TESTING SOME THEORIES ABOUT LAW: CAN WE FIND SUBSTANTIVE JUSTICE WITHIN LAW'S RULES?

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[The author takes as an organising theme the tension between law's formal rules, necessary as they are for a consistent, neutral and reasonably predictable system, and the requirement that law deliver substantively just outcomes in individual cases, exhibiting sensitivity to particular contexts. The discussion considers a number of theories about law — Formalism, Realism, Idealism and Critical Legal Studies — in light of their approach to this tension. Whilst there is something of a progression in the theories toward acknowledging the underlying inequalities that characterise law's social context, and the posited tension between formalism and substantive justice, the theories do not appear to offer transformative possibilities. Such a possibility is suggested finally in the social theory of Roberto Unger.]

I INTRODUCTION

The controlling idea of this piece[1] will be the inability of a number of theories about law to deal with the notion of delivering substantive justice through law's formal rules in a social context of inequality. I will posit a seemingly inescapable tension within law between notions of formalism — the search for universal rules of law before which we are all, as liberal social units, equal — and of substantive justice — the felt need for a 'fair' result in each particular case.[2] I will use that tension as a conceptual grid upon which to map a number of different theories about law as they have evolved over the last century, drawing on American legal scholarship.[3]

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1 This article has its roots in the course 'Theories About Law', taught by Professor Sargentich at Harvard Law School. I thank him for his patient teaching, his insights and his comments both in the classroom and on an earlier draft of this paper. I have largely followed his characterisation of the theories about law, though any mistakes, misinterpretations and misapplications are of course solely mine. Thanks also to Chris Tennant and Diane Macdonald, at Harvard and North Eastern Universities respectively, for their comments on an earlier draft.

2 An instance of the general tension would be the historical evolution of equity as a groping for a flexible response to the formality and rigidity of the common law and its perceived failure as an increasingly inflexible system to deliver substantive justice in particular cases.

A more specific example of the tension in contract law can be seen in the claim that 'a major feature of contract writing has been its denunciation of equitable conceptions of substantive justice as undermining the "rule of law"': Morton Horwitz, *The Transformation of American Law, 1780-1860* (1977) 160.

Finally, a concrete example of an individual judge grappling with the tension might be found in the judgments of Lord Denning: see, eg, *D & C Builders Ltd v Rees* [1966] 2 QB 617.

3 Of course this is not to say that American jurisprudence is the first to face this dilemma — Aristotle, eg, considered justice to comprise both general justice/lawfulness (formalism) and particular justice/equality (substantive justice).

The tension is, in the first instance, simply a useful reference point around which I have chosen to organise a discussion about legal theories. But reference points, and particularly one as irritating and intractable as this, cannot be left entirely unexamined and I shall venture a more critical, and even prescriptive, discussion later in the piece. I will show that none of the considered legal theories speak to the resolution of that tension, but that in the evolution of the theories we can arguably discern signposts to the source of the tension and perhaps a suggestion of transformative possibilities.

Suffice it to say for the moment that the tension is a constant and dissonant background 'noise' in any consideration of legal theory and practice, and this claim will for the moment justify its invocation as the focus of my discussion. The central question I am addressing initially then is this : how do various jurisprudential theories account for, and deal with, this tension between formalism and substantive justice?

Although I am taking the existence of the tension for granted and am not going to try and prove it here, I do want to at least sketch its outlines in a way that hints at its competing characteristics.

A *Formalism and Substantive Justice*

When we look at law 'close up' we are often puzzled and troubled by its contradictions, inconsistencies, tensions and conflicts — its failure to deliver what in our imaginings it promises. On the one hand, we in the Western liberal democracies want a system of law that is "law" — not just interest-centred politics, or religion, or the will of an individual sovereign, or even the tyranny of a collective. We want it to deliver us from arbitrariness, irrationality and caprice, and to do so in a coherent, reasoned way. It should be a body of work which we are capable of understanding and, to a reasonable degree, predicting so that we can order our affairs accordingly and in the knowledge that none of us will be individually disadvantaged before it by our personal social reality of class, economic status, race, gender, sexual preference, political persuasion, and so on. It should be an ordering principle which is rational, consistently applied and 'blind' in ignoring the social, economic and political situations of those who come before it. In short, it is imperative that law take a *formalist* form — that it be nomological, or rule-based, exhibiting a law-like rationality, a deductive method producing consistent, reasonably predictable, determinate solutions.

On the other hand, such a body of law is of little use if it merely delivers *procedural* justice — if it cannot deliver a result in individual cases which we can recognise as 'fair' — a result that seems 'reasonable' in light of our lived social and cultural reality. It need not of course be the outcome that we, as an individual party, would want — someone must, after all, 'lose' in our adversarial system. But it must at least be an outcome that we, as parties and observers, can accept as believable, legitimate and justifiable according to some felt sense of 'fairness' and justice within some common web of understanding. It should not, for example, be an outcome pre-determined by the unthinking application of

rigid, inflexible rules fashioned in an alien context and mechanically applied to a concrete case, regardless of the equity and reasonableness of the outcome. Such rule fetishism, or extreme formalism, without sensitivity to context, applied neutrally and without prejudice, speaks more to the forms than to the substance of justice. We do not want procedural equality through formalism only to suffer substantive inequality through the thoughtless application of formal rules divorced from social reality. In short, it is imperative to our conception of law that it deliver substantive justice in concrete, particular cases — that it be connected to social reality, not separation from it, and derive from and relate to subjective experience as well as objective reason.

We seek to realise seemingly mutually exclusive criteria, and it seems that we are left with an irreconcilable tension. Each is a necessary but not sufficient condition for 'justice', yet are they not contradictory? Formalism requires that we 'cram', and thereby distort and exclude, facts in individual cases into the 'appropriate' normative rule, virtually guaranteeing at least some degree of unreality to their resolution and thereby compromising, and very possibly denying, substantive justice. It is structuralist in its emphasis on the formal, organisational aspects of social life. Substantive justice, on the other hand, requires that ultimately we must be sensitive to the facts and context of the individual case, taking it as socially and culturally situated rather than as potentially reducible to some legally recognisable norm. Each case will therefore be unlike any other and to that extent not subject to extrapolation. There can be no universal rules since to posit them is to deny case-sensitivity. Substantive justice tends to the functional and empirical in its emphasis on practical, culturally located responses to conflict. It does not rationalise legally 'correct' outcomes through formal legal rules. In the pursuit of justice, rationalisation is not meaning. Thus, the outcome of individual cases will be largely unforeseeable, and must depend on the personal judgment of the adjudicator on the day — it is therefore in dire peril of arbitrariness and unpredictability, and worse, abuse of the power relations that characterise social reality if it is unconstrained by rules.

Taking this admittedly crude and simplified discussion of formalism versus substantive justice as it stands — and emphasising *versus* — I will now use the contradiction as a reference point for considering alternative legal theories. I choose this tension as representing a critical dilemma within legal systems, and one which any jurisprudential theory must at least address.

B *Liberal Theories of Jurisprudence*

Liberal law is realised in the notion of the 'rule of law'. If we are all to be discrete, self-contained social actors pursuing and optimising self interest, and thereby maximising aggregate community utility, then we must operate in conditions that do not constrain that pursuit. We must be treated equally at least in the sense of freedom to pursue our personal visions of the 'good life', short of interfering with the similar rights of others, and to do so we must all be equally

endowed with certain legal (as well as political) rights and entitlements. What might be perceived as a certain commonality of legal and political experience — that sense in which we are 'equal' in our shared entitlements — is in reality not a celebration of community but rather of its opposite. These entitlements are simply necessary pre-conditions for the celebration of difference, of liberal notions of individualism and the pursuit of self interest. Thus the rule of law is a condition of freedom, so that we may live free of the arbitrary rule of personalities and power — 'not under men but under God and the law'. Liberal law consciously constructs images of individuals as interchangeable, 'objective' holders of rights which define them as legal units, and it is as those units that we come before law.[4] Having done so, law can then construct 'objective' rules for the orderly conduct of these interchangeable social actors. Thus under liberal notions of law legal *rules* are seen as emancipatory rather than constraining, and indeed are central to the ideal condition for law and liberal society. The attempt to rationalise liberal law is exemplified in Formalism, later critiqued by the Legal Realists, refined by the Legal Idealists and critiqued again by the Critical Legal Scholars.

II THEORIES ABOUT LAW

A *Formalism*

Legal Formalism, exemplified in the writing of such nineteenth century scholars as Langdell in America and Austin in England, is a scientific jurisprudence which sees law's ideal condition as a series of rules, not informed by any moral discourse, but simply a matrix of rules evolving from a series of cases and statutes. It is positivist law which may be applied without recourse to morality, ethics or ideology. That is not to say that law is bereft of moral, ethical or ideological content — how could it be as the construct of human agency? — but that they are not values to be drawn upon in implementing law. There is no assumed or necessary connection between law and morality. One simply locates and applies the appropriate rule, and it is this rule-orientation that makes law 'law'. In this very modernist conception of law there is a master scheme of prescriptive categories, and their application constitutes the entirety of 'law'. Law is a seamless fabric, a system without gaps, in which the 'solution' to any dispute can be found if one searches diligently for the proper rule or pigeonhole. The image is one of a legal warehouse of rules, the inventory and incoming stock to be sorted and categorised by doctrinal analysts, with legal practitioners simply perusing stock numbers for the 'right' item. Thus, 'law, considered as a science, consists of certain principles or doctrines' and 'to have such a mastery

[4] Note here the paradox of liberal law defining individuals so as to eliminate difference, the very difference which Liberalism celebrates. Whether that flattening of individual difference is a necessary pre-condition for liberal law, albeit one which may defeat aspirations toward substantive justice, or whether in fact it is a sleight of hand which conceals something darker, will be discussed below.

of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs is what constitutes a true lawyer ...'.[5] The number of such doctrines is limited, they are knowable and can be unambiguously applied.[6] Law's aspiration is to a kind of legal autarky that is self sufficient in its rules, independent and untroubled by external social realities, for the rules are everything.

This legal formalism is self-defining and self-referential — substantive justice is not considered in contradiction to it because there is no contradiction. One follows from the other. The mechanical application of the rules is presumed to produce an optimally 'just' outcome, and substantive justice is not so much assumed as not considered, in that one does not look beyond the rules to the consequences of their application. Thus, even when faced with such a politically and ideologically 'loaded' statute as a constitution, courts may still seek refuge in a formalist / positivist mode of interpretation which limits itself to discerning the meaning of the words of the instrument in some allegedly 'objective' way, for example a 'literal' interpretation of the 'plain meaning'. The judicial gaze is (in theory) averted from social context and consequences, and from moral, political and ideological values. Privileged values under Formalism are those of consistency, predictability and 'rationality' within the body of law, but not substantive justice in individual cases. Law is reduced to a descriptive enterprise — a pseudo-science — which collects like cases under rational rules. Any tension between the rationalist rules and the empirical 'ever-tangled skein of human affairs' is ignored — rules are not contingent on social reality. There can be no 'principles' of substantive justice, and it will therefore be arbitrary and uncertain.[7] Formalist rules must therefore prevail. The internal logic and integrity of 'Law' must prevail even in difficult cases where substantive injustice may be a regrettable but unavoidable outcome. There is no enquiry as to where the rules come from, other than past cases.[8] Thus, any enquiry as to what law is

[5] C C Langdell, *Selection of Cases on the Law of Contracts* (Preface to the 1st ed, 1871) vi.

[6] Ibid vii:

> the number of fundamental legal doctrines is much less than is commonly supposed ... if these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.

[7] For an explicit statement of the contradiction between formalist rules and the indeterminacy of substantive justice see, eg, Powell's 1790 *Essay Upon the Law of Contracts and Agreements*, quoted in Morton Horwitz, *The Transformation of American Law, 1780-1860* (1977) 160:

> It is absolutely necessary for the advantage of the public at large that the rights of the subject should ... depend upon certain and fixed principles of law, and not upon rules and constructions of equity, which when applied ... must be arbitrary and uncertain, depending .... upon the will and caprice of the judge.

Equity 'must be arbitrary and uncertain' because '*there could be no principles of substantive justice*': Horowitz paraphrasing Powell (emphasis added).

[8] See Langdell, above n 5, vi: '[G]rowth is to be traced in the main through a series of cases' and 'the cases which are useful and necessary for this purpose ... bear an exceedingly small proportion to all that have been reported.'

or ought to be is foreshortened by the assertion of the supremacy of rules — that is what 'law' is.[9]

It should be noted that a milder version of Formalism, including a degree of rule scepticism, has more recently been advocated by authors like H L A Hart.[10] It admits of a degree of discretion in the rules, which will inevitably manifest a solid core of clear and settled meaning yet be surrounded by a penumbra of uncertainty and ambiguity in what Dworkin, as we shall see later, calls 'hard cases'. Positivists would suggest that any effort to achieve substantive justice where Formalism (the hard core) fails will be problematic — 'hard cases make bad law', and the penumbra is not a happy place for law. Better that hard cases should make hard law. Formalists would therefore strive to fit hard cases within the hard core.

B *Realism*

After its most influential period around the turn of the century, Formalism waned as a credible theory about law, to be followed chronologically in the 1920s and 1930s by the sociological jurisprudence of the Legal Realists. The influence of Realism continued until perhaps the 1960s, and arguably continued to animate the later Critical Legal Studies movement.

Whereas Formalism took pride in its rules, relatively devoid of any (articulated) informing morality, the Realists decried this rule-boundedness and declared untenable the notion of implementing law as rules empty of moral and political debate. Rather than take refuge from indeterminacy in the rules of Formalism, we should acknowledge and embrace indeterminacy. In any situation, said the Realists, there are a variety of possible rules available, they are often flagrantly contradictory, and choice between them is not governed by 'law'.[11] The role of the judge is to *choose*, the imperative of choice should be acknowledged, and the exercise of choice should be one that is case-sensitive and aware of policy implications and social outcomes . As Cohen puts it, 'logic provides the springboard but it does not guarantee the success of any particular dive',[12] and to suppose that all conflicts can be 'rationally' solved within this self-defining legal logic is 'transcendental nonsense' since there are always social, economic and ethical issues at stake.[13] Therefore considerations of

[9] Note that if this truncated vision of law now seems like a caricature in light of subsequent developments in legal theory we would nonetheless do well to recall its lingering influence in the courts and in legal education.

[10] H L A Hart, *The Concept of Law* (1961). For a brief discussion of Hart's vision of legal rules see, eg, Margaret Davies, *Asking the Law Question* (1994) 79.

[11] See, eg, Felix Cohen, 'The Ethical Basis of Legal Criticism' (1931) 41 *Yale Law Journal* 201, 216:

> [E]lementary logic teaches us that every legal decision and every finite set of decisions can be subsumed under an infinite number of different general rules .... Every decision is a choice between different rules which logically fit all past decisions but logically dictate conflicting results in the instant case.

[12] Ibid.

[13] Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809.

substantive justice cannot be ignored or assumed away in the service of a greater cause — the Formalist fantasy of an internally logical and consistent system of rules. Indeed, 'economic prejudice masquerad[es] in the cloak of legal logic',[14] and law is to be judged by its social consequences, that is to say, not by its formalism but by its ability to deliver substantive justice. Thus the Realists acknowledge the role of social policy in law.[15] They are against the primacy of abstract rules, demanding candour in admitting of choice and therefore of indeterminacy. Rather they demand that we attend to the *consequences* of laws, which reflect policy judgments and social facts, which are in fact the means and ends of social engineering. Judges should admit the role of choice and take responsibility in exercising it, rather than attempting to conceal and deny it. The question of the legitimacy of judges, as unelected officials in a liberal democracy, playing such an overtly interventionist role in social, commercial and political life does not constrain this Realist view since the role is an inevitable, if unacknowledged, outcome of the inherent ambiguity and choice in law. Oliver Wendell Holmes anticipated the Realists in his claim that 'the life of the law has not been logic: it has been experience'.[16] Legal Realism in fact represented an aspect of a broader philosophical movement grounded in empirical experience rather than abstract rules.[17]

But how does this speak to our central question: how does one find substantive justice among the social constructedness of legal rules and the plethora of choices ignored by the Formalists and exposed by the Realists? And further, how does one do so without sacrificing predictability? Legal Realism certainly suggests a consciousness of substantive justice in its demands that the 'real' legal context of politics and social life be acknowledged and honoured. Law does not and cannot operate in isolation from society, and to the extent that it tries to do so through Formalism it distorts and truncates its practice and possibilities. Yet the Realists seem not so much to promote a particular vision or program for realising substantive justice as to simply point out how ludicrous it is to expect it as an outcome of Formalism, which uses rules as dogma to *conceal* the reality of choice, indeterminacy and moral relativism. The implication seems to be that in simply drawing aside the veils of Formalist deceit (or at best self deception) they

[14] Ibid 817.

[15] Ibid 834, eg: '"Social Policy" will be comprehended not as an emergency factor in legal argument but rather as the gravitational field that gives weight to any rule or precedent'.
See also Karl Llewellyn, 'Some Realism About Realism — Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222, 1252, eg:
> if there is available a competing but equally authoritative premise that leads to a different conclusion — then there is a choice ... which *can* be justified only as a question of policy — for the authoritative tradition speaks with a forked tongue.

[16] Oliver Wendell Holmes, *The Common Law* (1881) 1.

[17] See, eg, Llewellyn, above n 15, 1223:
> They want law to deal, they themselves want to deal, with things, with people, with tangibles, with *definite* tangibles, and *observable* relations between definite tangibles —not with words alone; when law deals with words, they want the words to represent tangibles which can be got at beneath the words, and observable relations between those tangibles. (Original emphasis.)

have facilitated a new, more authentic legal order which will somehow organise itself in a way that reflects its 'real' context, yet presumably free of chaos and caprice. That may appear admirable (and perhaps even sound) as a concept, but in terms of execution there is a vacuum — there is no attempt at programmatic argument. The assumption is that by revealing how judges — for this is a court-centred movement — really make decisions, and encouraging them to acknowledge that process, a necessary consequence will be that they will then make decisions more sympathetic to real societal needs, that is to say moving away from formalism and toward substantive justice. Again, that implies a considerable leap of faith.

Importantly, however, the Realists have debunked the redeeming icon of Formalism, namely its claims to consistency, predictability and rationality. They have done so by revealing the field of ambiguity and choice inherent in the formalist rules. The reality of choice cannot be circumvented by denying its existence. Similarly, by exposing the reality of choice they have also exposed forever the reality of a social agenda behind law — the idea that law determines as well as describes society.

But the Realists do not move beyond this stance of incredulity toward Formalism to any resolution of the tensions they raise, including that between formalism and substantive justice. Even if we embrace post-Realist rule scepticism in the sense of no longer subscribing to formalist rule mythology — by no means a given in light of our law school teaching and our courts — are we then condemned to flounder in the relativism and indeterminacy of Realist choice? The Realists may have helped us to better *understand* the social and political realities of law, but they have not taken us further. They have helped to strip away some of the masks we legal actors assume, albeit usually unknowingly, but not how to redeem the performance. In more contemporary terminology they deconstructed a legal myth in order to reveal its constructedness, but (curiously for the time) did not attempt the substitution of an alternative modernist agenda. The next school of legal theory — the Idealists — sought to reconstruct a redeeming theory about law by revealing an informing meta-narrative which is immanent in law itself.

C *Idealism*

If the Legal Realists had succeeded (presumably forever) in debunking the tautological model of 'gapless' law, the Idealists attempted to reconcile formality and indeterminacy by looking for some guiding unity in the principles, policies and purposes underlying the law. They might be unearthed by looking deeper within law itself (for example Dworkin), or alternatively outside law to society (for example Llewellyn). The idea is that if one excavates diligently then one can find embedded within the law, if not a unifying morality or elevated moral discourse, then at least certain principles, policies and purposes which inform it and to which one can look for guidance. There is some partial move toward a sociological jurisprudence as judges are required to go beyond all-or-nothing

rules to weigh and balance on the scales of these principles, policies and purposes. The Idealists are anti- (or at least post-) Formalist in rejecting unblinking faith in legal rules, but go beyond the Realists in an attempt to redeem those rules by vindicating them through their underlying morality.

An early form of Idealism, extant after the Second World War until the early 1960s, affirms the anti-formality of the Realists but tries to deal with the problem of indeterminacy. Thus Llewellyn, formally a Realist himself, felt that law is indeed 'reckonable' because, notwithstanding the 'large numbers of mutually inconsistent major premises available for choice', there are a variety of 'steadying factors', and that judges bring to their rulings a combination of 'situation-sense', wisdom and reason.[18] Such judicial attributes will serve to limit the scope of discretion. Further, there are principles, policies and purposes concretely embedded in law which can be unearthed. He quotes Goldschmidt approvingly — there is law which 'rests on the solid foundation of what reason can recognise in the nature of man and of the life conditions of the time and place' and 'is indwelling in the very circumstances of life ... the highest task of law-giving consists in uncovering and implementing this *immanent* law'[19] (emphasis added). This seems to be law which is both reason — a wink to formalism — and sensitivity to context — a nod to substantive justice.[20] That is a very comforting prospect, but as Llewellyn admits there is another great leap of faith involved here, namely an omniscient judge of extraordinary wisdom and judgement who can 'uncover and ... implement the immanent law'[21] through an unerring 'felt sense and decency'. Note also that it is very much *status quo*-oriented law, lacking a critical purchase and therefore a spirit of transformative possibility in law. One looks to something, that is principles, policies and purposes, immanent in law but not for something transcendent, such as the possibility of moral discourse capable of transforming law and social reality. It is adaptive law, in that when formality is exhausted reason can carry on to the underlying principles, policies and purposes. But it is not critical law. Realism at least claimed a critical edge, though, similarly, it lacked a transformative program.

If this early version of Idealism looks to society for the situation-sense which will reveal immanent law, a later version from the late 1960s to the present, and typified by Dworkin, rather looks within law itself for a unifying narrative.[22] To

[18] Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960)

[19] Ibid 122.

[20] Ibid 135: 'the main guide is felt sense and decency, the right result on the facts of case and situation (or, more wisely, on the facts first of the situation-type and only then of the particular case).'

[21] Ibid 127:

> *Only as a judge or court knows* the facts of life, *only as they truly understand* those facts of life, *only as they have it in them to rightly evaluate those facts and to fashion rightly a sound rule* and an apt remedy, *can they lift the burden* ... to uncover and to implement the immanent law. (Original emphasis.)

[22] See also, eg, C Fried, 'The Laws of Change: The Cunning of Reason in Moral and Legal History' (1980) 9 *Journal of Legal Studies* 335.

paraphrase within our context of formalism versus substantive justice, Dworkin looks to '... [build] a bridge between the *general* justification of the practice of precedent [that is, formalism] ... and [a] decision about what general justification requires in some *particular* hard case [that is, substantive justice]'[23] (emphasis added). He admits the dilemma of choice in Formalism (choices among various rules and interpretations), and for that matter of substantive considerations of choice (a variety of alternative principles, policies and purposes) within Idealism. However, he claims that through reason (rather than policy) one can unearth in any given area of law a unifying theory with which to decide hard cases. It is a complex (indeed 'Herculean')[24] task, mistakes will be made, and not all instances will fit the theory, but nonetheless there is 'theory in the doctrine' — a large, unifying construct which satisfies our taste for harmony and consistency, and presumably one which honours both procedural and substantive justice, since again one should flow from the other.

Thus, there is a light at the end of the tunnel, and Hercules is holding it — he can, with endless striving, resolve hard cases within the formalism of legal rules and their underlying principles, policies and purposes, notwithstanding their complexity and contradictions.[25] Indeed some of these contradictions may remain just that and a 'best fit' theory will have to suffice; as well, mistakes will be made in this very difficult undertaking.[26] Importantly, however, this form of Idealism does give an account of transformative moments in law. Hercules need not, for example, be constrained by 'popular morality' on a particular issue if the larger theoretical construct suggests otherwise. Therefore a court may strike down anti-abortion legislation even though it is supported by a majority of the community, on the grounds that there is a contrary vein of unifying morality in the law that overrides community feeling on the particular issue of abortion.[27]

It is an underlying political/community morality which infuses the law with coherence and legitimacy, not because it can be verified by (say) an opinion poll on a particular subject like abortion (on the contrary perhaps), but because it is a deep, background community morality which is pre-supposed by the law and therefore immanent in it. Law is in fact one of its institutional forms. There are conflicts within that community morality,[28] and law must acknowledge them but not bend before them — the community has an 'institutional right' that dictates that courts consistently mine that vein of unifying political morality within law and presupposed by it, even in the face of contrary public opinion on a given issue, for the community may simply have it 'wrong'. It is the community

[23] Ronald Dworkin, 'Hard Cases' (1975) 88 *Harvard Law Review* 1057, 1093-4.

[24] Ibid 1083.

[25] See Ronald Dworkin, *Taking Rights Seriously* (1977) 105: Hercules, Dworkin's mythical judge, is 'a lawyer of superhuman skill, learning, patience and acumen.'

[26] See, eg, Dworkin, above n 23, 1109.

[27] Ibid 1104-5.

[28] See also, eg, a Dworkin ally in Fried, above n 22, 343: 'There is, after all, within certain communities a very large measure of moral consensus with considerable dispute about details — just as in science'.

morality embedded in the *law* which counts, and which gives law its inherent coherence.[29] Hercules may therefore come up with a 'correct' legal decision which is nonetheless controversial.[30] Surprising results can be explained. Of course Hercules' own opinion on a particular issue is not relevant, only his legal opinion on the proper reading of the underlying political morality immanent in the law. In that sense his reflective exercise is not one of exercising personal prejudice on a given issue but rather of testing alternative broad theoretical constructs, based on settled (or 'not-hard') cases, for the proper one to apply in a particular hard case.

Thus, in a special and carefully defined sense Dworkin's law is situated *in* community, rather than prior to it, yet possibly 'transcending' it in particular hard cases. Of course (the argument would go for our central question) it is because law's rules are ultimately derivative of community that they can be expected to deliver, if properly read, substantive justice as an outcome. The postulate of a unifying community morality within the rules (properly read) assures us of harmonious outcomes — there will be no tension between the rules and the substantive outcomes as they are applied to particular cases. The 'correct' rule choice — the righteous exploitation of indeterminacy (or more kindly, flexibility) within the available rules — will enable us to ensure substantively just decisions even in hard cases. Like the earlier Idealists, Dworkin explains why and where there is a place to go when Formalism runs out, and that place is a deeper level of legal discourse which *can* disgorge a 'right' answer in hard cases. He tries to show how this can be done without sacrificing law's rationality and autonomy. There is consistency in law, rooted not in the procedural rules but in the informing morality of the rules. Unlike the earlier Idealists, Dworkin locates that place within law rather than in some socially located 'situation sense'.

However, both streams of Idealism arguably subsume the problem of substantive justice in a theory of law's formalism which simply skirts the issue by assuming/asserting the presence of an underlying set of principles, policies and purposes representative of that kind of immanent communal morality, be it in law itself or in society, which when properly unearthed and applied will satisfy claims to substantive justice. The claim is vulnerable both from within and without.

From within there is the troubling reliance on Llewellyn's uncritical leap of faith that human judges can discern and apply the legitimising immanent principles, policies and purposes to be found in social 'situation sense'. Similarly, Dworkin can posit Hercules but can he deliver him (and a 'him' it certainly seems to be) to us? Procedurally the challenges are, to put it mildly, daunting for there is still an enormous degree of discretion available to the judge. To say that

[29] See also, eg, Fried, above n 22, who similarly characterises 'the law [as] a moral science, and judges [are] moral agents ... the best study of morals, and therefore of law, is moral philosophy'.

[30] Dworkin, above n 23, 1105.

mistakes are made is to trivialise the tension we have posited between formalism and substantive justice. For this Idealism can be characterised as a more sophisticated, extended kind of Formalism in that whilst mere rules may not deliver all the answers, particularly in hard cases, they nonetheless contain within them (at least according to Dworkin) the seeds of an answer to hard cases through their immanent political morality. The formalism lies not in the rules but in their unifying, motivating spirit. So, an Idealist would argue, any observed tension between Dworkin's 'sophisticated' formalism and the substantive justice which is so difficult to deliver in hard cases is simply the unfortunate outcome of imperfectly applied Dworkian Idealism — that is to say, Hercules making mistakes — or else the community's imperfect understanding of the underlying political morality to which Hercules has properly turned. Either way, the tension is simply the result of a regrettable misapplication, or misunderstanding, of the unifying theory that legitimises formal law. Certainly one can argue that, but only if one ignores substantive questions about this background institutional morality which Idealism takes for granted. For that is the problem — the absence of a reflective, critical aspect to Idealism (and of course more so to Formalism) which permits of too ready an acceptance of the *status quo*.

Thus, from without Idealism is vulnerable to a substantive critique as well as a procedural critique of the application of this immanent morality. What is this morality? From whence does it come? Is it a singular, unified community morality which can be mechanically applied, or is it (for example) interest group morality driven by power relations? Critical Legal Theory, the last of our Theories About Law, asks both the procedural question — echoing the Realist critique of choice between competing rules — and the substantive question — what is the nature of this moral / political structure to which the Idealists turn?

D *Critical Legal Studies*

There is no one theme or theory which links the diverse writings of the Critical Legal theorists, except perhaps the 'critical' descriptor. It is more in the nature of a movement than a theory. However, it is in the scope of this 'critical' descriptor — how deep and in what direction the critique is extended — that we might attempt a broad distinction in the writings. I will distinguish a 'milder' from a more 'radical' strand, although many CLS writers, including those discussed below, must be included in both.

One strand of Critical Legal Studies essentially takes up and presses forward with the thesis of the earlier Legal Realists, namely the open-endedness and indeterminacy of law, whereby judges simply choose from a range of competing rules and principles. Like the Realists, this strand seeks to expose law's disingenuous claim to provide 'determinate answers, determinate solutions in particular cases, without resort to political or ethical choice'. [31] As with the rule-

[31] Karl Klare, 'The Law School Curriculum in the 1980s: What's Left?' (1982) 32 *Journal of Legal Education* 336, 340. Klare continues: 'there simply is no necessity or determinacy to

scepticism of the Realists, this strand of Critical Legal Theory sees legal rules competing with each other in a petty, unstructured conflict, devoid of any Grand Theory[32] (as postulated by, say, the Idealists). Alternatively, or as well, the conflict will take the form of 'large' political choices of policy and ideology. Thus Frug deconstructs the emasculation of the traditional institutional form of the city as an entity which was inconsistent with liberal ideology;[33] Klare shows how an apparently radical piece of legislation (the Wagner Act) was selectively interpreted to produce a labour relations model which was consistent with existing values of liberal capitalism,[34] and Kennedy maps the tension between the two opposing rhetorical modes of altruism and individualism in private law.[35] The rejection of determinacy in law, based on a variety of grounds from the procedural to the ideological, is a minimum position for a Critical Legal scholar. Law is not rational but rather rationalising.

A second, more radical, Critical thesis addresses the underlying structures of law and its implicit ideology, attempting to connect law to its social purposes and political interests, notably those of liberal capitalism[36] — that is, confronting the deep structure directly. Whilst the Idealists seek to find the underlying principles, policies and purposes which inform law and legitimise it, Critical Legal Theorists take the enquiry a step further, seeking to expose and challenge the legitimacy of the underlying ideology which actually motivates legal decisions. They see the Idealists (and of course the Formalists) as not simply accepting the *status quo* but as legitimating it — not merely an interpretive role but an instrumental one. Thus, the Critical schools of jurisprudence share one assumption with Dworkin — that there is indeed 'theory in the doctrine' — but

legal reasoning, no inner compulsion to its methods. Legal reasoning is a texture of openness, indeterminacy, and contradiction.'

See also, eg, Clare Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94 *Yale Law Journal* 997, 1007, on the dualities which lead to doctrinal indeterminacy. She is concerned with 'the way legal doctrine is unable to provide determinate answers to particular disputes while continuing to claim an authority based on its capacity to do so.'

32 See, eg, Mark Tushnet, 'The Dilemmas of Liberal Constitutionalism' (1981) 42 *Ohio State Law Journal* 411.

33 Gerald Frug, 'The City as a Legal Concept' (1980) 93 *Harvard Law Review* 1057.

34 Karl Klare, 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937-1941' (1978) 62 *Minnesota Law Review* 265.

35 Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685.

36 See, eg, Horwitz, above n 2, 160, in respect of Contract law principles of freedom to contract:

> Substantive justice, according to the earlier view, existed in order to prevent men from using the legal system in order to exploit each other. But where things have no 'intrinsic value', there can be no substantive measure of exploitation and the parties are, by definition, equal. Modern contract law was thus born staunchly proclaiming that all men are equal because all measures of inequality are illusory.

See also, 181:

> *The rise of a modern law of contract, then, was an outgrowth of an essentially procommercial attack on the theory of objective value which lay at the foundation of the eighteenth century's equitable idea of contract.* (Emphasis added.)

This new will theory of contract could then be used to rationalise, eg, blatantly inequitable labour contracts.

they see the theory as mere legitimating ideology.[37] Of course, the Critical Legal theorists would say, the object of this legitimation is an entrenched social structure of unjustified hierarchy and domination which is the real impediment to substantive justice.[38] Gabel, for example, points out that one way of entrenching and perpetuating a set of power relations is to de-politicise law and invoke principles of objectivity and neutrality through formal rules, so that any possible enquiry into substantive justice within those power relations is foreclosed.[39] The passive observer begins to mistake the images of objectivity and neutrality, and the assertions of equality, for social reality itself. Thus does law reify self-serving conceptions like the 'rule of law'. Law, then, becomes an important tool in the social construction of reality, in this case the non-existent reality of equality. In this light law is seen as an enabling mechanism of power and privilege that disguises itself as the pursuit of interpretive truth. That, at least, is a typical position for Critical Legal scholars.

In this view the light at the end of Dworkin's tunnel can now be identified as the onrushing train of dominant ideology. Whether or not one approves of that ideology, the tragedy is that it forecloses alternative ideologies. It is literally exclusive, and that is unfortunate. That is the lighter view. The darker view is that, far from encapsulating some communal political morality, law is simply a legitimating tool for dominant power structures, and it is naive (even foolish) to look for substantive justice from such a body of law. One finds such claims in, for example, feminist legal scholarship. To put it crudely the deck is stacked systemically against such disadvantaged groups as women and indigenous peoples, and for that matter, in a practical financial sense, against all who cannot afford 'legal' justice. Of course this last financial obstacle might be said to be of

[37] Ibid 253, eg:

> Law, once conceived as protective, regulative, paternalistic and, above all, a paramount expression of the moral sense of the community [that is to say Idealist], had come to be thought of as facilitative of individual desires and as *simply reflective of the existing organization of economic and political power.* (Emphasis added.)

[38] Ibid 188, eg:

> Although nineteenth century courts and doctrinal writers did not succeed in entirely destroying the ancient connection between contracts and natural justice, they were able to elaborate *a system that allowed judges to pick and choose among those groups that would be its beneficiaries.* And, above all, *they succeeded in creating a great intellectual divide between a system of formal rules — which they managed to identify exclusively with the 'rule of law' — and those ancient precepts of morality and equity, which they were able to render suspect as subversive of 'the rule of law' itself.*

(Note the interesting implication here that there is an historical perspective, an evolutionary pattern, to this tension between formalism and substantive justice — perhaps a parallel between the shift away from notions of substantive justice towards formal rules and the ascendancy of liberal capitalism.)

[39] See, eg, Peter Gabel, 'Reification in Legal Reasoning' in S Spitzer (ed), *Research in Law and Sociology*, vol 3, n 7:

> Law serves directly the interests of the dominant classes not by directly 'enforcing their will' but by legitimating the entire socio-economic system within which they already exercise a dominant position. This version of the 'relative autonomy' position keeps clear the distinction between the role of force, which is instrumental and concrete, and the role of law, which is a form of abstract justification.

less import to those (say white middle class males) for whom the dominant paradigm is constructed, or who at least have a privileged role within it.

There is a deep structural problem posed by the Critical Legal Theorists: if this background institutional morality of the Idealists exists, whose morality is it? Admitting that it is socially constructed, whose social construct is it? Critical Legal Theorists would say that it is the morality of the dominant class, the class of property, wealth and power who people the legislature, the courts, the legal profession and the business sector. In that case it is no morality at all other than a legitimating one which conceals unjust inequality and hierarchy. Without some reasonable approximation of distributive justice, going to the distribution of goods, wealth and life opportunities generally in society, we cannot realistically aspire to corrective justice, which aspires to correcting the vagaries of legal rules applied to hard cases. If the underlying social order is fundamentally unjust, and if the legal order is an instrumental aspect of the power relations which exploit that social order, then it is clearly nonsense (say the Critical scholars) to look for the legal order to correct injustice. Indeed some would argue that the law is doubly coded in that whilst law itself is part of a coercive regime it must, at the same time, deny that role and in fact pretend a contrary one[40] — for example through the 'rule of law' which, whilst knowing we are all unequal social actors, denies that reality and claims to render us all 'equal' before the law. Dworkin's answer is therefore no answer at all in the sense that, like Formalism, it conservatively assumes the *status quo* of hierarchy and simply ignores substantive justice — not just in the sense of isolated hard cases within the dominant paradigm, but systemically for all those groups excluded from it. Thus, Idealism (and of course Formalism) is not just harmlessly wrong, it actually perpetuates and even legitimises entire classes of hard cases by ignoring them, and indeed by attempting to foist a 'false reality' onto them.

Thus, say the Critical Legal theorists, in any field of law one can find a deep structure with characteristics of 'framing' to fit a particular ideology — a 'vision' of idealised society, a 'legitimising' of the legal order which has been 'cooked up', and the 'exclusion' of alternative orders. We have noted an example of such a framing of institutional arrangements to fit a dominant ideology in Frug's sketch of the emasculation of the City through liberal ideology — what was formerly a complex, multi-faceted organisation of private freedoms and democratic public government is now reduced to a relatively powerless State organ within the Liberal polarity of Individual and State.[41] We

[40] Ibid 26:

> Thus, reification is not simply a form of distortion, but also a form of unconscious coercion which, on the one hand, separates the *communicated* or *socially apparent* reality from the reality of experience and, on the other hand, denies that this separation is taking place. The knowledge of the truth is both repressed and 'contained in' the distorted communication simultaneously.

[41] Frug, above n 33 — as an *association* of individuals, that is to say a strong *group* institution manifesting a powerful sense of *community*, the city did not sit well with the Liberal dichotomy of Individual and State, and was therefore dissolved. Thus 'our current image of cities has become an established part of liberal social thought' (1120).

saw another example, this time in the institutional arrangements of Labour relations, in Klare's tracing of the de-radicalisation of the Wagner Act, with its promise of income redistribution and participatory democracy in the workplace, to the dictates of liberal capitalism.[42] The point in both cases is not whether or not there is something 'wrong' with liberal capitalism but rather that it excludes / forecloses other options. Of course the same is true of any dominant ideology, and as we shall see later that principle of exclusion may be a catalyst for an alternative critique.

Note that there is a conceptual problem here. We have seen that in the first, 'milder' version of Critical Legal Studies, judges simply choose between competing ideologies which offer different and contradictory rules — disorder and indeterminacy rather than Dworkin's deep-rooted, unifying community morality pre-supposed by law. Yet, as we have seen, Dworkin allows for indeterminacy within the legal rules — mistakes are made, or the informing morality in a particular institutional context may be at odds with some broader, 'grander' informing moral theory which Hercules must discover and apply. But both clearly admit to indeterminacy whilst also postulating a background structure — Dworkin's grand political morality immanent in law, and the Critical theorists' deep structure of dominant ideology, which we characterise broadly as liberal capitalism. But isn't there a logical inconsistency here? If there is a dominant frame for which law is a mere vehicle, how then can there be choice and conflict within that frame? Can we reconcile conflict within structure?

There are various responses. It is not difficult to conceive of petty conflict over 'details' within any given ideology, as none can be completely seamless, omnipresent and unambiguous. Larger conflict can also be contemplated, even within Dworkin's institutional morality, as different grand theories compete as best-fit explanations of the phenomena of political, economic and social life. As to major conflict between competing ideologies, there can simply be a restricted range of such large choices which nonetheless exclude possible alternatives. For example, ongoing skirmishes may occur between remembered visions of civic republicanism with its vision of individuals situated *in* community and its competing (now ascendant) ideology of liberalism with its view of the individual as preceding — and *trumping* — community. Thus, there may be conflict within ideology — different theories may be warring within a dominant paradigm (say liberal capitalism) — but only marginal engagement with competing ideologies. To put it another way, the ideological space within which different visions of institutional arrangements compete is a very narrow one. It is unlikely to accommodate any competing transformative ideology for (say) re-defining liberal capitalism. Thus, alternative transformative projects are excluded or foreclosed even though one can admit of conflict within and between (a narrow range of) ideologies. The stronger version of Critical Legal Studies would go a

[42] Klare, 'Judicial Deradicalization of the Wagner Act', above n 34.

step further, beyond ideology, to a structure of domination and hierarchy for which liberal ideology would be a mere legitimating instrument. Within that structure both petty and major conflict may be tolerated so long as it does not interfere with the power relations of that structure.

III ALTERNATIVE EXPLANATIONS

One might descend from the clouds of theory for some more prosaic explanations of our central conflict. Substantive justice, like democracy, may be an unrealisable ideal forever trapped between imperfect practice and conceptual purity. One tries and fails but that does not necessarily suggest dark scenarios of systemic oppression, hierarchy and smoke screen ideology. That would support Dworkin — a rather self-satisfied view of law as performing, on the whole, rather well, failing only in that minority of hard cases where its informing morality is complex and imperfectly applied by all too human judges. Further, what may appear to be an erosion of the formalist dream of consistency by the indeterminacy of a plethora of conflicting rules is really not that at all — rather the consistency derives from a deeper level of principles, policies and purposes.

Alternatively, as Horwitz[43] argues, since society has chosen commercial over equitable values then it can only continue to try and balance the contradictory goals of formalism and substantive justice, or to put it more cynically, to at least deal with the more egregious outcomes of formalism given the stacking of the deck. Taking that to be the underlying institutional 'morality' that informs the law, Dworkin and the Idealists might make a somewhat diminished case. Indeed, perhaps one could fashion a Law and Economics argument that, having chosen allocative efficiency over equity (as Horwitz claims) then it is proper, 'efficient' and 'market-like' that the vagaries of the legal system should approximate those of social and economic life. In any event, whilst the equitable underpinnings of commercial arrangements may have given way to market notions of 'efficiency' (for example, the 'will of the parties' in contract law), we see new equitable notions like 'unconscionability' and 'unjust enrichment' — not much but something. Recall the discussion of conflict within structure. Indeed the development of the Courts of Equity can be seen as a kind of self-correcting mechanism within law which 'kicks in' when formalism fails in hard cases. Similarly, on a grander social scale one sees attempts through the agency of the welfare state to address at least limited notions of economic inequality, that is to say substantive justice — not so much a solution to the inadequacies of formalism but a pragmatic reaction to them.

Yet another explanation might be that there are *de facto* balancing factors at work in law and society that address the unfortunate shortcomings of formalist law and its deep structure liberal ideology. Thus the problem and the answers may lie outside our present conceptions of law in the imperfectly realised ideals of liberal ideology. As a substantive critique it may be that liberalism itself,

[43] Horwitz, above n 36.

because by definition it has no preconception of the good life, cannot resolve the tension since to do so would pre-suppose a form of the good life that by definition it may not do. Procedurally, it may be that liberalism's failure to deliver on its own program of a level playing field in social and political life is the fatal contradiction.

Such 'practical' explanations may comfort the Formalists, who might now allow a wink to indeterminacy but still find security within law's rule boundedness. So too for the Idealists, who can always fall back on the disingenuous nod to 'mistakes' in the tricky task of applying institutional morality to hard cases, but nonetheless find security in the knowledge that there are right answers, if not exactly within law's traditional boundaries then at least in its informing principles, policies and purposes. But such explanations can only be seen as at best banal, superficial and naive, and at worst wilfully blind and dangerous, to those who see that dark underside of liberal law which is caught in the light of Critical Legal Theory.

IV DEMONSTRATING THE THEORIES

A broad brush application of the theories may help locate them in the context of our liberal legal order. Taking liberalism to be the dominant ideology underlying Western legal systems, we can discern a background political morality that might inform our legal discourse, envisaging as it does a certain social order (individuals transcending community, pursuing self-defined notions of the good life), a certain political order (individuals endowed with equality of formal political rights, freedom from State interference), a certain economic order (market economy, allocative efficiency, minimal State interference), and so on.

Formalism would advocate faith in whatever self-defining system of legal rules evolved to make liberalism manifest in social, economic and political life — for example a regime of contract law rules rooted in the free will of contracting parties to make deals, rather than in, for example, an equity-based theory of 'fair' dealing.

The Legal Realists would point to the plethora of conflicting choices available within liberal law to decry its indeterminacy and mock the Formalist dream of seamless law. They would demand that judges 'come clean' and admit of the political and social context of the rule choices they make. If in applying the contract law rules they are to be handmaidens of commerce rather than 'justice' then they should admit that and make their choices explicit.

Idealism would advocate a more sophisticated faith in law, with Dworkin's Hercules seeking within liberal law the unifying theory with which to resolve hard cases — for example on the question of abortion, it might be that individual rights over one's own body transcend conflicting community values over the sanctity of life, the family, and so on.

The 'milder' form of Critical Legal Studies would echo the Realist critique of choice within the rules, and as well might deconstruct the working through of liberal ideology in those choices. The stronger, structural form of Critical Legal

Studies would point to the exclusionary nature of liberal (or any other dominant) ideology — its foreclosing of alternative arrangements. It might point to the constructedness of the liberal paradigm, and to the role of law in its construction — reifying liberal notions of the appropriate relationships between individual and community, individuals and the State, and so forth to the exclusion of alternative conceptions. In its more radical form it might seek to reveal a darker order of hierarchy and domination for which liberalism and liberal law is merely a *facilitating* ideology.

As an example, Critical Legal Theorists might point to an inexplicable anomaly in liberalism that permits the perpetuation of hierarchy through inheritance — a major factor in individual wealth and life opportunity. Formalists would not care — those are the rules. Idealists might find justification in a more deeply rooted liberal value such as individual free will. Yet the task would not be straightforward, for one might take it as a cornerstone of liberal ideology that individuals starting out on their self interested pursuit of the good life (and thereby maximising communal welfare) would at least begin with equality of opportunity — the proverbial level playing field — though not of course of outcome. To do otherwise would surely not be 'fair' within liberalism's own defining morality — a tough one for Hercules, though perhaps he might locate a valid competing morality which permits individuals to influence hierarchy even beyond the grave. But of course that is the problem for the Idealists: how to exercise such a choice among alternative theories without being merely self-serving.

The answer is much more straightforward for the stronger version of Critical Legal Studies — liberal law serves not merely liberalism itself but, at a deeper and darker level, serves an entrenched hierarchy of wealth and domination which finds in liberalism a convenient justificatory ideology. That it cannot justify inheritance is not surprising for that is not really its purpose — liberalism is just a smokescreen (or a legitimising ideology) for a set of exploitative power relations. Alternatively, an exploitative power hierarchy is an 'inevitable' outcome of liberalism, and liberal law merely serves that hierarchy, whilst still pretending the contrary via (for example) the 'rule of law'. Law is both facilitative and legitimating. Thus, anomalies like inheritance, these more radical Critical theorists would say, aren't just aberrant exceptions to the rule — they *are* the rule. Emancipatory projects are foreshortened by the exclusion of any genuinely transformative alternatives. In a society whose social reality is deeply at odds with its law, and even in significant part with its own informing ideology, surely no ideal of law is possible and indeed the Critical theorists do not promote one. Their project is the more limited one of revealing the constructedness in law and society, not to undertake its reconstruction. They, like the Realists, are more inclined to deconstruction,[44] and even nihilism,[45] than the

[44] The following description of deconstruction sounds very much like the agenda of Critical Legal Theory (from Jack Balkin, 'Deconstructive Practice and Legal Theory' (1987) 96 *Yale Law Journal* 743, 786):

descriptive remedies of the Formalists and the prescriptive remedies of the Idealists. They are strong on analysis but weak on design. That of course is the limitation of Critical Legal Theory insofar as it goes to our central question of formalism versus substantive justice.

V TRANSFORMATIVE POSSIBILITIES

Critical Legal scholars would think it absurd to seek substantive justice from any of these theories about law because none offer a transformative conception of law that goes to a social reality characterised by unjustified hierarchy and oppression. But nor do they offer such a project. They are (arguably) very good at showing how law is part of the 'problem' (facilitating, legitimating) but not how it could be part of a 'solution' (transforming). It seems that the Critical theorists do have a social / political agenda for a less hierarchical, more democratic, more participatory society, but not a program. A radical project[46] is required but none is forthcoming — indeed none seems possible on this view of law and society. As Klare puts it, "... law attempt[s] to accommodate yet *obscure* the contradictions of legal thought, which reflect the contradictions of *social* life in late capitalist society" [47](emphasis added).

If the role of law is to institute / legitimate / reify a present set of power relations, then different ideologies, and certainly conflict within ideology, can coexist so long as they do not disturb those relations. Law's role is simply to reify those power relations by putting forward equalising concepts like Formalism, even though there is no equality, and encouraging unequal individuals to *think* in those formalist terms, thus creating a (false) social self-image of equality.[48] The effect, of course, is to defuse some of the tension with substantive justice by assuming away — that is to say concealing — the problem of unjustifiable

> Deconstruction .... can displace a hierarchy momentarily, it can shed light on otherwise hidden dependences of concepts, but it cannot propose new hierarchies of thought or substitute new foundations .... Deconstruction is thus revelatory, and what the legal theorist does with the revelation is not dictated by the deconstruction itself, nor could it be.

[45] CLS writers often characterise this de-legitimation project as 'trashing'. See, eg, Alan Freeman, 'Truth and Mystification in Legal Scholarship' (1981) 90 *Yale Law Journal* 1229, 1230-1:

> The point of delegitimation is to expose possibilities more truly expressing reality, possibilities of fashioning a future that might at least partially realize a substantive notion of justice instead of the abstract, rightsy, traditional, bourgeois notions of justice .

[46] I am using 'radical project' here according to the sense used by one of the Critical Legal Theorists' early icons: see Roberto Unger, 'False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy' (1987) 253:

> the radical project ...of seeking human empowerment through the invention of institutions, practices, and ideas that more fully emancipate social life from rigid roles or hierarchies ... [it] is distinguished by its commitment to weaken rigid divisions among roles, genders, classes, communities, and whole societies.

[47] Klare, 'Judicial Deradicalization of the Wagner Act', above n 34.

[48] See, eg, Karl Klare, 'Law Making as Praxis' (1979) 40 *Telos* 123:

> In history, law-making becomes a mode of domination, not freedom, because of its *repressive* function — its connection with official (class) violence; its *facilitative* function — its emphasis on the promotion of transactions desirable from the standpoint of reproducing capitalist domination in particular and the social order in general; and because of its *ideological* function — its presentation as just and fair that which is inequitable, cruel, and inhumane. (Original emphasis.)

inequality. The result, say the Critical theorists, is to induce feelings of alienation, separation and anomie rather than equality. Dworkin, according to them, must be seen as being at the very least naive in ignoring the influence of self interested hierarchies on his institutional morality. The Critical theorists would be vindicated in at least acknowledging those realities. As to conflict, the only ideologies, or aspects of a given ideology, or moral theories within an ideology, that would be excluded would be those which were transformative — for the rest, conflict is not threatening.

In the context of formalism versus substantive justice, the resolution of this conflict dilemma in Critical Legal Studies is more straightforward. The tension between formalism and substantive justice arises not from any conflict within or between ideology but from the inherently contradictory premises underlying 'formalism' and 'substantive justice' . Any attempt to posit them both within a legal system is fatally flawed for systemic reasons arising out of the underlying social reality. Formalism cannot produce substantive justice as an outcome until there is a reasonable measure of social equality. Without it, formalism can only perpetuate social (that is to say substantive) injustice, and no 'universal rules' can make it otherwise. If one cannot aspire to substantive justice through formalism without a significant measure of substantive equality in social and economic life, then surely one should abandon formalism so that law can adapt to social reality. One simply can't have it both ways. The attempt to reconcile formalism and substantive justice within a legal system situated in social conditions of inequality is simply a misconceived project.

Thus, Dworkin is being too clever in looking beyond the contradiction for a unifying theory because no theory can help when the foundationalist assumptions (of equality) are not sound. The Critical Legal theorists are closer to the mark simply because they confront those unsound assumptions. Horwitz,[49] for example, takes an historical perspective in characterising nineteenth century law as based on equitable notions of substantive justice, later to be captured by commercial interests which decried that regime's uncertainty, arbitrariness and lack of rules. However, it did so not from the perspective of individual freedom but from that of low-cost development, or what we would now call allocative efficiency. In an increasingly market-oriented economy, with goods becoming more fungible, and their value no longer intrinsic and objective but increasingly based on expectations, then assumptions as to equality between parties are necessary so that courts can defer to the wills of those parties in formulating contracts, and parties' expectations will be realised. Universal rules are to be 'objectively' applied and the outcome will appear inevitable. Thus, law becomes facilitative of economics and power, not of 'justice'. That is not to say that this is necessarily a 'bad' outcome, but rather that the ascendancy of commercial interests over notions of 'justice' and 'fairness' should be acknowledged. Law should 'come clean', and not indulge in Dworkian gymnastics to try and

[49] Horwitz, above n 36.

reconcile that which the Critical theorists say it has given up — that is, claims to 'justice'. Law is politics and let's just deal with that.

Finally, we appear to be stuck at a rather unsatisfactory impasse, having rejected the possibilities of all these theories about law in dealing with our central question. The best we have been able to do is wring our hands at the existence of underlying social inequality, admit its fatal implications for delivering substantive justice within our legal system, and bestow a pat on the collective backs of the Critical Legal Theorists for bringing us this far. But are we not still disappointed at their inability, or unwillingness, to go further? Surely it is not sufficient to merely imply that once their de-legitimation project on liberal law is complete then somehow the future will look after itself. If a new ideology is called for, what is it? If a transformative program is required to redeem liberalism, where is it? Is this a failure of imagination or of nerve, or are the later Critical Legal Theorists simply declining to engage the modernist game again — are we simply too 'sophisticated' now to seek instrumentalist solutions to our 'problems'? Perhaps their critique manifests a postmodernist spirit of deconstruction for the purpose of showing constructedness, but not to suggest new prescriptive remedies. It is one thing to show the instrumental nature of law in propping up ideologies and power hierarchies, but quite another to suggest an instrumentalist role for law in any emancipatory effort — social transformation is, after all, the project of modernism. Yet this same postmodern stance arguably does lay some claim to a redemptive program in its claim to present a more authentic, if not prescriptive, view of society.

As a possible point of reference for this final part of the discussion I will choose the programmatic arguments of Roberto Unger, arguably neither a postmodern nor a Critical Legal Theory writer (though he was a leading early Critical Legal theorist) but a social theorist who provides an imaginative perspective on the impasse described above. Professor Unger suggests that we make two fundamental errors in taking a positivist social science approach to such fundamental 'law and society' type issues as our discussion of formalism and substantive justice. The first is to ignore the underlying deep structure, the framework of social life which explains the routine surface moves of our law or, for that matter, our political and economic systems, social relations, and so forth.[50] Formalism ignores deep structure; Idealism seems to be an attempt to unearth some kind of moral (though not ideological) deep structure. The stronger CLS critique of liberal law can be seen as an attempt to identify that deep structure which we have broadly characterised as liberalism.[51] The thrust is to

[50] See, eg, Roberto Unger, *Social Theory: Its Situation and Its Task* (1987) 88, defining 'deep structure social theory' as 'the attempt to distinguish in every historical circumstance a formative context, structure, or framework from the routine activities this context helps to reproduce'.

[51] See, eg, Roberto Unger, *Knowledge and Politics* (1975) 8:

> Though liberal theory is only an aspect of modern philosophy, it is an aspect distinguished by both the degree of its influence and the insight it conveys into the form of social life with which it was associated. All other tendencies have defined themselves by contrast to it; so it offers the vantage point from which to grasp the entire condition of modern thought.

See also 118:

show the constructedness of our institutional arrangements and how they flow in a determinist way from that deep structure. Thus, for example, we saw earlier how our system of contract law could be shown to be an outcome of the dictates of liberal capitalism; similarly, the claim that liberalism inevitably has outcomes of social and economic inequality which render problematic any aspiration of liberal law to deliver substantive justice.

But, says Professor Unger, therein lies the second mistake we make. Having identified this underlying deep structure we then make deterministic, necessitarian assumptions about the forms and outcomes of that deep structure — that is to say, we see the institutional forms as flowing inevitably from the deep structure thought, to the exclusion of alternative forms. We overlook the effect of contingent, historical circumstances in the evolution of the deep structure and its surface forms — we forget how loose-jointed and free-wheeling history can be. Deep structure theory imposes its own revisionist determinism, retrospectively imposing an inevitability on the relations between, say, liberal ideology and its present institutional forms in, say, property law. In fact the range of those forms is potentially vast, and we could for example perceive some of its alternative forms in failed options from the past as well as imaginative conceptions of the future. The deep structure and its surface institutional forms is not a 'natural', inevitable and indissoluble whole, but rather a relatively *ad hoc* collection of history's 'winners'. Is our system of private property relations, for example, really a 'necessary' outcome of liberal political and economic theory, or an historical accident of industrial development? What of the other myriad forms our property relations might have taken, or might yet take, and still fall within the rubric of 'liberal'? That is the fatal flaw of deep structure theory — its imaginative failure which foreshortens alternative options and therefore transformative projects.[52] Social theory becomes a victim of history rather than its agent. If Formalism remains trapped within the surface moves of established institutional forms, Critical Legal Theory remains similarly trapped, if at one level removed — it at least acknowledges and explores the deep structure and critiques its institutional forms, yet does not imagine different forms.

A transformative program, argues Professor Unger, need not necessarily undertake the construction of some new and preferred deep structure (even if one were available, which it is conspicuously not), but rather should nurture institutional arrangements which by their nature recognise the free-wheeling nature of history. An important aspect of this approach is the recognition that the institutional arrangements themselves, accidents of history though they may be,

> Liberalism .... is also a type of consciousness that represents and prescribes a kind of social existence .... it overruns the boundaries of the realm of ideas and lays root in an entire form of cultural and social organization .... it is a 'deep structure' of thought.

[52] See, eg, Unger, *Social Theory: Its Situation and Its Task*, above n 50, 93:

> an inability to grasp how and why the relations between ... social structure and human agency may change ... deep structure social theory disorients political strategy and impoverishes programmatic thought by making both of them subsidiary to a ready-made list or sequence of social orders.

are profoundly important in shaping social behaviour — indeed they have independent force with sometimes unanticipated and fateful consequences. The outcomes of particular institutional arrangements can be said to exhibit 'sensitive dependence on initial conditions'.[53] Note the movement away from such 'formalist' values as 'objectivity', 'consistency', 'rationality' and 'predictability' and toward more free-wheeling, open-ended approaches which aspire to more closely reflect 'reality' rather than seek to confine it. For example, in the context of a topical issue such as the environmental problem, our legal regime of private property rights is arguably pivotal in shaping our view of the right of individuals (human and corporate) to exploit common environmental resources, perhaps with disastrous effects. But do we have to abandon liberalism in order to save the environment, or need we simply experiment with different forms of property regimes? The thesis is that by experimenting with our institutional arrangements — favouring those which are context-challenging rather that context-preserving, and which are sufficiently loose-jointed to embody the seeds of their own re-invention — we can avoid the pitfalls of positivist social science. If there is no 'right' *answer* to these Grand Questions of social and legal theory — if the modernist project is always incomplete and conceptually misguided — then there is the possibility of a *process* which has 'history under its belt, not on its back'.[54]

Arguably in this brief allusion to Professor Unger's social theory we find echoes of the broader postmodern movement, for example in its incredulity toward meta-narratives and Grand Theory (that is, deep structures); in its willingness to reach into the past for transformative inspiration; in its spirit of 'everything up for grabs'; but above all in its unwillingness to be constrained by present institutional forms. If Professor Unger has a radical emancipatory project in mind — let us call it emancipation from unjust hierarchy,[55] redeeming liberalism through its institutional forms — then that may violate postmodern sensibilities (a prescription that dare not speak its name), but the style of his project certainly seems to resound in postmodernism. He seeks to set us on a path of change though not toward a fixed destination.

For our purposes in addressing the original question of formalism versus substantive justice, the promise this approach holds is that it is inherently sympathetic to the vagaries of social reality, that is to say, to the problem of substantive justice. It is obviously hostile to the rigidity of Formalism, and to the

[53] The phrase is taken from chaos theory: see, eg, James Gleick, *Chaos: Making a New Science* (1987); similar insights have been applied in the unlikely field of management theory, eg, in David Freeman, 'Is Management Still a Science?', (November-December 1992) *Harvard Business Review* 26, 37: '"leverage" .... [as] the idea that "small, well-focused actions can sometimes produce significant, enduring improvements"' and (30) '[the] basic insight that minute changes can lead to radical deviations in the behaviour of a natural system'.

[54] Charles Jencks, *What is Postmodernism?* (1986) 9.

[55] See, eg, Unger, 'False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy', above n 46, 253:

> the radical project of seeking human empowerment through the invention of institutions, practices, and ideas that more fully emancipate social life from rigid roles or hierarchies and that make themselves more easily available to revision in the midst of everyday life.

implicit deep structure assumptions of the Idealists. It is more sympathetic to the efforts of the Realists to expose the loose-jointed nature of legal rules, and to the efforts of the Critical Legal Theorists to expose a deep structure behind liberal law, but sees them as still caught in the determinist logic of deep structure theory, and as failing to offer any transformative possibilities. Yet it avoids unfocussed, utopian fantasies of alternative but undefined paradigms that will somehow deliver us from what ails us.

The implications for law are that we should focus on its institutional forms rather than agonise over its informing deep structure — whatever grand ideological narrative we think does or should represent its motivating spirit. Those forms, like the institutional arrangements in society generally, should be motivated by a spirit which is context transforming and self-revising, rooted in existing forms but looking backward to historical alternatives as well as forward to new imagined possibilities. Again, the motivating spirit is one which recognises but then runs with the notion of social constructedness, and in that sense it suggests the possibility of delivering substantive justice by acknowledging social reality and its constructedness, and further by seeking to mine the possibilities of its contingent history as well as its imaginative future. It seeks institutional forms for law, as for other social, political and economic arrangements, that embody a transformative promise not toward some fixed (deep structure) destination but along a trajectory of emancipation from present social hierarchies. Thus, if our dilemma in dealing with the contradictions of formalism and substantive justice is indeed rooted in underlying social realities then the fact that this somewhat lateral approach to its resolution comes out of social theory should be no surprise.

VI SUMMARY AND CONCLUSION

The contradiction between formalism and substantive justice remains unresolved. The Formalists and Idealists essentially assume it away. The Realists, and the later, milder stream of Critical Legal Scholars see Formalism foundering on the shoals of indeterminacy and choice, lacking the navigational skills of a Hercules to guide them to a resolution of conflict through institutional morality. The more radical stream of Critical scholars see the dead hand of entrenched hierarchy behind law and the underlying social reality which it refuses to address. Material and social inequality are the context for law, and the pursuit of substantive justice through formalism is by definition a doomed enterprise. The tension between them will not be constant but will vary with the underlying social circumstances of the case. Hercules merely labours on behalf of an elite. No substantive justice is possible, but nor is a transformative agenda (at least within law itself). Note, however, that the vaunted ideal of consistency through Formalism begins to wear thin after the Legal Realists. Similarly, the feared spectre of inconsistency in substantive justice may also begin to fray — why not consistency in the spirit of felt justice and fairness which we posit as guiding substantive justice? In any event, none of these theories about law seem to

satisfy. Yet within the broader movement of postmodernism, and for example within the social theory of Roberto Unger, a sometime Critical Legal Scholar, we see a hint of a possible escape from the dilemma — that is to say by a radically reformed view of the institutional arrangements which comprise law (and other social institutions).

In locating oneself in these theories about law one ultimately responds in highly personal and subjective ways to the stimulus they provide. Whilst presumably few would now buy into pure Formalism, many may find comfort and an indispensable security in law's rules — after all we still teach little else in our law schools. Few would dispute the Realist thesis of indeterminacy and choice, but many may not find it a fatal flaw. They would be further comforted by the Idealists, who acknowledge the thesis and offer a way out. But others may respond to something wrong in law that simply cannot be papered over with convenient, self justifying theories, and that something is the chronic inability of legal rules to satisfy a felt sense of justice, to speak to a manifest social injustice which cannot be dealt with by assumptions of equality before the 'rule of law'. No matter how sophisticated the attempt to reify notions of formal equality, neutrality and the 'presentation as just and fair that which is inequitable, cruel and inhumane',[56] something still smells. One feels[57] that there is indeed a web of common understanding in words like 'justice' and 'fairness', but one harbours a nagging suspicion that law more often betrays than honours that understanding. Law begins to feel like just one more of the received ideas that condition our social reality, yet incompletely. It is a discourse which subtly conditions our social life but still imperfectly, so that we still cannot quite swallow its claims — at some felt level we know that we are *not* all equal before the law, just as and because we are not equal in social life, and no amount of assertions, claims and assumptions to the contrary can persuade us that it is so. Law seeks to convince us that 'what is ought to be', yet we are not convinced. It is to this last group that the Critical Legal Scholars speak, and yet there is still frustration — where does one go from there? Like the Realists they offer a critical location but no refuge.

The effort here has been to map historical theories about law against a critique of the way they deal with the defining issue of substantive justice. That none does so satisfactorily is perhaps not surprising, but that none offers a credible theory for more closely approaching it is more surprising. The closest we have come to an answer is that the pursuit of substantive justice is an emancipatory project that Critical Legal Theory tells us is impossible within our extant liberal law, but which one of its earlier theorists tells us is possible by focusing not on law's deep structure of liberalism, far less its routine surface moves, but rather on re-learning and imagining the myriad institutional forms it might take. That is where transformative possibilities lie, and that is where our focus should be.

[56] Klare, 'Law Making as Praxis', above n 48.

[57] And perhaps in the end it is a question of feeling rather than reason. See, eg, Lord Alfred Denning, *The Road to Justice* (1955) 4: 'How does a man know what is justice? It is not the product of his intellect but of his spirit.'