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Methodologies in Academic Legal Research: Lessons from Critical Legal Studies

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The coherence of academic legal research methodologies employed by critical legal studies (CLS) is seriously questioned by mainstream legal scholars. Some scholars also maintain that CLS has lost its appeal, if any, due to the shortcomings in these methodologies. On the other hand, there is another school of thought that considers that CLS is not so powerful for its philosophical contents as it is for its powerful and innovative methodologies. Faced with these arguments and counter-arguments, the present paper focuses on the methodologies as employed by CLS scholars to appraise their viability for present and future academic legal scholarship. Though the CLS methodologies such as trashing, dereification, deconstruction and genealogy are not free from imperfections, the paper argues that their essence and contribution in the field of academic legal research deserve acclaims and legal scholarship can still be benefited by these methodologies.

Introduction

The critical legal studies (CLS)[2] emerged in 1970s as a threat for the orthodox liberal legal scholarship.[3] Although its contentions are "far from monolithic",[4] there are at least two, if not

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[2] For an historical account of CLS, see John Henry Schlegel (1984) 'Notes Towards an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies', *Stanford Law Review*, 36(1-2): 391-411. Also see Mark Tushnet (1991) 'Critical Legal Studies: A Political History', *Yale Law Journal*, 100(5): 1515-44, at 1523-37. For basic concepts and assertions of CLS, see Alan D. Freeman (1981) 'Truth and Mystification in Legal Scholarship', *Yale Law Journal*, 90(5): 1229-37; Alan Hyde (1983) 'The Concept of Legitimation in the Sociology of Law', *Wisconsin Law Review*, 1983(2): 379-426; Allan C. Hutchinson and Patrick J. Monahan (1984) 'Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought', *Stanford Law Review*, 36(1/2): 199-245; Anthony Chase (1984) 'Left on Rights: An Introduction', *Texas Law Review*, 62(8): 1541-62; David Kairys (1984) 'Law and Politics', *George Washington Law Review*, 52(2): 243-62; David Kairys (ed.) (1998) *The Politics of Law: A Progressive Critique*, New York: Basic Books; Deborah L. Rhode (1983) 'Equal Rights in Retrospect', *Law and Inequality*, 1(1): 1-72; John Forester (1982) 'A Critical Empirical Framework for the Analysis of Public Policy', *New Political Science*, 3(1/2): 33-61; John Forester (1993) *Critical Theory, Public Policy, and*

more, central premises that are shared by almost all crits.[5] According to them, law is an instrument to maintain inequality.[6] As an institution, it mirrors the existing power structures in society and operates as an ideological system that legitimates the existing social order as "normal, desirable, and just".[7] Another central premise of CLS is that law is radically indeterminate to such an extent that authoritative legal norms permit multiple outcomes in adjudication,[8] and "legal reasoning can virtually always justify contradictory results in a given case".[9] They claim that the texts of law hardly have any definite meaning and one single interpretation of the texts is as good as any other.[10] This indeterminacy, as claimed by crits, primarily works in furtherance of maintaining a status quo of injustice.[11]

Planning Practice: Toward a Critical Pragmatism, New York: State University of New York Press; John Marquez (1999) 'Law of Equality before Equality was Law', *Syracuse Law Review*, 49(4): 1137-90; Joseph William Singer (1982) 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld', *Wisconsin Law Review*, 1982(6): 975-1060; Mark Kelman (1990) *A Guide to Critical Legal Studies*, Harvard: Harvard University Press; Michael H. Davis (1981) 'Critical Jurisprudence: An Essay on the Legal Theory of Robert Burt's Taking Care of Strangers', *Wisconsin Law Review*, 1981(3): 419-53; Roberto Mangabeira Unger (1983) 'The Critical Legal Studies Movement', *Harvard Law Review*, 96(3): 561-675; William H. Simon (1983) 'Legality, Bureaucracy, and Class in the Welfare System', *Yale Law Journal*, 92(7): 1198-269; W.J. Samuels and A.A. Schmid (eds.) (1981) *Law and Economics: An Institutional Perspective*, Boston: Kluwer Academic Publications. For a bibliography of CLS, see Duncan Kennedy and Karl E. Klare (1984) 'A Bibliography of Critical Legal Studies', *Yale Law Journal*, 94(2): 461-490.

[3] Faced with the challenges of CLS, critics asserted that CLS scholars "distort the purposes of law and threaten its very existence". See Owen M. Fiss (1986) 'The Death of the Law?', *Cornell Law Review*, 72(1): 1-16, at 1.

[4] Sandra Berns (1993) *Concise Jurisprudence*, Sydney: Federation Press, p. 75.

[5] The scholars belonging to CLS movement are sometimes referred to as 'crits'. See Robert W. Gordon (1988) 'Law and Ideology', *Tikkun*, 3(1): 14-18 and 83-87, at 14.

[6] Reading the CLS scholarship as a neo-Marxist version of jurisprudence is, however, reductionist. While Marxist theory claim that the ruling class dominates through control of the means of production, CLS scholars hold that the domination is through ideology. See Joan C. Williams (1987) 'Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells', *New York University Law Review*, 62(3): 429-96, at 459. On the relationship between CLS movement and the Marxist legal-theoretic enterprise, see Akbar Rasulov (2014) 'CLS and Marxism: A History of an Affair', *Transnational Legal Theory*, 5(4): 622-39; Alan Hunt (1986) 'The Theory of Critical Legal Studies', *Oxford Journal of Legal Studies*, 6(1): 1-45, at 8-10. Many CLS scholars describe their school more as postmodernist than as Marxist. See Alan Hunt (1990) 'The Big Fear: Law Confronts Postmodernism', *McGill Law Journal*, 35(3): 507-40; Mark Tushnet, supra note 2. One of the founding fathers of CLS also criticizes the Marxists theory of the state. See Duncan Kennedy (1985) 'The Role of Law in Economic Thought: Essays on the Fetishism of Commodities', *American University Law Review*, 34(4): 939-1000, at 993.

[7] Katherine S. Newman (1983) *Law and Economic Organization: A Comparative Study of Preindustrial Societies*, Cambridge: Cambridge University Press, p. 19.

[8] Richard Michael Fischl (1987) 'Some Realism About Critical Legal Studies', *University of Miami Law Review*, 41(3): 505-32, at 513.

[9] Ibid, at 529.

[10] The school of legal realism also put forward the indeterminacy argument. According to the realists, "judges actually decide cases according to their own political or moral tastes, and then choose an appropriate legal rule as a rationalization." See Ronald Dworkin (1978) *Taking Rights Seriously*, Massachusetts: Harvard University Press, p. 3. The CLS thesis of legal indeterminacy, unlike that of legal realists, however is aimed to

Since its emergence, CLS, despite stiff oppositions from orthodox legal scholars,[12] "enjoyed a period of organizational momentum" at least for two decades,[13] and thereafter arguably went into deep decline.[14] This decline is sometimes attributed to the 'shortcomings in the CLS approach'.[15] However, there is another school of thought that considers that CLS is not so powerful for its philosophical contents as it is for its "powerful *methodological approach* for criticizing and analyzing contemporary Western legal philosophy".[16] Faced with these arguments and counter-arguments, the present paper focuses on the methodologies as employed by CLS scholars to appraise their viability for present and future academic legal scholarship.

Methodological approaches of CLS

Legal education in law schools is largely concentrated in teaching law students how to *think like a lawyer*. This in turn ensures that academic legal scholarship is by and large similar to professional legal research that lawyers and judges employ for their professional purposes. The traditional academic legal scholarship therefore is hardly anything but -

> . . . a sophisticated and elaborated form of legal brief. Doctrinal analysis, the chief method for legal scholarship, is undertaken to establish a particular interpretation of case law on the basis of arguments and authority which would be acceptable to an appellate judge. As a method of inquiry, conventional legal scholarship serves the narrow professional function of supporting lawyers' advocacy.[17]

question the very concept of the rule of law. For the realist account of indeterminacy of law, see Felix S. Cohen (1935) 'Transcendental Nonsense and the Functional Approach', *Columbia Law Review*, 35(6): 809-49; Hanoch Dagan (2015) 'Doctrinal Categories, Legal Realism, and the Rule of Law', *University of Pennsylvania Law Review*, 163(7): 1889-917. For a comparative analysis of indeterminacy argument of the realists and that of the crits, see Andrew Altman (1986) 'Legal Realism, Critical Legal Studies, and Dworkin', *Philosophy & Public Affairs*, 15(3): 205-35.

[11] By 'indeterminacy of law', CLS scholars do not necessarily claim that legal outcomes are always unpredictable. Rather, some CLS scholars even claim that "law is quite predictable when understood in light of its underlying biases, assumptions, and ideological tilt". See Gary Minda (1989) 'The Jurisprudential Movements of the 1980s', *Ohio State Law Journal*, 50(3): 599-662, at 638. Also see Joseph William Singer (1984) 'The Player and the Cards: Nihilism and Legal Theory', *Yale Law Journal*, 94(1): 1-70, at 19-25. For more on indeterminacy thesis of CLS, see Muhammad Mahbubur Rahman (2016) 'Revisiting the Indeterminacy Thesis of Critical Legal Studies', *Bangladesh Journal of Law*, 16(2): 1-16.

[12] While mainstream legal scholarship was critical about CLS, many scholars perceived it as "the most influential progressive movement in legal studies". See Alan Hunt (1990), supra note 6, at 508.

[13] James R. Hackney (2012) *Legal Intellectuals in Conversation: Reflections on the Construction of Contemporary American Legal Theory*, New York and London: New York University Press, p. 9.

[14] In his textbook on jurisprudence, Brian Bix discusses about CLS in the past tense. See Brian Bix (2009) *Jurisprudence: Theory and Context*, London: Sweet & Maxwell, pp. 231-5.

[15] Robert C. Ellickson (2000) 'Trends in Legal Scholarship: A Statistical Study', *Journal of Legal Studies*, 29(2): 517-43, at 525.

[16] J. Stuart Russell (1986) 'The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy', *Ottawa Law Review*, 18(1): 1-24, at 23.

While the traditional legal scholarship heavily relies on doctrinal analysis of law, CLS treats legal doctrine as its primary target of criticism.[18] Consequently, the interpretative techniques of the orthodox legal scholarship strongly resist the CLS views.[19] Therefore, the paradigm of orthodox legal scholarship remains an ever present challenge for development of CLS scholarship. Viewing this shrinking space as 'the dictatorship of no alternatives',[20] CLS scholars borrowed, invented and accordingly applied various methodological techniques to confront the mainstream legal discourses.[21] These methodological techniques are however not equally and consistently applied by all crits.[22] The most common of these techniques include trashing, dereification, deconstruction and genealogy.[23] In what follows, an attempt is made to throw light on these techniques.

Trashing

Trashing,[24] a technique to question and undermine mainstream liberal legal understandings, "represents the primary focus and driving energy of the CLS agenda".[25] The methodological sequence of this technique is well described by a crit: "take specific arguments very seriously in their own terms; discover that they are actually *foolish* ([tragi]-*comic*); and then look for

[17] Frank W. Munger and Carroll Seron (1984) 'Critical Legal Studies versus Critical Legal Theory: A Comment on Method', *Law & Policy*, 6(3): 257-97, at 260.

[18] Mark Tushnet (2005) 'Critical Legal Theory (without Modifiers) in the United States', *Journal of Political Philosophy*, 13(1): 99-112.

[19] Robert W. Gordon (1989) 'Critical Legal Studies as a Teaching Method, Against the Background of the Intellectual Politics of Modern Legal Education in the United States', *Legal Education Review*, 1(1): 59-84.

[20] For a discourse on this dictatorship of no alternatives, see Roberto Mangabeira Unger (2005) *What should the Left Propose?*, London/New York: Verso, pp. 1-11.

[21] CLS scholars argue that methodology of mainstream legal thoughts is controlled "almost entirely by political values, particularly those of capitalism". See Donald H. Gjerdingen (1986) 'The Future of Legal Scholarship and the Search for a Modern Theory of Law', *Buffalo Law Review*, 35(2): 381-477, at 409.

[22] As said by Kennedy and Klaire, "CLS scholarship . . . does not reflect any agreed upon set of . . . methodological approaches." See Duncan Kennedy and Karl E. Klare, supra note 2, at 461.

[23] It is said that "the CLS scholar seeks to develop a totalistic critique of legal doctrine, but does so by using different nonlegal methodologies and insights". See Gary Minda, supra note 11, at 614.

[24] The term 'trashing' was first employed by Kelman. See Mark G. Kelman (1984) 'Trashing', *Stanford Law Review*, 36(1/2): 293-348.

[25] John Hardwick (1991) 'The Schism Between Minorities and the Critical Legal Studies Movement: Requiem for a Heavyweight?', *Boston College Third World Law Journal*, 11(1): 137-64, at 149.

some (external observer's) *order* (*not* the germ of truth) in the internally contradictory, incoherent chaos we've exposed".[26] In most cases, it operates as "an anti-hierarchical technique of recognizing and undermining illegitimate power rooted in hierarchies that superficially appear legitimate and inevitable",[27] and exposes that the law is in fact 'politics by other means'.[28]

This technique helps CLS scholar to show how the mainstream legal discourses have turned contingency into necessity and to reveal that there are repressed alternative interpretations that are perfectly consistent with the discourse's stated premises.[29] By employing trashing technique, CLS scholars have so far been able to question many legal structures that had long been generally regarded in orthodox legal scholarship as scientific and coherent.[30] Noorie demonstrates how the basic tenets of criminal law are founded on conflicts and contradictions.[31] Similar findings are attributed by crits in respect of the law of contract,[32] law of tort,[33] and public law.[34]

Dereification

By dereification, CLS scholars attack the reification process as employed by mainstream legal discourses. The reification process "*presupposes* both the existence of and the legitimacy of existing hierarchical institutions",[35] "makes the legal system appear as a

[26] Mark G. Kelman, supra note 24, at 293.
[27] J. Stuart Russell, supra note 16, at 15.
[28] John Henry Schlegel, supra note 2, at 411.
[29] Robert W. Gordon, supra note 5, at 17.
[30] According to a crit, trashing is "the most valid form of legal scholarship available at the moment". See Alan D. Freeman, supra note 5, at 1229.
[31] See Alan Noorie (2001) *Crime, Reason and History: A Critical Introduction to Criminal Law*, Edinburgh: Butterworths.
[32] Dan B. Dobbs (1980) 'Tortious Interference with Contractual Relationships', *Arkansas Law Review*, 34(3): 335-76; Duncan Kennedy (1976) 'Form and Substance in Private Law Adjudication', *Harvard Law Review*, 89(8): 1685-778; Duncan Kennedy (1982) 'Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power', *Maryland Law Review*, 41(4): 563-658; Jay M. Feinman (1983) 'Critical Approaches to Contract Law', *UCLA Law Review*, 30(4): 829-60; Peter Gabel and Jay M. Feinman (1998) 'Contract Law as Ideology', in David Kairys (ed.) *The Politics of Law: A Progressive Critique*, New York: Basic Books, pp. 497-510; Robert A. Hillman (1988) 'The Crisis in Modern Contract Theory', *Texas Law Review*, 67(1): 103-36.
[33] Dan B. Dobbs, supra note 32; Duncan Kennedy (1982), supra note 32; Richard L. Abel (1981) 'A Critique of American Tort Law', *British Journal of Law and Society*, 8(2): 199-231.
[34] Richard Davies Parker (1981) 'The Past of Constitutional Theory – And Its Future', *Ohio State Law Journal*, 42(1): 223-260.
[35] Peter Gabel and Paul Harris (1982) 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law', *New York University Review of Law and Social Change*, 11(3): 369-412, at 373.

relation between the laws themselves, rather than the legal subjects"[36] and "results from an authoritarian conditioning process through which people 'command' one another to acquiesce to the status quo".[37] The very essence of process is brilliantly described by two crits as follows:

> The principal role of the legal system . . . is to create a political culture that can persuade people to accept both the legitimacy and the apparent inevitability of the existing hierarchical arrangement. The need for this legitimation arises because people will not accede to the subjugation of their souls through the deployment of force alone. They must be persuaded, even if it is only a 'pseudo-persuasion', that the existing order is both just and fair, and that they themselves desire it.[38]

The obvious consequence of reification process is that "like religion in previous historical periods, the law becomes an object of belief which shapes popular consciousness toward a passive acquiescence or obedience to the status quo".[39] Faced with this reality, crits employ dereification as an attempt to engineer a counter-mechanism process. Whereas reification process makes an abstract legal concept as concrete and material,[40] dereification process argues that reification distorts our thinking and leads people to think abstract legal concepts as objectively real facts and accordingly CLS scholars advocate viewing concrete and material facts in abstract legal terms.[41] The central premise of dereification technique as applied by CLS scholars informs us that "law is not simply an armed receptacle for values

[36] Christopher M.J. Boyd (2012) *Examining (International) Law: Towards a Systematic, Coherent and Radical Theory*. Glasgow: School of Law, University of Glasgow (LL.M. thesis), p. 35. Available at http://theses.gla.ac.uk/3312/ (last accessed December 24, 2017).
[37] Peter Gabel and Paul Harris, supra note 35, at 373.
[38] Ibid, at 372.
[39] Ibid, at 374. Duncan Kennedy forcefully argues how Blackstone's *Commentaries on the Laws of England*, a masterpiece on common law, has employed reification techniques to 'naturalize purely social phenomena' and thus legitimate the status quo of injustice. See Duncan Kennedy (1979) 'The Structure of Blackstone's Commentaries', *Buffalo Law Review*, 28(2): 209-382.
[40] Those critical of CLS sometimes argues that social relations are always reified and law cannot but recognize these relationships. Employing reification process in legal discourse is therefore inevitable. Moreover, such employment is evident not only in law but also in any other method of social decisionmaking. See Gary Peller (1985) 'The Metaphysics of American Law', *California Law Review*, 73(4): 1151-290.
[41] For more on dereification as a CLS response to reification of mainstream legal discourses, see Peter Gabel (1977) 'Intention and Structure in Contractual Conditions: Outline of a Method of Critical Legal Theory', *Minnesota Law Review*, 61: 601-42; Peter Gabel (1980) 'Reification in Legal Reasoning', in Steven Spitzer (ed.) *Research in Law and Sociology*, *Vol. 3*, Greenwich: JAI Press, pp. 25-51; Peter Gabel and Paul Harris, supra note 35.

and priorities determined elsewhere; it is part of a complex social totality in which it constitutes as well as is constituted, shapes as well as is shaped".[42] Accordingly, crits believe that "the conservative power of legal thought is not to be found in legal outcomes which resolve conflicts in favor of dominant groups, but in the reification of the very categories through which the nature of social conflict is defined".[43]

Coleman shows, by employing dereification technique, how different branches of law are founded on 'structures on contradiction' that are biased against one of the two diametrically opposed visions of social life.[44] Similarly Duncan Kennedy shows how traditional legal education employs reification to legitimate law that in turn legitimates existing inequalities.[45] By dereification, CLS even contends that the architecture of courtrooms, though usually claimed to be expressions of popular will, are in fact expressions of social alienation.[46] In this way, dereification as a methodological tool is "closely related to that of trashing: the goal of both is the delegitimation of a central pillar of liberal legal philosophy".[47]

Deconstruction

As CLS scholarship treats language as "a kind of social action rather than a system of referential tags",[48] CLS scholars heavily rely on deconstruction technique developed by French scholars Jacques Derrida.[49] This technique "involves the identification of hierarchical oppositions, followed by a temporary reversal of the hierarchy".[50] This reversal is however not meant "to establish a new conceptual bedrock, but rather to investigate what happens when the given, 'common sense' arrangement is reversed".[51]

[42] David Kairys (1998) 'Introduction', in David Kairys (ed.) *The Politics of Law: A Progressive Critique*, New York: Basic Books, pp. 1-20, at 5.
[43] Peter Gabel and Paul Harris, supra note 35, at 373.
[44] Jules L. Coleman (2002) *Markets, Morals, and the Law*, Oxford: Oxford University Press.
[45] Duncan Kennedy (1980) 'First Year Law Teaching as Political Action', *Law & Social Problems*, 1(1): 47-58; Duncan Kennedy (1982) 'Legal Education and the Reproduction of Hierarchy', *Journal of Legal Education*, 32(4): 591-615; Duncan Kennedy (1986) 'Liberal Values in Legal Education', *Nova Law Journal*, 10(2): 603-17; Duncan Kennedy (1998) 'Legal Education as Training for Hierarchy', in David Kairys (ed.) *The Politics of Law: A Progressive Critique*, New York: Basic Books, pp. 54-75.
[46] See Peter Gabel and Paul Harris, supra note 35.
[47] J. Stuart Russell, supra note 16, at 19.
[48] James Boyd White (1984) *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community*, Chicago: University of Chicago Press, at 291.
[49] See Daniel Williams (1988) 'Law, Deconstruction and Resistance: The Critical Stances of Derrida and Foucault', *Cardozo Arts and Entertainment Law Journal*, 6(2): 359-410.
[50] Jack M. Balkin (1987) 'Deconstructive Practice and Legal Theory', *Yale Law Journal*, 96(4): 743-86, at 746.
[51] Ibid, at 746-7.

Through deconstruction technique,[52] CLS scholars mainly attack categorical distinctions in law and argue that the justifications for the distinction is artificially constructed and shift radically once they are placed in new contexts of judgment.[53] In other words, they claim that legal doctrines and principles have no substance of their own; they are only what they appear to be, and appearances can be manipulated in a thousand different ways.[54] By deconstructing legal rules, CLS scholars demonstrate that "the rules do not have an internal logic that compels specific results".[55] Consequently, "legal reasoning can virtually always justify contradictory results in a given case"[56] Crits even deconstruct the rights standards – traditionally perceived by orthodox legal scholars as a forceful recognition in favour of the weaker sections of the society – to argue that legal rights are "malleable and manipulative" to such an extent that they "marginalize rather than empower" the weaker sections of the society.[57] For example, as crits contend through deconstruction, laws recognize certain rights in favour of labour at the cost of fitting into a framework of legal regulation that certified the legitimacy of management's making most of the important decisions about the conditions of work.[58] Deconstruction in this way "uncovers the systemic and institutional biases built in to legal structures and procedures and reveals systemic contradictions".[59]

[52] For more on the method of deconstruction technique as applied by CLS scholars, see Jack M. Balkin (1987), supra note 50; Jack M. Balkin (2010) 'Deconstruction', in Dennis Patterson (ed.) *A Companion to Philosophy of Law and Legal Theory*, West Sussex: Blackwell Publishing, pp. 361-7; Michel Rosenfeld (1992) 'Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism', in Drucilla Cornell, Michael Rosenfeld and David Gray Carlson (eds.) *Deconstruction and the Possibility of Justice*, New York: Routledge, pp. 152-210; Pierre Schlag (2005) 'A Brief Survey of Deconstruction', *Cardozo Law Review*, 27(2): 741-52.
[53] See generally Clare Dalton (1985) 'An Essay in the Deconstruction of Contract Doctrine', *Yale Law Journal*, 94(5): 997-1114; David Kennedy (1985) 'The Turn to Interpretation', *Southern California Law Review*, 58(1): 251-75; Gerald E. Frug (1984) 'The Ideology of Bureaucracy in American Law', *Harvard Law Review*, 97(6): 1276-388; James Boyd White, supra note 48; Pierre Schlag (1988) 'Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction', *Stanford Law Review*, 40(4): 929-72.
[54] Girardeau A. Spann (1984) 'Deconstructing the Legislative Veto', *Minnesota Law Review*, 68(3): 473-544, at 536-9.
[55] Joan C. Williams, supra note 6, at 491.
[56] Richard Michael Fischl, supra note 8, at 529.
[57] Joel F. Handler (1992) 'Postmodernism, Protest, and the New Social Movements', *Law & Society Review*, 26(4): 697-732, at 707.
[58] William E. Forbath (1991) *Law and the Shaping of the American Labor Movement*, Massachusetts: Harvard University Press.
[59] Robert Gordon (2016) *Law, Ideology and Critical Legal Studies*, available at: https://universitarianweb.com/2016/09/08/robert-gordon-law-ideology-and-critical-legal-studies/ (last accessed April 30, 2018).

As a CLS methodology, deconstruction supplements the technique of trashing in the sense that random chaos exposed through trashing is interpreted in deconstruction process as a matter of 'patterned chaos' revealing doctrinal indeterminacy.[60] According to Elizabeth M. Iglesias:

> The deconstructive critical analysis of law . . . reminds us of the many ways in which the struggle *through law,* can distract us from the even more fundamental struggle *over law* - over the assumptions it embraces and deploys, the misrepresentations it affirms, the impunity it disguises and the power/lessness it creates and allocates among different groups in different socio-legal contexts.[61]

Genealogy

CLS scholars also rely on Foucaultian genealogy[62] to substantiate their arguments. This technique critically interprets the historiography of legal norms and institutions to argue that the causes of development of these norms and institutions are not internal to the legal scholarship or juristic thinking, but are external and to be found mainly in social, economic and political construction of the society and state.[63] As such, to attribute any spiritual, asocial, apolitical qualification to these norms and institution, as is often done by orthodox mainstream legal scholarship, simply sweeps many relevant facts and consideration under carpet. By employing this technique, CLS scholars argue that -

> Even the most basic legal concepts, such as private property, have never had any definite, agreed-upon content but have, on the contrary, always been fiercely struggled over, so that any conventional stability the concepts may now seem to possess represents nothing more than a temporary truce that could be unsettled at any moment.[64]

Morton Horwitz, through genealogical analysis, demonstrates how the equitable face of contract law has gradually changed with the growing expansion of market economy.[65] Similarly, Agozino shows that the discipline of criminology simply emerged as a tool at the hands of imperialist powers and since then developed by maintaining a knowledge-power axis that has been serving in unequal societies as an academic discipline ultimately legitimising fascist uses of coercive forces in the name of criminal law.[66] Using genealogy, American CLS scholarship has also demonstrated that "American legal history can be understood as a 'winner's story' about how a long-term political tradition displaced other traditions and how law developed to serve the needs of American corporate enterprise and industrialization".[67] Through historical analysis, CLS scholars also demonstrate how a legal system, through employment of elite doctrines, sometimes alienates itself from everyday practice and social reality.[68] It is now shared by many scholars that the historical works of the CLS scholars have, over time, turned out to have the most lasting influence of any of CLS works.[69]

CLS methodologies: Where to draw the line?

The coherence of CLS methodologies is seriously questioned by mainstream legal scholars. It is quite often said that CLS scholars are yet to map the territory of different CLS techniques.[70] If the scope, extent and exceptions of these techniques having wide range and

[60] Robert W. Gordon, supra note 5, at 17.

[61] See Elizabeth M. Iglesias (1998) 'Out of the Shadow: Marking Intersections In and Between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory', *Boston College Third World Law Review*, 19(1): 349-83, at 383.

[62] Foucaultian genealogy, being an intellectual endeavour in historical facts, is mainly "against the effects of the power of a discourse that is considered to be scientific". See Michel Foucault (1980) 'Two Lectures', in C. Gordon (ed. and trans.) *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, Sussex: Harvester Press, pp. 78-108, at 84. For more on Foucaultian genealogy, see David Hoy (ed.) (1986) *Foucault: A Critical Reader*, Oxford: Blackwell; Gary Gutting (1989) *Michel Foucault's Archaeology of Scientific Reason*, Cambridge: Cambridge University Press; H. Dreyfus and P. Rabinow (1983) *Michel Foucault: Beyond Structuralism and Hermeneutics*, Chicago: University of Chicago Press; John Rajchman (1985) *Michael Foucault and the Freedom of Philosophy*, New York: Columbia University Press; J. Ransom (1997) *Foucault's Discipline: The Politics of Subjectivity*, London: Duke University Press.

[63] See Robert W. Gordon (2012) ''Critical Legal Histories Revisited': A Response', *Law & Social Inquiry*, 37(1): 200-15.

[64] Robert W. Gordon, supra note 5, at 18.

[65] MORTON J. HORWITZ (1974) 'THE HISTORICAL FOUNDATIONS OF MODERN CONTRACT LAW', *HARVARD LAW REVIEW*, 87(5): 917-56.

[66] Biko Agozino (2003) *Counter-Colonial Criminology: A Critique of Imperialist Reason*, London: Pluto Press.

[67] Gary Minda, supra note 11, at 616.

[68] According to Gordon: "the legal system sometimes wraps itself up like a mummy in hyper-formal elaborations of its doctrines, or mechanical rigidity in applying its rules or precedents, to the point where it is alien to what any sentient nonlawyer actor would think about any subject". See Robert W. Gordon, supra note 63, at 208.

[69] John Henry Schlegel (2007) 'CLS Wasn't Killed by a Question', *Alabama Law Review*, 58(5): 967-77, at 973.

[70] See generally, Anthony D'Amato (1985) 'Whither Jurisprudence', *Cardozo Law Review*, 6(4): 971-86; G. Edward White (1986) 'From Realism to Critical Legal Studies: A Truncated Intellectual History', *Southwestern Law Journal*, 40(2): 819-44; John Stick (1986) 'Can Nihilism be Pragmatic?', *Harvard Law Review*, 100(2): 332-401; John W. Van Doren and Patrick T. Bergin (1985) 'Critical Legal Studies: A Dialogue', *New England Law Review*, 21(2): 291-304; Kennedy Hegland (1985) 'Goodbye to Deconstruction', *Southern California Law Review*, 58(5): 1203-24; Owen M. Fiss, supra note 3; Phillip E. Johnson (1984) 'Do We Sincerely Want to be Radical?', *Stanford Law Review*, 36(1-2): 247-91.

wider implications are not demarcated, these techniques can go too far and produce superficial findings. Even a CLS stalwart like Gordon admits that "CLS is too heterogeneous, too divided into conflicting schools and working methods, too well stocked with mavericks and eccentrics, to have produced an orthodox cannon of 'correct' approaches".[71]

CLS scholars employ the technique of trashing to demonstrate that all legal doctrines and principles are indeterminate. The legal proposition and methodological base that are used in applying this technique, if conceived as unqualified and absolute, possess the potentials to demonstrate that all legal principles and doctrines including CLS suffer the same crisis of indeterminacy. In this way, the technique can place the whole debate on an infinite regression leaving no room for objective way-out.[72]

When CLS scholars use deconstruction to show that legal doctrines can be manipulated in different ways, they do not answer whether there can have any full-proof safeguard against manipulation of any doctrine including CLS. One critic asserts:

> Critical legal studies scholars want to unmask the law, but not to make law into an effective instrument of good public policy or equality. The aim of their critique is critique. Critical legal studies scholars realize that any normative structure created to supplant law would be subject to the very same critique they used to attack the law.[73]

Unless it is established that vulnerability to manipulation is deliberately structured, how far the technique of deconstruction be stretched to decipher legal norms and institutions remains open to debate. The problem of deconstruction technique is that it can be applied for every text, every notion and every doctrine. Once we deconstruct an idea, the findings that emerge can also be deconstructed.[74] Thus the technique can produce a never-ending narrative.[75]

[71] Robert W. Gordon (1987) 'Unfreezing Legal Reality: Critical Approaches to Law', *Florida State University Law Review*, 15(2): 195-220, at 201.

[72] For a similar argument, see Kennedy Hegland, supra note 70, at 1205.

[73] Owen M. Fiss, supra note 3, at 10.

[74] Even Duncan Kennedy has characterized deconstruction as 'viral' since there is no internal reason for the epidemic to stop. See Pierre Schlag, supra note 52, at 745. According to another crit: "Deconstruction does not exempt itself from its own critical maneuvering; it is alive to the possibilities of its own deconstruction." See Allan C. Hutchinson (1984) 'From Cultural Construction to Historical Deconstruction', *Yale Law Journal*, 94(1): 209-38, at 230. According to Balkin: "if deconstruction could be used to show the incoherence of liberal thought, it could equally be used to show the incoherence of any alternative to liberal thought". See Jack M. Balkin (2010), supra note 52, at 364.

Therefore, to allow deconstruction to go on forever cannot really be an option. Then again, the question is where this interpretation technique should stop its play.[76]

Whereas those critical of CLS allege that CLS scholarship has employed deconstruction too much, others contend that CLS scholars have terminated the play of deconstruction "too soon" in their scholarship, "precisely at the point where the deconstruction had reconceptualized the field so as to enable the advocacy of a preferred political prescription".[77] Without taking part in this debate as to whether the crits have underplayed or overplayed deconstruction, this paper contends that CLS scholarship is yet to come up with a convincing suggestion as to where the never-ending process of deconstruction should stop. Despite this lacking, CLS's employment of deconstruction technique informs us that many legal doctrines and principles that are traditionally treated as sacred and sacrosanct are not really so and demonstrates "how doctrinal arguments are informed by and disguise ideological thinking".[78] However, to deconstruct each and every legal material to argue total indeterminacy and complete absence of reason in law cannot be a pragmatic option for a school of jurisprudence.[79] Balkin seems to map the boundary of deconstruction that CLS as a school of jurisprudence can consistently follow:

> Deconstructive readings do not assert that texts have no meaning or that their meanings are undecipherable. Rather, deconstruction argues that texts are always overflowing with complicated and often contradictory meanings. The predicament that deconstruction finds in texts is not the lack of meaning but a surplus of it. Similarly, the point of deconstructing conceptual oppositions is not to show that concepts have no boundaries, but rather that their boundaries are fluid and appear differently as the opposition is placed into new interpretive contexts. Deconstruction is not a mechanical demonstration of total indeterminacy. Deriving interesting results from deconstructive techniques is a skill that requires sensitivity to changes in interpretive

[75] According to one crit: "Deconstruction denies that any particular mode of linguistic signification can achieve interpretive hegemony; interpretation is an endless exercise in unbounded free play." See Allan C. Hutchinson, supra note 74, at 230. Also see Jack M. Balkin (1990) 'Tradition, Betrayal, and the Politics of Deconstruction', *Cardozo Law Review*, 11(5/6): 1613-30.

[76] Balkin suggests that "deconstruction need not continue indefinitely if it has achieved the goals of emancipation and enlightenment". See Jack M. Balkin, supra note 50, at 766.

[77] Pierre Schlag, supra note 52, at 745.

[78] Jack M. Balkin, supra note 50, at 744.

[79] Balkin clarifies: "although all conceptual oppositions are potentially deconstructible in theory, not all are equally incoherent or unhelpful in practice". See Jack M. Balkin (2010), supra note 52, at 363.

> context. It does not attack reason but rather employs reason to critique particular forms of reasoning. Moreover, deconstructing a legal distinction does not necessarily show that it is incoherent. That is a pragmatic judgment to be made by the interpreter. All legal distinctions are in principle deconstructible, but not all are unworkable; their usefulness depends on the context in which they are employed.[80]

Deconstruction therefore should not be treated as an end in itself. It is just an interpretation process and does not necessarily lead us to a conclusion as to what is just. This aspect is brilliantly described by Balkin:

> The deconstructionist must engage in a process of self- reflection to determine when the insights provided by deconstruction have produced sufficient enlightenment with respect to a view of law, legal doctrine, or human society previously accepted as privileged, natural, or complete. This decision is, of course, a political and moral choice, but it is one informed by insights gained through the activity of deconstruction itself. At the moment the choice is made, the critical theorist is, strictly speaking, no longer a deconstructionist. However, the purposes of engaging in the deconstruction have been served.[81]

This is why many contemporary crits avoid deconstruction for the purpose of deconstruction only.

CLS methodologies and nihilism

CLS methodologies, however good they may be for criticising mainstream legal scholarship, are arguably not effective enough to solve practical legal problems.[82] If all the legal doctrines, rules and principles are accused of being indeterminate and lacking reasonable degree of coherence, as it is claimed by CLS scholars, how to deliver justice in any particular circumstance that can extract confidence of the recipients of justice mechanism? This question becomes more pressing especially because CLS scholars not only deny the

[80] Jack M. Balkin (2005) 'Deconstruction's Legal Career', *Cardozo Law Review*, 72(2): 719-40, at 727.
[81] Jack M. Balkin, supra note 50, at 766.
[82] Steven M. Barkan (1987) 'Deconstructing Legal Research: A Law Librarian's Commentary on Critical Legal Studies', *Law Library Journal*, 79(4): 617-637, at 618. Also see G. Edward White, supra note 70; John Stick, supra note 70.

determinacy and coherence of existing doctrines, rules and principles, but many of them also proclaim the impossibility of having any legal doctrines, rules and principles with complete determinacy and coherence. What can then be the way-out? It is true that mainstream legal scholarship overclaimed for many centuries the scientific bases, coherence and determinacy of legal discourses. To attack this exaggeration simply does not provide any ground for jurisprudential solution. Unless and until CLS techniques of legal scholarship succeed to offer any determinate and coherent legal structure, if at all possible, we should be content with the claim of coherence and determinacy in legal enterprises, if not as a matter of fact, at least as an assumed legal fiction necessary to preserve public confidence in legal system. Otherwise, justice through law as a system is bound to collapse. This observation of the present paper, however, is not meant just to undermine the CLS scholarship as a whole but to suggest that CLS scholarship should not just concentrate on negative techniques – meaning techniques that are only useful to discredit the prevailing system – of trashing, dereification, deconstruction, and genealogy; they should, side by side, develop positive methodological tools to suggest pragmatic approaches that can bring about at least better, if not absolute, coherence and determinacy in legal discourses.

CLS is characterized as a negative movement for it exclusively concentrates on criticism of traditional legal understanding but hardly offers any constructive perspective of law.[83] The crits have arguably failed to "ground their critiques in a systematizing alternative vision of law".[84] Even one crit claims that the challenge of offering this alternative has almost killed the movement of CLS.[85] Faced with this criticism, some CLSers bring a counter-accusation that the mainstream legal discourses rather "structure our ordinary perceptions of reality so as to systematically exclude or repress alternative visions of social life".[86] They also assert that "there is an inherent absurdity to the premise that, in order to critique the current paradigm (i.e., liberalism or law), one has to be able to provide an alternative to law or liberalism itself".[87] This may be fair enough that providing an alternative is not a precondition for criticising the mainstream legal theories. But an alternative vision is certainly vital for

[83] Gary Minda (1995) *Postmodern Legal Movements: Law and Jurisprudence at Century's End*, New York/London: New York University Press, p. 107. Also see Phillip E. Johnson, supra note 70.
[84] Corinne Blalock (2014) 'Neoliberalism and the Crisis of Legal Theory', *Law and Contemporary Problems*, 77(4): 71-103, at 78.
[85] Richard Michael Fischl (1992) 'The Question That Killed Critical Legal Studies', *Law & Social Inquiry*, 17(4): 779-820.
[86] Robert W. Gordon, supra note 71, at 200.
[87] Corinne Blalock, supra note 84, at 79.

replacing the current paradigm that CLS attacks. On this point, the mainstream crits believe that "critical theory can be used to re-rationalize mainstream legal doctrine and provide a normative basis for 'reconstruction' after the demise of liberal legalism".[88] However, a few crits who are more radical claim that such 'reconstruction' is neither possible nor desirable.[89] So far as this radical version of CLS relying on deconstruction method is concerned, the charge of nihilism is well-founded as this radical claim "renders impossible the project of achieving a rational ordering of social relations or of law serving as a means of constraining governmental power".[90] As said by Balkin: "Deconstructive analyses can be of no use to the pursuit of justice unless deconstructive arguments assume the existence of an alternative which is more just than the one being deconstructed, even if this alternative is subject to further deconstruction."[91]

CLS can justify their negativity only by laying out a minimal social vision that gives people a sense of where they are being led.[92] However, if we treat CLS as a postmodern legal theory, it is understandable that postmodern way of thinking is more concerned with attacking the conventional, modern certainties and structural framework than offering any new structural framework. The less attention of CLS so far in offering any such framework therefore can be excused on the ground that crits are still more concerned with attacking the existing framework. This however does not mean that CLS as a whole has no alternative vision to offer. Gordon claims that there is plenty of CLS work that suggests alternatives.[93] Unger, a prominent guru in CLS circle, severely criticizes the liberal legal tradition but does not outrightly reject the possibility of a legal tradition that can replace the existing one.[94] He calls for a return to natural law and the rule of 'living law'. In his words:

> It is important to remember that the three kinds of law present themselves historically as overlapping and interpenetrating realms, rather than neatly separated worlds. The legal profession and legal education in postliberal society show the juxtaposition of concerns with all these forms of law and legal thought. This universe has an outer sphere of blackletter law: the area wherein the rule of law ideal and the specialized methods of legal analysis flourish. Then there is an inner sphere of bureaucratic law and bureaucratic rhetoric. At this level, law is approached instrumentally; one talks of costs and benefits, and one searches for a science of policy that can help the administrative and the professional elite exercise its power in the name of impersonal technique and social welfare. But, beyond legalistic formality and bureaucratic instrumentalism, lie the inchoate senses of equity and solidarity. . . . The search for this latent and living law - not the law of prescriptive rules or of bureaucratic policies, but the elementary code of human interaction - has been the staple of the lawyer's art wherever this art was practiced with the most depth and skill. What united the great Islamic *'ulama'*, the Roman jurisconsults, and the English common lawyers was the sense they shared that the law, rather than being made chiefly by judges and princes, was already present in society itself. Throughout history there has been a bond between the legal profession and the search for an order inherent in social life. The existence of this bond suggests that the lawyer's insight, which preceded the advent of the legal order, can survive its decline.[95]

[88] Gary Minda, supra note 11, at 619-20.
[89] John Hasnas (1995) 'Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument', *Duke Law Journal*, 45(1): 84-132, at 99-100.
[90] Alan Hunt (1990), supra note 6, at 526.
[91] Jack M. Balkin (1994) 'Being Just With Deconstruction', *Social and Legal Studies*, 3(3): 393-404, at 393.
[92] Eugene D. Genovese (1991) 'Critical Legal Studies as Radical Politics and World View', *Yale Journal of Law & the Humanities*, 3(1): 131-56, at 155.
[93] Robert W. Gordon (1996) 'American Law through English Eyes: A Century of Nightmares and Noble Dreams', *Georgetown Law Journal*, 84(6): 2215-43, at 2240-41.
[94] See generally Allan C. Hutchinson and Patrick J. Monahan (1984) 'The "Rights" Stuff: Roberto Unger and Beyond', *Texas Law Review*, 62(8): 1477-1539.

Conclusion

> *Knowing when doctrine sticks, when it doesn't, and why—and suggesting why knowing why is important—are major intellectual contributions of the Critical Legal Studies movement.*[96]

CLS seeks "to liberate law and legal interpretation from its self-referential, circular, and ideological shackles".[97] To that end, CLS methodologies of legal research are mainly focused on various interrelated subjects – the incoherency and indeterminacy of legal doctrine, the myth of legal reasoning and the nature and effects of categorising legal problems.[98] The

[95] Roberto Mangabeira Unger (1977) *Law in Modern Society: Towards a Criticism of Social Theory*, New York: Free Press, pp. 241-2.
[96] Mari J. Matsuda (1987) 'Looking to the Bottom: Critical Legal Studies and Reparations', *Harvard Civil Rights - Civil Liberties Law Review*, 22(2): 323-99, at 329.
[97] Peter Gabel (2009) 'Critical Legal Studies as a Spiritual Practice', *Pepperdine Law Review*, 36(5): 515-33, at 515.
[98] Steven M. Barkan, supra note 82, at 618.

methodological approaches of CLS people centred on these subjects deserve acclaims for introducing a new paradigm in jurisprudence that exposes many deficiencies and concerns of traditional legal thoughts. CLS tries to locate problems not at the surface of legal principles and their underlying doctrines but in the deep structure of law, society and culture. Undeniably, CLS movement per se is not so much active now as it was in 1970s and 1980s. CLS as a school of thought primarily launched targeted attack against liberal legalism but as of now is "far from replacing liberal legalism as the mainstream legal philosophy".[99] CLS, however, "has unquestionably presented a most profound critique".[100] The CLS approach offers a new way of thinking about "how legal measures interact with, and are constructed by, the areas they target",[101] and helps in developing "the attitude of looking at what really matters in the law, beyond the rhetoric contained in the law in the books".[102] This 'new way of thinking' certainly has not died with the decline of CLS movement. Even if one rejects CLS arguments, the questions posed by these arguments have potentials to force legal researchers in exploring many new issues of utmost significance.[103] In 1989, when CLS was quite alive as a powerful movement, Gary Minda tried to assess the future of CLS movement but could not finally end up with one single conclusion. Minda, however, confidently asserted that "the attitudes and perspectives of mainstream legal scholars will be forever affected by the challenge posed by the critics of the new movements".[104] It would therefore be reductionist to dismiss the essence and contribution of CLS methodologies. Even a critic of CLS opines:

> A critique of CLS must begin by acknowledging its striking contributions. Most striking is its success in opening up legal scholarship to fields outside the law, to fruitful discussions of legal practice, to diverse political viewpoints, and to playful discourse free from compulsive footnoting. CLS has also changed the terms of the debate in jurisprudence.[105]

CLS methodologies have successfully challenged many claims of orthodox legal scholarship that escaped the critical scrutiny of legal scholars for many centuries. The caricature of

[99] J. Stuart Russell, supra note 16, at 24.
[100] Ibid.
[101] Thomas E. Webb (2015) 'Critical Legal Studies and a Complexity Approach: Some Initial Observations for Law and Policy', in Robert Geyer and Paul Cairney (eds.) *Handbook on Complexity and Public Policy*, Massachusetts: Edward Elgar Publishing, pp. 48-64, at 48.
[102] Ugo Mattei and Anna di Robilant (2001) 'The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe', *Tulane Law Review*, 75(4): 1053-92, at 1083.
[103] Steven M. Barkan, supra note 82.
[104] Gary Minda, supra note 11.
[105] Joan C. Williams, supra note 6, at 471.

orthodox legal discourses as depicted by CLS techniques, however negative in face that may be, can be taken as a positive contribution – for its potentials as a call to rethink, reshape, redefine and reconstruct - even for the sake of orthodox legal jurisprudence. These techniques "have the very real utility of exposing the vulnerability of the routine justifications of power, of enabling people to spot the structural defects and to challenge many of the rationales they hear advanced for especially ugly legal practices".[106] In that sense, CLS as a movement of legal thought has positive impact on overall legal scholarship. Faced with the revolutionary challenges of CLS techniques, mainstream jurisprudential schools these days are engaging in more rigorous legal reasoning to justify their position and at the same time abandoning or redefining some earlier propositions of their own. It is true that CLS approaches by and large contribute to the decline of faith in formal and liberal legal order that rules in today's world. This impact of CLS can be seen as a positive development since this loss of faith generates legitimacy crisis for the existing legal order and forces the legal order to take corrective measures.[107] It is evident that the liberal legal order itself is not constant in every aspect. For example, the emergence of legal aid and public interest law movements and the growing emphasis on alternative dispute resolution can be seen as liberal legal order's forced response to legitimacy crisis. This paper does not link these developments to CLS, but asserts that legitimacy crisis can lead a legal order to make institutional changes that promise more justice to its subjects.

We should also be mindful of the efficacy crisis of CLS techniques. The methodological techniques employed by CLS scholars are yet to be sufficient as building blocks of any alternative jurisprudence that is assertive as well as pragmatic.[108] Nevertheless, this criticism must not be stretched too far. If we consider the relatively recent origin of CLS, all the deficiency of CLS techniques – since they are not structural to CLS concepts - can be taken as a gap in development that can be hoped to be repaired in the days to come. While criticising CLS, Dworkin observed in 1986 that "we have much to learn from the critical exercise it proposes, from its failure as well as its successes".[109] This observation holds true even today.

[106] Robert W. Gordon, supra note 5, at 83.
[107] See David M. Trubek (1977) 'Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought about Law', *Law & Society Review*, 11(3): 529-69.
[108] Thomas E. Webb, supra note 101, at 60.
[109] Ronald Dworkin (1986) *Law's Empire*, Massacusetts: Harvard University Press, p. 275.