thought about law: (1) what creates social order; (2) what is the nature of social action; (3) what is the role of law in society; and (4) what constitutes valid knowledge in general and of law in particular. The analysis is summarized in Figure 1:

**FIGURE 1**
Two Modes of Legal Studies

<table>
<thead>
<tr>
<th>Social Order</th>
<th>Behaviorist</th>
<th>Interpretivist</th>
</tr>
</thead>
<tbody>
<tr>
<td>Structures of constraint which impose on actors external limits dictated by objective necessities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Consciousness, culture and organization form mutually reinforcing structures of meaning which define what is possible</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Action</th>
<th>Conduct in accordance with arbitrary individual desires, internalized norms (roles), objective constraints and external sanctions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conduct in accordance with socially created systems of meaning</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Law in Society</th>
<th>Behavior of a subset of individual actors and institutions in society which constrain or facilitate action by others</th>
</tr>
</thead>
<tbody>
<tr>
<td>A complex cultural code which explains the social world and how it fits together, and forms part of the structure in which action is embedded</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Social Knowledge About Law</th>
<th>Empirically validated objective knowledge of causal laws governing law-related social behavior</th>
</tr>
</thead>
<tbody>
<tr>
<td>“De-coding” or explicating the deep structures of law and demonstrating the relationship between these structures and action and order in society</td>
<td></td>
</tr>
</tbody>
</table>
A. Behaviorist Legal Studies

Behaviorism is a form of positivism applied to the study of law in society. It stresses empirical validation of theories about the conduct of actors affected by the legal system. The behaviorist focuses on externally observable indicators of legally relevant individual or group conduct, such as the decision whether to litigate. A behaviorist believes that it is possible to provide causal explanations of such conduct. A causal explanation consists of a proposition concerning the effect of one set of observable behavioral indicators on another plus an empirical validation of the proposition using representative data. Thus, a behaviorist might assert that “people in long term continuing relationships litigate less frequently than those whose contacts are episodic” and would consider this proposition proven if a representative sample of people in disputes showed higher litigation rates for those whose contacts were fleeting.

To determine the presuppositions of behaviorist legal studies, we must explore how behaviorism deals with social order, social action, law, and knowledge. These are the four principal theoretical axes on which I will build my construct and comparison.

The problem of social order is to explain how social behavior is organized in nonrandom patterns. Behaviorism treats social order as the result of the interaction of an autonomous individual rationality and a collective constraint. Order is maintained because individuals seek their own separately determined and arbitrarily chosen ends based on rational calculation within constraints imposed by external social sanctions.

Behaviorism treats social action—what actors do in social life—as at once voluntary yet at the same time determined, since it is constrained by external structures that obey an objective logic of functional necessity. The “soft,” voluntaristic possibilities of action are constrained by a hard reality of roles and sanctions.

The next theoretical axis is law. Behaviorism equates law with external constraint on action. For the behaviorist, the social significance of the law derives from its impact on decisions of those it affects. In this sense, the most important dimension of social knowledge about the law is knowledge about the relationship between legal sanction and social behavior. Legal behavior constitutes part of the hard structure of constraint and reality that gives action its direction and society its order. Whatever it is about “law” that affects social behavior is relevant; whatever lacks such an effect is not.

For our purposes, it is especially important to understand how
behaviorism deals with legal doctrine. A behaviorist would not deny the importance of legal doctrine for the understanding of the social role of law, any more than she would deny the relevance of a judge’s prior political affiliations. She simply would see doctrine as one factor that may influence the behavior, present or future, of actors in the legal system. To twist an old canard, behaviorism is not more interested in what the judge had for breakfast than in what the law says; it is concerned with both if either might influence what the judge does.

The final theoretical axis is knowledge. Behaviorism is based on a belief in objective knowledge of causal relationships. In the behaviorist model, for example, “law” may be either a dependent variable explained by other social variables or an independent variable that explains other social variables. But in either case, the ideal of knowledge is a statement that X causes Y. In what sense is this knowledge objective? Behaviorism would make two claims to objectivity. Since it is on these claims that interpretivism and behaviorism diverge most significantly, it is important to develop this point.

Behaviorism sees social knowledge as objective because it is knowledge about facts that are neutral and external to the observer. (This is the weak sense of objectivism.) If we “know” something about the relationships between facts X and Y (e.g., litigation rates and social relationships), this knowledge exists independently of our values. The facts we are talking about must be representative, so we have to worry about things like sampling and statistical significance. But as long as these tests are met, there is no further bar to objectivity.

Behaviorism can, however, involve a stronger sense of objectivity in the nature of knowledge. For behaviorism, objective “laws,” social factors external to the individual, can account for the actor’s conduct. In this stronger sense, behaviorist knowledge is objective because it reflects the deep logic of society, the basic and general principles that explain constraints and thus determine action. To the extent that behaviorists accept this view of objectivity, they would be both positivists and determinists.

B. Interpretive Legal Studies

Interpretivism is the study of relations among legal ideas, social beliefs, action, and order. Like behaviorism, interpretivism seeks to account for action and order, but it does so by stressing the role of consciousness in action and that of belief in consciousness. An inter-
pretivist does not see beliefs as random, or individual actions as arbitrary. Rather, beliefs form coherent wholes, systems that are structured by principles of meaning. Since beliefs constitute consciousness, they influence action and explain order. And since beliefs are organized into distinct and interrelated structures, they are neither arbitrary nor random. Law is both a set of beliefs and a constituent part of consciousness. Interpretivist scholarship, therefore, focuses on the structure of legal ideas, seeking to identify the deep principles of meaning that lie behind them, and to relate these principles to social action and order.

An interpretivist emphasizes the role of meaning in maintaining order. Consciousness, culture, and social organization are mutually interrelated and reinforcing systems of ideas 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. In contrast to a behaviorist, an interpretivist does not split action into a soft and arbitrary core of individual volition and a hard shell of external constraint. Rather, he sees action as the result of socially constructed systems of meaning which constitute the individual, providing the grounds for behavior and defining the channels of conduct.

The concept of law in this account of interpretivism derives from a view of action and order. Law on this level is one of several important interrelated systems of belief or complex cultural codes. Law, like other aspects of belief systems, helps to define the role of an individual in society and the relations with others that make sense. At the same time that law is a system of belief, it is also a basis of organization, a part of the structure in which action is embedded. In this way, law forms consciousness and influences outcomes.

An interpretivist understands law as a set of interrelated ideas and practices whose deep structures reflect an effort to order social existence in a meaningful way. Interpretivism leads naturally to the internal analysis of systems of legal ideas, not simply to identify the ideas themselves, but also to see how ideas and society shape each other. An interpretivist seeks to identify the relationships between the structures of legal belief and practice, on the one hand, and social order and the springs of action, on the other. An interpretivist attempts to explain legal ideas and practices in light of systems of belief and principles of order and to identify the points at which law forms part of the cultural and organizational whole that determines the pattern of social development.
C. **Critical Legal Studies and Interpretivism**

While pure behaviorists and interpretivists probably do not exist, many Critical legal scholars undoubtedly would accept much of what I have called interpretivism and reject much of behaviorism. I have suggested already that Critical scholars have focused on the analysis of legal consciousness. Their view of the relationship between scholarship and politics rests on an interpretivist notion of how meaning affects action. Further, most Critical scholars reject the positivism and determinism they see in behaviorist legal studies. Indeed, in his masterful summary of theoretical developments in CLS, Robert Gordon argues that the central thrust of the movement is interpretive and *therefore* antideterminist. He stresses the importance of the rejection by Critical scholars of all instrumental accounts of law:

Positivist social scientists (who would include both liberal and Marxist “instrumentalist” legal theorists) are always trying to find out how social reality objectively works, the secret laws that govern its action; they ask such questions as, “under what economic conditions is one likely to obtain formal legal rules?” Anti-positivists assert that such questions are meaningless, since what we experience as “social reality” is something that we are constantly constructing; and that this is just as true for “economic conditions” as it is for “legal rules.”

To the extent that Critical legal scholars stress interpretivist views of law and seek to make a clean break with positivism and determinism, they hold a distinct vision of what it means to carry out nondogmatic research or empirical legal studies. While it would be misleading to classify all other forms of empirical legal studies as either positivist or determinist (or both), their practices often reveal a tacit acceptance of one or both of these elements of behaviorism.

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80. For example, a large number of law and society studies seek to discover or quantify the causal effect of law in the “real world”—e.g., the effect of police activity on the crime rate; the impact of a Supreme Court decision on public attitudes; the impact of the death penalty on the murder rate; or the effect of racial, social, or economic factors on sentencing or the exercise of police discretion. The general commitment of these scholars to causal explanation is attested to by the widespread use of statistical methods for the analysis of data. In explicit recognition of the complex nature of causation, results are usually framed in probabilistic rather than simple causal terms. Nevertheless, such studies exhibit some of the general features of what I have called behaviorism: a belief in external constraints on action and in the possibility of objectively verifiable knowledge about the operation of such constraints.
VI. CRITICAL LEGAL STUDIES AND THE INTERPRETATION OF LAW IN CAPITALIST SOCIETIES

Perceiving CLS as an interpretive mode of scholarship can help us understand the movement’s intentions as well as its rationale for the study of legal doctrine as ideology. But to treat CLS merely as part of the interpretive approach to legal scholarship would truncate the account.\textsuperscript{81} The Critical scholars’ main concern is with the interpretation of the legal consciousness of capitalist societies, to the end of social transformation. CLS is interpretive scholarship with both a particular subject and a distinct intent.

This brings me to one of the most difficult aspects of any account of CLS, namely, the relationship between this mode of scholarship and the “Marxist” tradition. I do not intend to determine if it still makes sense to speak of a single, coherent “Marxist” tradition in social thought, or to canvass the relationships between the ideas of the Critical scholars and the history of Marxist scholarship. But I want to identify some of the key ideas used by Critical scholars in “decoding” the legal consciousness of capitalism as these concepts relate to the question of empiricism or method. Some of these ideas, particularly the Gramscian notion of “hegemonic consciousness,”\textsuperscript{82} and the Lukacsian concept of “reification,”\textsuperscript{83} derive from the Marxian tradition. These ideas provide a clue to the theory of law in society used by Critical scholars and have implications for the question of method.

Critical scholars see social order as maintained by a system of beliefs. The belief systems that structure action and maintain order in capitalist societies present as eternal and necessary what is only the transitory and arbitrary interest of a dominant elite. This commonly accepted body of ideas justifies the unequal and unjust power of the dominant group. These systems of ideas are reifications, presenting as essential, necessary, and objective what is contingent, arbitrary, and subjective.\textsuperscript{84} Furthermore, they are hegemonic, that is, they serve to legitimate interests of the dominant class alone.\textsuperscript{85}

\textsuperscript{81} For an evaluative discussion of recent trends and moods in social scientific thought, see R. Bernstein, \textit{The Restructuring of Social and Political Theory} (1978).
\textsuperscript{83} See G. Lukács, \textit{History and Class Consciousness} 83–222 (1971).
\textsuperscript{84} Gabel, \textit{Reification in Legal Reasoning}, 3 Research L. & Soc. 25 (1980); see also Gordon, supra note 49; Kennedy, supra note 11, at 22.
\textsuperscript{85} See, e.g., Freeman, \textit{Legitimizing Racial Discrimination}, supra note 35; Gordon, supra note 49; Klare, \textit{Labor Law as Ideology}, supra note 34.
In addition to classifying modern legal consciousness as reifying and hegemonic, Critical scholars see legal thought as denial.\textsuperscript{86} Like the Frankfurt School, the Critical legal scholars have incorporated concepts from Freudian psychology into social theory.\textsuperscript{87} Legal thought is a form of denial, a way to deal with perceived contradictions that are too painful for us to hold in consciousness. Legal thought \textit{denies} the recognition of the contradiction between the promise of universality, equality, and freedom and the reality of a legal order that benefits some over others, maintains hierarchy, and constrains the possibilities of action.\textsuperscript{88}

By employing the concepts of reification, hegemony, and denial, Critical scholars adopt what I want to call an "action perspective." An action perspective seeks to explain relationships between systems of ideas, social structure, and social change.

\textsuperscript{86} Gabel, \textit{supra} note 84, at 28–29; Kennedy, \textit{supra} note 11, at 214.

\textsuperscript{87} The similarity of the epistemic structure of the Frankfurt School’s theory of society to psychoanalytic theory should be apparent. As Geuss points out, both theories "have special standing as guides for human action in that: (a) they are aimed at producing enlightenment in the agents who hold them" permitting them to determine their true interests, and "(b) they are inherently emancipatory, i.e., they free agents from a kind of coercion which is at least partly self-imposed . . . ." R. Geuss, \textit{supra} note 70, at 1–3. Moreover, whereas traditional theories are "objectifying," Critical theories are "reflective." Thus the revolutionary contribution of Freud and the Frankfurt School lies in reestablishing reflection as a valid source of knowledge and connecting that which traditional theory assiduously separates: knowledge and interests.

\textsuperscript{88} The implications of contradiction have been most thoroughly discussed by Duncan Kennedy. In \textit{The Structure of Blackstone’s Commentaries}, Kennedy argues that we experience a "fundamental contradiction" between our desire for individual freedom and our participation in a social community. The contradiction lies in the fact that our "freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it." Kennedy, \textit{supra} note 11, at 212. Our universe of others both "forms and protects us" and "imposes on us" (and we impose on others) "hierarchical structures of power, welfare, and access to enlightenment that are illegitimate." \textit{Id.}

Legal thinking—the enterprise of categorizing, analyzing, and explaining legal rules—has as one of its motives the aim of denying or mediating our feelings of contradiction. The most recently dominant mode of legal categorization and thought, the one that Blackstone helped establish, is generally called liberalism. Liberalism accomplishes its mediating function by dividing the social world into two opposed entities. One entity—"civil society"—is an arena of free interaction among private individuals. Individuals acting in civil society are rendered unthreatening to each other because the other entity—"the state"—forces people to respect one another's rights. Thus, the message of liberalism is that "in civil society, others are available for good fusion as private individual respecters of rights; through the state, they are available for good fusion in the collective experience of enforcing rights." \textit{Id.} at 217. One who accepts such a view can effectively deny the fundamental contradiction.

In addition to its mediating function, legal thought can also serve an apologetic function. "The element of apology comes in because legal thought denies or mediates with a bias toward the existing social and economic order." \textit{Id.} at 217. It tells us that through the existing order, either as it is or with some minor adjustments, we can overcome the contradiction.
As synthesized by CLS scholars, the concepts of reification, hegemony, and denial all point to the contradictory relationships between the world views of capitalism and the structure of capitalist domination. This contradiction has methodological implications. We must decode world views in capitalism differently than we would those of some other society, say Bali or Imperial China. It is the nature of social ideas in capitalism that they not merely justify capitalist social relations, but that they do so by making social relations appear as something other than they are. Reifications distort what we really are as human beings. They alienate us from what is fundamental in ourselves. A hegemonic consciousness masks and hides hegemony. As hegemony must conceal its nature as power, so does the mechanism of denial permit us to avoid admitting or facing something we know, in some way, to be true.

The action perspective of CLS responds to this contradictory quality of world views in capitalist culture generally and in legal consciousness in particular. It assumes that if the contradictions are uncovered, the “incoherencies” demonstrated, and the denied material brought to light, then the society can be transformed. Like the Freudian analyst, the Critical scholar can bring to “consciousness” what is hidden by hegemonic world views. The truth inheres in the very system that serves to hide it: The present contains a draft history of the future. This assumption about the relations between understanding society and social change is the basis of the emancipatory hope expressed by scholars like Kennedy and Klare. By interpreting the world, we set in motion forces that can change it.

The idea that critique of consciousness may contribute to social transformation derives from the view of society as a constructed totality of meaningful relationships. Here, it is useful to contrast the CLS approach with traditional Marxist doctrine as expressed in Marx’s metaphor of the “base and the superstructure.” At least as understood by most Marxist scholars, this phrase refers to a material base (“relations of production”) that in some more or less direct way determines the realm of ideas. Legal ideas, no less than other ideas, are determined by economic structure. In the metaphysics of the base/superstructure metaphor, social relations are “reality,” and ideas the “reflection” of reality. CLS has not tried to reverse this polarity; that would make the movement purely idealistic. Rather, it

89. For Marx’s own explanation of the theory, see, e.g., K. Marx, Preface to a Contribution to the Critique of Political Economy, in 1 Selected Works 503-04 (1969).
has sought to eliminate the dichotomy altogether. In CLS, neither ideas nor structures are the reality.

The transcendence of this dichotomy between an intellectual and a material realm of human existence is one of the central features of Critical legal thought. For scholars in this tradition, there is no real world which is mirrored, directly or indirectly, in legal ideas. Ideas and economic or social structures are mutually constituting. Law creates society and society creates law; the relationships are complex and multidirectional. The resulting systems of action and order must be seen as a totality.

If law and society are mutually constituting, then the distinction between law and society breaks down. This distinction, like that between a “public” and a “private realm,” is another product of hegemony and of reification. And if law and society are mutually...

90. It could be argued that, at least as I have presented it, the CLS approach has not transcended, but rather has rejected the base-superstructure model, and that CLS appears in my account to be pure idealism and thus as a complete rejection of Marxist notions. In his essay on Hegemony and Consciousness in the Thought of Antonio Gramsci, Joseph Femin identifies four ideal-typical models of this relationship:

(1) consciousness determines base (idealist view);
(2) consciousness and base interact on an equal basis (conventional view);
(3) base determines consciousness (classical, scientific Marxism);
(4) base determines what forms of consciousness are possible (Gramscian Marxism).

Femin argues that only models (3) and (4) can be considered Marxist and that Gramsci’s revision of the classical Marxist formulation did not reject the determining force of the economic base or mode of production, but rather weakened the direct causal relation between changes in economic relations and changes in consciousness on which the classical account rested. In Gramsci’s model, “the economic base sets, in a strict manner, the range of possible outcomes, but free political and ideological activity is ultimately decisive in determining which alternative prevails. There is no automatic determination: only the creation of a more or less favorable atmosphere for the diffusion of a new ethos.” Id. at 38. (I am indebted to Mark Lazerson of the University of Wisconsin Department of Sociology for drawing this study to my attention.)

By now, most of the active scholars in the CLS movement would reject the view Femin attributes to Gramsci, since they reject the very terms of the analysis—namely, that there are separate realms of social life that can be called the “base” or the “superstructure.” This repudiation does not mean, as Lazerson has pointed out to me, that we cannot find passages or whole articles in which some of the Critical scholars seem to adhere to the “Gramscian” view. CLS is a project in formation, and undoubtedly it has been influenced by Marxist thought in general and by Gramsci in particular. But as the passage from Robert Gordon suggests, see text accompanying note 79 supra, at least the interpretivist strand in CLS has firmly broken with all forms of determinism, whether direct or “in the last instance.”

91. For example, Gerald Frug has shown how the categorization of the city as a “public” entity and the corporation as a “private” entity presents the power of the latter and the powerlessness of the former as natural, right, and necessary. This categorization prevents us from recognizing that the present powerlessness of cities results from an historical choice which can be overturned. Frug, supra note 38.
constituting, there is no \textit{a priori} barrier to the success of a transformative politics that employs the methods of critique and what Unger calls "deviationist doctrine." Critique can create the possibility for imagining new forms of social relations and for deriving a utopian vision from the core of truth in our current legal consciousness. Deviationist doctrine can carry forward that effort by reconstructing the core and moving beyond our current understanding of what is possible and desirable in our institutional arrangements.

The key idea here is that legal consciousness affects those who live in it, and legal consciousness is vulnerable to attack and reconstruction.

VII. READING IDEOLOGIES: WHERE ARE THE MESSAGES, WHO ARE THE RECIPIENTS?

Critical legal scholars read ideologies. They see capitalist legal consciousness as a complex set of messages which deny immanent possibilities of human action and freedom. They believe that by demonstrating the falseness or incoherence of our dominant legal concepts, critique can lead to change through an imaginative reconstruction of our social reality. This approach assumes that social actors, like psychoanalytic patients, can be freed of the constraints of delusions once the nature of the delusion is identified.

The question then arises: Where do these processes of the production and the critique of consciousness occur? If legal consciousness is a code containing partially false messages, who are the recipients of these messages? If critique consists of an alternative set of messages, to whom is critique addressed? If social actors are like patients suffering from a delusion, how do we know that the therapy is valid? How can the Critical scholars be sure that the messages they send are less illusory than the ones they attack?

Critical legal scholars have barely begun to address these issues. One can find some general ideas in chance remarks made in the course of extended criticism of legal ideas, but one cannot find any description of how Critical "method" is expected to work in practice. Perhaps Karl Klare has gone furthest towards providing an explana-

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92. Though declining to specify in advance "what exactly its methods or boundaries should be," Unger offers two criteria of "deviationist doctrine": (1) it would "explore the relations of cause and effect that lawyers dogmatically assume... when they claim to interpret rules and precedents in the light of imputed purpose"; (2) it would "recognize and develop the disharmonies of the law." Unger, supra note 7, at 577-78.

tion. In *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, he tries to explain the relationship between liberal labor law doctrine, which is explicitly labelled as an elite ideological product, and the behavior of the union movement. To demonstrate the existence of labor law ideology, Klare concentrates exclusively on appellate court opinions and academic commentary. He draws on his own analyses and those of other Critical labor law scholars like Katherine Stone to show how labor law doctrine denies the desirability or possibility of extended worker control of the workplace and thus justifies managerial prerogative. Because Klare assumes that the justificatory messages in this elite literature have a direct influence on worker and union decisionmaking, he is able to assert that labor law ideology has caused the relative passivity of American unions in the postwar period. This belief, in turn, grounds his faith that the critique of labor law can influence the labor movement.

Klare makes no effort, however, to prove his assumption or explain why workers or union officials might accept labor law’s justificatory rhetoric. Klare himself is uneasy about this: In a footnote which reveals more than may have been intended, he confesses that “an important limitation of the Critical labor law approach is its relative neglect, thus far, of the important task of drawing out empirically the interrelationships and connections between the intellectual history of collective bargaining law and the social history of the post-World War II labor movement.” Kennedy makes a similar confession in his study of *Blackstone’s Commentaries*: “[W]hat I have to say is descriptive, and descriptive only of thought. It means ignoring the question of what brings a legal consciousness into being, what causes it to change, and what effect it has on the actions of those who live it.”

These and similar disclaimers in the Critical literature are disquieting. If Klare recognizes that there is no systematic empirical evidence for the propositions he asserts about the legitimating effects of labor law doctrine in the postwar period, how can he be so sure that critique will result in social transformation? Maybe nobody in the labor movement believes a word of liberal labor doctrine; if so, it might make no difference to anyone if Critical labor law scholars uncovered the world views in this doctrine, or demonstrated its inco-

herence. If Kennedy omits any discussion of the effects of legal consciousness in a 173-page article on Blackstone's legal thought, how confident can he be that his method bears any relationship to his political intent? We might find Kennedy's superb (but complex) analysis of the structure of Blackstone's thought inherently interesting, but how can we be confident that if we master it our lives would be changed any more than they would be if we grasped the structure of Confucianism?

These doubts lead some to question the whole project of transformation through the critique of doctrine as ideology. For these commentators, the dominant interpretivist tradition in CLS has failed to grasp the lessons of legal sociology. At least since Stewart Macaulay's research on contract law, it has been a commonplace in the law and society tradition that relations between elite doctrine and social behavior cannot be assumed a priori. Indeed, one might go so far as to say that law and society scholars assume that the burden of proof lies with those who would assert that any relationship exists at all. Thus, in a recent paper delivered at the annual meeting of the Conference on Critical Legal Studies, Carroll Seron and Frank Munger argue that interpretivist Critical legal scholarship simply replicates the errors of the liberal doctrinal tradition it attacks, for it starts with the assumption that legal doctrine is produced autonomously and directly influences social life. At least until CLS meets the sociologist's "burden of proof" and provides evidence that legal consciousness does affect what goes on in society, these authors remain skeptical of claims that doctrinal critique can have a transformative effect.

This is a challenge that CLS must meet. Until we can produce convincing maps of the relationships between elite ideological production, the social definition of meaning, and the history of social relations, we will not be able to sustain the claims made for Critical studies. But in contrast to the conclusions drawn by Seron and Munger, this challenge does not mean that Critical studies should reject the project of reading ideologies by analyses of texts. Rather, the lesson to be drawn from such criticism is that the project of Critical understanding must be extended to studies of the construction of meaning and its relationship to action at all levels. In the labor law field, for example, we need studies that go beyond the analyses of texts to investigate the social construction of meaning through law in

98. F. Munger & C. Seron, supra note 1.
law firms, board rooms, union halls, and on the shop floor, as well as historical studies that demonstrate how conceptions of what is possible and desirable affected landmark decisions in labor relations.

Inquiry into practice at the field level and the micropolitics of legal consciousness would be quite consistent with the Critical studies tradition. While Critical scholars have not paid much attention to the study of everyday legal consciousness, they already have contributed a great deal to our understanding of how the social meaning of law is constructed in one area of daily life: the law school. Because a central feature of Critical scholars' political project is transforming the law schools, they have devoted substantial attention to what might be called the "interpretivist sociology of legal education". Kennedy's analyses of the social psychology of legal education are masterful studies of how consciousness is created in micro-settings: One need look no further than his essays on legal education for models of how to study legal consciousness in action.99 The challenge of meeting the "sociologist's burden of proof" must be met, but the tools are already at hand within the CLS tradition.

What will we learn when, for example, we turn the study of labor law from the Supreme Court to the shop floor? I am too much of a pragmatic empiricist to speculate on something about which so little is known. But I would not be surprised if we discover something very different than the simple "transmission belt" model that one might derive from the Critical labor law literature. Anyone familiar with the literature on the sociology of meaning systems in capitalist societies will know that these societies tend to produce a multiplicity of world views. For example, Michael Mann, surveying the extant literature on social stratification and value consensus in liberal democracies, observes that members of the working class are more likely to reject dominant beliefs about social relations than are the middle class, especially when questions are posed in terms of concrete issues of daily life. This analysis leads Mann to question both liberal notions of consensus and Marxist theories that posit the existence of a single hegemonic consciousness. He notes,

While rejecting more extreme versions of harmonistic theories, we must also do the same with Marxist ones. There is little truth in the claims of some Marxists that the working class is systematically

and successfully indoctrinated with the values of the ruling class. Though there is a fair amount of consensus among the rulers, this does not extend very far down the stratification hierarchy.\textsuperscript{100} Although Mann’s paper relies on very fragmentary evidence, it does suggest that labor law ideology on the shop floor may be rather different than it appears when we read the elite texts.

Exploration of these questions will further the project of reading ideologies already set by the Critical scholars. What we will learn from this will be more complex than the simple transmission-belt theory, but that does not mean that studies of labor law on the shop floor, for example, will refute what the Critical scholars have discovered. Once we have successfully mapped the universe of labor law ideologies, we may find countertrends and “counter hegemonic consciousness,” but it is likely that these will appear along with dominant views in a complex and contradictory amalgam.

One of the most interesting findings in Mann’s study is that working class consciousness is split between a concrete realization of injustice and inequality in day-to-day matters and an acceptance of broad propositions about the necessity and justice of existing social relations.\textsuperscript{101} Joseph Femia comes to a similar conclusion. Analyzing a wide range of surveys of mass consciousness in the United States and Great Britain, Femia finds that workers tend to accept dominant images of society when these are stated in very general terms, but to disagree about the desirability of specific actions and about the application of general beliefs to everyday situations. He reads the survey data as suggesting that

the average man tends to have two levels of normative reference—the abstract and the situational. On the former plane, he expresses a great deal of agreement with the dominant ideology; on the latter, he reveals not outright dissensus but nevertheless a diminished level of commitment to the bourgeois ethos, because it is often inapposite to the exigencies of his class position.\textsuperscript{102}

If these general analyses hold true for the mass legal consciousness as well, then the initial insights of Critical scholars like Klare are partially correct: Mass consciousness does reflect elite consciousness to a degree. Moreover, the identification of areas of dissensus should provide a basis for the development of alternative visions of social relations, thus realizing the full CLS program. Finally, it is important to recognize that elite consciousness may be an important part

\textsuperscript{101} \textit{Id.} at 429.
\textsuperscript{102} Femia, \textit{supra} note 90, at 46.
of a system of control, even if it is rejected by the mass. For to the extent that an elite accepts a favorable view of its own role in society, its self-confidence is enhanced. The labor law ideology Klare and Stone examine may be important not simply because it justifies the system to the workers but also because it justifies it in the minds of the managers.

VIII. CLS AND THE NONDOCTRINAL TRADITION: RUPTURE OR RECONCILIATION?

I have shown that there is continuity between the work of the Critical scholars and of other scholars interested in nondoctrinal legal studies. The Critical scholars share with others the goal of showing how the law works and what impact it has. Both groups look at law from the outside, as it were, questioning its own self-understanding. I have suggested that CLS is part of a broad movement in nondoctrinal thought on law that rests on the critique of legal order and accepts the principles of indeterminacy, antiformalism, contradiction, and marginality.\(^{103}\)

Yet at the same time I have suggested that CLS has rejected some of the views that animated many studies to date.\(^{104}\) Moreover, I think it is fair to say that Critical scholars have ignored the implications of what I called the principle of marginality: As my discussion of Critical labor law doctrine suggests, CLS scholars assume rather than investigate the relationship between elite legal ideological production and social action. Not only do they fail to meet the "sociologist of law’s burden of proof," they also seem relatively indifferent to most of the literature on law and society that does try to explore the impact (or lack thereof) of legal rules, doctrines, and institutions.

What explains the failure to examine assumed mechanisms for the social construction of meaning and the indifference towards, or even hostility to, so much of what is normally understood as "empirical legal studies"? I can offer two explanations. First, a major theme in CLS is the hostility to what the CLS scholars call "positivism." Since Critical scholars identify empirical legal studies with positivism, they are suspicious of its methods and dubious about its results. Second, CLS is the product of the law schools; it is legal scholarship first and foremost. Strong forces within the legal academy channel scholars towards the study of legal doctrine, even if the result of the

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103. See notes 8–12 supra and accompanying text.
104. See notes 13–28 supra and accompanying text.
study is a critique of doctrine. These forces have influenced the Critical scholars, as they have shaped the scholarly tradition of their less radical colleagues.

A. Antipositivism

When CLS scholars start talking about empirical research, the word “positivism” immediately arises. When asked why there is so little empirical research, in the traditional sense, done by Critical scholars, or why empirical studies are so rarely cited in CLS literature, a typical Critical theorist will answer that work of this type is “positivist.” What does this answer mean and why do Critical scholars react so vehemently when they think they have found a positivist in their midst?105

The critique of positivism in CLS has three general themes. First, it is thought that positivism necessarily entails determinism. In the introduction to this article, I separated positivism (a theory of knowledge) from determinism (a metaphysics of society). CLS discussions conflate the two. Since most CLS scholars believe that the world is made by willing subjects and can be remade by willing subjects, they are as opposed to determinism in social thought as to determinacy as an adequate description of legal doctrine (the principle of indeterminacy). Indeed, one CLS scholar described the movement as an attempt to do for social thought what the Legal Realists did for legal thought: to recognize frankly that society, like law, is constantly made and remade by human actors with concrete intentions and to build a body of scholarship around this recognition of indeterminacy.106 As Robert Gordon has pointed out, CLS scholars are as hostile to statements from the left like “this is an inevitable development of the logic of monopoly capital” as they are to statements like “this set of arrangements for operating the factory, or this set of property rights, is functionally necessary to achieve maximum output or efficiency.”107

The second dimension of the critique of positivism is the view that it is reductionist. CLS scholars think that the behaviorist ap-

105. Once again, in setting forth CLS views on method, I must draw heavily on oral sources. The views set forth in this section are derived from several sources, including extended conversations with Mark Tushnet, Duncan Kennedy, Morton Horwitz, and Robert Gordon. For the views of two CLS scholars on these questions, see Gordon, supra note 49; Tushnet, supra note 1.
106. This point was made by Karl Klare at the first Critical Legal Studies Summer Camp, Santa Cruz, Cal., July 1980.
proach to law in society reduces the law to an external force acting in social life and thus ignores the complex relationships between action on the one hand, and subjective meanings and sets of beliefs, on the other. Behaviorism, Critical scholars fear, leads necessarily to methods that relate objective indicators of behavior with variables external to the actor; a central theme of Critical legal thinking is that the actor’s ideas about the meaning of the relations in which he/she is embedded are the most important thing for which a social explanation should account.

The third critique of positivism or behaviorism relates to the first two: Behaviorism is thought to be politically conservative, in part because all determinist and reductionist thought is conservative and in part because of the particular form which behaviorism in legal studies has taken in the United States. Any form of determinism is conservative because it suggests that the real springs of social change lie outside the individual or the group. If society only changes because of some external, objective, deep logic, like the needs of the economy or the logic of monopoly capitalism, then there seems to be no room for political action. Determinism of the right reifies the status quo while determinism of the left encourages a quiescent waiting for the inevitable turn of the wheels of history. Similarly, reductionism is conservative because it denies the possibility of what Critical scholars see as a central instrument for social transformation: the change of consciousness through the critique of belief systems.

Just as CLS scholars view all forms of “positivism,” whether of the right or the left, as politically conservative, I think they also believe that much of the actual practice of empirical research on law in the United States is politically conservative in a more direct and concrete way. Topics are defined and studies are conducted, it is alleged, so as to reify the existing system of law and existing beliefs.  

Survey research, Critical scholars probably would argue, can tap only the very belief systems or false consciousness that it is the task of the scholar to unmask. In the Critical legal view, empirical researchers who spend years analyzing the answers to complicated surveys about disputes are like madmen wandering in an asylum that they themselves have constructed. Though they believe they are in touch

with “reality,” such researchers live in a set of false constructs whose pernicious social effect they themselves have strengthened through their analytic categories.

But the Critical attack is not just on methods in the narrow sense. Behaviorists could shift to participant observation or in-depth interviews or other data collection efforts without saving themselves from the attack of the Critical scholars. The real problem is that the behaviorists’ methods accept the world as it seems to be, both to the observer and the observed. For the Critical scholar, this world is a dream, and the task of scholarship is not simply to understand the dream, but also to awaken the dreamers.

One of the tenets of behaviorism that merits particular scorn from the antipositivist school is the notion that social knowledge of a positive nature is objective. For the Critical scholar, the pretense that social science methods lead to objective and value neutral knowledge hides an implicit and conservative political message behind a neutral and technocratic facade.

B. Legal Education

Because Critical scholars erroneously think that all studies using methods of empirical inquiry are positivistic and thus determinist, they may feel justified in ignoring the findings and rejecting the methods of empirical research. But these tendencies are strengthened by other, perhaps stronger, forces. Most Critical legal scholars are legal educators. They are paid to train students to read the law and argue about it. They spend their working lives in settings that stress the importance of legal texts. Many work in schools that are largely isolated both from the day-to-day world of legal practice and from other academic disciplines. All these factors help explain why, even though contextual studies of law and legal thought in action form a necessary part of a genuine program of Critical thought on law, such studies are rarely produced. The chief exception—namely analyses of how the law school itself works as a social process—only proves the point.

Many studies demonstrate the strong impact of the mission of professional education on legal scholarship and the “tilt” this mission creates towards studies of legal doctrine.\textsuperscript{109} This is not the place to analyze this impact in depth; suffice it to say that the scholarship of the Critical legal movement shares with legal scholarship generally a

\textsuperscript{109} See Macaulay, \textit{supra} note 21 and works cited therein.
concern with analysis of doctrine. This tendency has been noted by sympathetic critics like Frank Munger and Carroll Seron, who argue that the Critical scholars’ focus on doctrine limits their ability to explain adequately the social role of law in capitalist societies and undercuts their effort to demystify liberal legalist notions. Seron and Munger argue that the doctrinal focus of Critical scholarship may actually confirm liberal assumptions of doctrinal autonomy and undercut the political message that the Conference seeks to communicate. Tracing the doctrinal focus of Critical legal scholarship to the way by which most professional legal educators define their roles, Seron and Munger argue that the Critical scholars have failed to challenge the paradigm of professional scholarship dominant in elite law schools. They note the paradox that Critical Legal Studies, apparently the most radical of legal studies movements, tends to share the same domain of study that its conservative opponents occupy, contrasting this trend in law with the tendency of radical movements in other social studies to break more fundamentally with the scholarly traditions of their fields.\footnote{110}

I have attempted to show that it is a mistake to treat CLS as a replication by the left of conventional studies of legal doctrine.\footnote{111} But at the same time, there is validity in the comparison and force in Seron and Munger’s criticism. For while CLS reads doctrine as ideology, thus distancing itself from mainstream legal scholarship, it has limited itself to the study of ideology in doctrine.

C. Beyond the Study of Ideology in Doctrine

I hope that the barrier between the study of doctrine and the study of practice will be breached. The purpose of this essay, beyond self-clarification, is to make the case that CLS should extend its study of legal consciousness beyond doctrine. When the movement does that, it will find that the ground has already been laid. For the tradition of empirical studies of law has produced exemplary research by empiricists who want to know how the world works, but who share the Critical scholars’ fears of positivist determinism.

An example is Stewart Macaulay’s recent study, Lawyers and Consumer Protection Laws.\footnote{112} This study purports to be an empirical study of how lawyers handle consumer complaints. But it can be read both as more and as less than that. Macaulay tries to explain why lawyers

\footnote{110. See F. Munger & G. Seron, supra note 1, at 6-7.}
\footnote{111. See notes 34-77 supra and accompanying text.}
\footnote{112. See Macaulay, supra note 19.}
who are asked to assist aggrieved consumers behave as they do. Lawyers seek an accommodation between the consumer and the provider of goods and services. They neither litigate nor tell the clients to go away: They aim to persuade the provider to give redress if the client is aggrieved, but if informal methods fail to achieve this goal the lawyer shifts his/her efforts towards persuading the client that the grievance does not exist or is unworthy of further effort. Macaulay's study isolates a "moment" of social action, that is, of meaningful behavior. This moment is influenced by a set of overlapping and potentially conflicting sets of beliefs and by what are seen as structural constraints that the attorney must face. Consumer law and consumerism create a set of beliefs that press the client towards a vindication of "rights"; the client is influenced by these cultural factors and names, and blames, the provider. The lawyer is influenced to a degree by the same set of beliefs, as well as by the popular image of the attorney as a zealous advocate for the client and by the reinforcement of these notions in professional ethics. But the attorney is influenced as well by an ethic of individualism that runs contrary to the ideals of consumerism, an ethic that the attorney may hold because he/she is a small businessperson and capitalist entrepreneur. Individualism is the dominant ethic of the providers who are at once the other side in this dispute and the people with whom the attorney maintains long term continuing and potentially profitable relationships. The actual conduct of the attorney results from these competing forces, which derive from the ideals and beliefs of the actors, as well as from the economic relations between them (you cannot make money litigating small claims; you cannot have a successful law practice in a small town if you make too much trouble for the merchants).

There is no reductionism in Macaulay's story as I have reconstructed it. The attorney is not reduced to a puppet of some general deep logic nor presented as the embodiment of some universal cultural ideal. Material and ideal interests impel behavior, but behavior is defined and mediated by the cultural situation. The account is interpretivist and empirical at the same time. It is based on the minute observation of a moment of action, yet it relates that moment to the whole in a way that unites beliefs and conduct, individual consciousness and cultural ideals.

The pragmatic tradition in empirical legal studies, illustrated by Macaulay's essay on consumer law, offers a possibility for reconciling the Critical impulse with the study of legal consciousness in action. A vast number of questions should be explored using this approach.
How, for example, do the ideas about what is the proper organization of society, encoded in legal beliefs, affect the way the legal profession behaves? How are lawyers’ views of what is possible shaped by legal ideas, and how do these views influence other actors in society? Does the fact that law draws lines between a public and a private sphere influence political struggles? Does the possibility of a legal remedy—or the lack of one—make a difference in the organization and expression of social conflict?

These issues have already been explored by scholars who study the process of dispute transformation, the way the nature, intensity, and trajectory of social conflicts are affected by the intervention of various actors, including lawyers.\textsuperscript{113} As I have pointed out in an earlier essay,\textsuperscript{114} the study of dispute transformation offers a rich field for concrete studies of how legal ideas and legal organization affect social order and disorder. Numerous studies have shown how the lawyer’s definition of a valid claim influences the kind of disputes that emerge and do not emerge.\textsuperscript{115} The lawyer’s views of what is a “legitimate” grievance are in turn influenced by ideas and values drawn from the law itself and legal consciousness generally, as well as from social norms and ideals. The lawyer’s perception of conflict is influenced by her own position in the social structure, by the structure of legal representation, and by the incentive system of legal practice.\textsuperscript{116}

These illustrations lead me to conclude that the time has come for Critical scholars to stop berating all empiricists for an alleged positivism and for the legal sociologists to stop calling the Critical scholars neo-Willistonians. These two camps think that they are arguing about methods, but the claims they make suggest they are arguing about nothing at all.

Clearly, there are many real questions posed by CLS that are worthy of serious debate, and clearly, CLS poses a serious challenge to our understanding of what we are doing when we study law. It is


\textsuperscript{114} See Trubek, \textit{supra} note 108.

\textsuperscript{115} See, e.g., Felsteiner, Abel, & Sarat, \textit{supra} note 113; Macaulay, \textit{supra} note 19; Mather & Yngvesson, \textit{supra} note 113.

\textsuperscript{116} For an illustration of a similar mode of analysis, see Gordon’s essay on the way elite New York lawyers sought to reconcile their ideals and their practices at the turn of the century. R. Gordon, \textit{The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870-1910} (July 1983) (unpublished paper delivered to the University of Wisconsin Legal History Program Summer Workshop).
time to move on to the real questions. We must put positivism behind us and work out the full implications of pragmatism in legal studies. Critical Legal Studies points the way to a richer understanding of law in action in our society. But the full potential of the action perspective will not be realized until the Critical scholars use their Critical insights in a careful investigation of the operation of legal consciousness at all levels of American society.