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## The Communitarian Vision of Critical Legal Studies

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The basic critique of the nature of Western liberal legal institutions, presented in various forms by Critical Legal Scholars, is relatively well developed. However, it is more difficult to ascertain how the Critics would structure a post-liberal society. Radical theorists generally fail to advance concrete proposals regarding the composition of such a society. This is partly due to their own belief that the determination of the values and institutions forming the basis for a future society must be postponed until it can be accomplished through truly democratic means. Nevertheless, there are recurring themes in the literature. The central flaw with liberalism is its isolation of the individual and the emphasis of pluralism on balancing competing interests while making no attempt to ascertain the overriding interests of society as a whole. A post-liberal society would shift the focus to notions of community. The author examines theories of community manifested in divergent critiques, ranging from "socialist" and "republican" approaches to the ideas of critics such as Unger and Habermas. In so doing, he examines many of the problems inherent to the reconstitution of community, particularly addressing the legal community and the areas of concern to Critics attempting to play a role in the transformation of society.

La critique fondamentale du libéralisme des institutions juridiques du monde occidental, articulée des façons les plus diverses par les penseurs du mouvement des Critical Legal Studies, est relativement bien développée. Toutefois, il est plus difficile d'imaginer la forme que devrait prendre, selon ces penseurs, une société post-libérale. Les théoriciens radicaux omettent généralement de formuler des propositions concrètes relativement à la composition d'une telle société. Cela s'explique en partie par leur conviction que la détermination des valeurs et institutions propres à une société future ne pourra s'accomplir que par un processus démocratique. Néanmoins, on observe des thèmes constants dans la littérature. Le principal inconvénient du libéralisme est l'isolement de l'individu et l'emphase mise par le pluralisme dans la considération des intérêts divergeants, sans pour autant chercher à assurer les intérêts primordiaux de la société dans son ensemble. Une société post-libérale mettrait plutôt l'emphase sur la notion de communauté. L'auteur aborde les théories relatives à la communauté, développées par des auteurs dont les vues divergeantes s'étendent des approches « socialistes » et « républicaines » aux réflexions de critiques tels que Unger et Habermas. Ce faisant, il soulève divers problèmes inhérents à la reconstitution de la communauté, plus particulièrement de la communauté juridique de même que d'autres préoccupations des critiques désireux de jouer un rôle dans la transformation de la société.

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**I. Introduction**

This article is about two paradoxes that afflict the most recent concerted attempt to mount a radical critique of legal institutions and legal learning. The authors of this critique are commonly grouped under the banner of Critical Legal Studies. The first paradox I shall call the paradox of engagement. This takes the form of a critic at once calling for an appreciation of law as deeply political while refusing on principle to disclose in detail the composition of his or her political views. The second paradox I shall call the paradox of postponement, which denotes the argument that although law is entirely a matter of political choice, a critic has no business com-

mending any particular values that ought to shape a legal regime. The selection of those values must be left to a process that operates at a grassroots level. If I am right that these two paradoxes are ordinarily present, if only in the background, in the radical literature to be examined, then their presence might account for the degree of threat that the critique poses to teachers and practitioners of the law. A cryptic political agenda, by the very fact of its concealment, inevitably invites distrust. The ultimate result of this mode of argument is that, while the radical critics claim to expose the hidden ideological content of contemporary law, they have adopted a strategy which seeks to justify the provision of only the barest outline of a progressive legal regime. The language of communal aspiration, of government by the acclamation of fundamental values, and of the separation of citizens into intentional political cultures, is used to try to persuade us that the era of post-liberal politics has dawned. But where the radical scholar finds illumination and hope in this morning of political reconstruction, others of us, including left-wing sympathizers, see only indiscernible shapes and ominous shadows.

The main thrust of the Critical Legal Studies Movement, in both its rare, self-consciously theoretical moments and its more often encountered doctrinal moments, is that certain philosophical assumptions pervade legal thinking in Western liberal societies and work to obstruct progressive social and political change. These assumptions derive from a body of liberal economic and political thought developed over the past four centuries. They inform and dominate our collective consciousness and set limits on the range of our legal and political imagination. Critical Legal writers have proved especially adept at discovering what they see as the unacknowledged presence of pernicious liberal assumptions in developed legal doctrine. This summary invites many questions. Precisely what is meant by "liberal" in this context? How many possible versions of liberalism or of constitutive liberal principles are covered by the typical Critical Legal reference to the dominant legal consciousness of our time? How do we explain the formation and change of consciousness? While these questions are pertinent, they will not be touched on here.<sup>1</sup> This article examines the Critical Legal project in

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<sup>1</sup>The foregoing questions are huge in scope. If one agrees that liberalism cannot be equated with simplistic theories of political or possessive individualism, the Critical Legal meaning attached to such a broad ideological label becomes mystifying. See N. MacCormick, "Access to the Goods" *Times Literary Supplement* (5 June 1987) 599 and also the remarks on "a new type of liberal theory" by which such writers as Rawls can be seen as differing significantly from, for example, Hobbes: T. Nagel, "Moral Conflict and Political Legitimacy" (1987) 16 *Phil. & Pub. Aff.* 215 at 220. I grant, however, that some descriptions of the projects attempted by liberal writers are readily construable as based on a thesis of radical individualism: see, for instance, M. Walzer, "Liberalism and the Art of Separation" (1984) 12 *Pol. Theory* 315.

a different dimension: it focuses on the alternative ideas that can provide the foundation for a better social order.<sup>2</sup>

Critical Legal writing has so far been reluctant to give explicit accounts of the nature of a post-liberal society. At most, writers ordinarily identified with the Movement have referred episodically to alternative values or alternative institutional arrangements within the context of legal adjudication. An extended treatment of how revised conceptions of law will be integrated into a wholly transformed society is lacking.<sup>3</sup> Doctrinal commentaries are not of course obliged to include neat, synoptic descriptions of utopian arrangements. Since much Critical Legal publishing has taken the form of such commentary, we should not set our expectations too high. One of the most ambitious attempts to delineate the essential features of a post-liberal polity, Unger's *Knowledge and Politics*, antedates much of this doctrinal critique.<sup>4</sup> As we shall see, that text, as well as Unger's recent voluminous tracts, presents many of the major problems associated with understanding how the business of critique translates into social reconstruction. This assumes a point that should not be taken for granted, namely that critique by

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<sup>2</sup>Another disclaimer is in order. The literature that treats "community" from political, historical and sociological perspectives is vast. The ways of looking at the relationship of individuals to a community and of one community to another, are manifold and therefore immune to any short, facile summary. The theme of antagonisms between the need for group life and the importance of personal values is both as old and as rich as Western literature: see, for instance, Sophocles, *Antigone*, trans. R.E. Braun (Oxford: Oxford University Press, 1974) at 806-943; and the appreciation in G. Steiner, *Antigones* (Oxford: Clarendon Press, 1984) at 277-83; and W.C. McWilliams, *The Idea of Fraternity in America* (Berkeley, Calif.: University of California Press, 1973). Sociology as a discipline has been generally fascinated with the distinction between community and society: see R.A. Nisbet, *The Quest for Community* (New York: Oxford University Press, 1969) and R. Bellah *et al.*, *Habits of the Heart: Individualism and Commitment in American Life* (Berkeley, Calif.: University of California Press, 1985). Critical Legal writing occasionally taps into one or more of these streams of inquiry and discussion. But there is no specific reliance on one conception of community as the key by which to understand post-liberal social arrangements. Consequently, in this article I am more interested in pursuing the particular discussions of the Critical Legal writers on this and allied topics; only cursorily will I mention how a Critical Legal point is clarified by reference to outside sources and debates. Although there are numerous invocations of the values of "community", "solidarity", and "intersubjectivity" in Critical Legal discussions, it is not the abstract concepts that are the subject of this article. Rather, I concentrate on the uses and nuances of those terms as they bear some meaning for our actual and projected political structures.

<sup>3</sup>Two examples of the historical and sociological treatment of proposed and actual attempts at building utopian communities, both of which give a detailed portrait of the integration of legal structures or alternatives to law into the whole vision, are: C.J. Erasmus, *In Search of the Common Good: Utopian Experiments Past and Future* (New York: Free Press, 1977) and R.M. Kanter, *Commitment and Community: Commune and Utopia in Sociological Perspective* (Cambridge, Mass.: Harvard University Press, 1972).

<sup>4</sup>R.M. Unger, *Knowledge and Politics* (New York: Free Press, 1975). See *infra*, notes 92-109 and accompanying text.

itself constitutes a mode of such reconstruction. There are grounds for interpreting some Critical Legal writers as holding this last opinion. One of the central conclusions of this article is that such an opinion is wrong. There are many ways to practice politics while engaged in legal debates, in whatever forum, but the academic criticism of existing legal arrangements is not a sufficient condition of revolutionary change. It is the latter goal that the Critical Legal Studies Movement is dedicated to achieve, yet to date the envisioned society is not clearly apparent.<sup>5</sup>

By isolating the two paradoxes at the beginning of this article, I am characterizing the failure of Critical Legal exponents to stimulate political transformation as a systematic failure. The critique, thus far developed, is disabled from achieving its goal of a post-liberal regime by its reluctance to assert a defensible scheme of political values or of the arrangements that are meant to serve them. The paradoxical quality of this failure arises from the widespread conviction that the Critical Legal project makes political debate the core of legal education. This conviction or, in some quarters, this apprehension should be set off against a reading of Critical Legal texts that is intent on discovering the elements of a distinctive Critical legal politics. What we shall find as a result of this search is a surprisingly non-committal stance toward fundamental political questions. The ways of escape from these paradoxes are difficult. What we might ask the members of the Movement for, and what members might demand of one another, is more political discussion and activity, not less. But in the ensuing debate, the object would be to take a stand, to develop and defend political conceptions of legitimacy, authority, disobedience, and social justice — to become fully engaged in political discussion, rather than to leave political matters to be decided within an imaginary or future society. The mood of the debate ought to be assertive instead of subjunctive.

There is a sense within the Movement that Critical Legal writing need not always be aimed at the final form of a transformed society. Indeed, the approach of nearly all Critical writers has been more modest. They have

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<sup>5</sup>This deficiency has not gone unnoticed in the Critical Legal literature: see, for instance, the comments of that merry prankster of the Critical Legal set, David Fraser, in "Truth and Hierarchy: Will the Circle be Unbroken?" (1984) 33 Buffalo L. Rev. 729. However, to assert the missing element does not make that element appear. Fraser's clarion call, at 755, takes the following form:

We must examine the texts of particular, discrete communities in order to develop a larger hermeneutics of the American and of the human community.

Yet his article conspicuously fails to examine any concrete community in particular. We are left instead with a programme of engaging in "edifying discourse", an opaquely described activity considered in Part III below. See also A.C. Hutchinson & R.J. Monahan, "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1984) 36 Stan. L. Rev. 199 at 227-30.

two concerns. First, they want to suggest particular values, perhaps underplayed in precedent or current law, that ought to be accorded priority in further doctrinal development. Secondly, they wish to suggest novel patterns of argument that would offset the notion that adjudication should be conceived as a matter of finding and applying reasonably definite and determinative rules. Such procedures as these have received labels like "advocacy scholarship".<sup>6</sup> There is no pretence of neutrality on the part of the radical critic. Once those proposals are made however, the test of their validity must lie, at least in part, in the kind of society to which they would lead or in the context they would occupy in a quite different system. It is this point at which the Critical Legal discussion too frequently leaves off, for it is part of the nature of the critique that the final determination of the shape of a post-liberal society is to be left for an authentically democratic decision. It is not something to be imposed in advance.

Nevertheless, some of the claims of Critical Legal writing are still liable to scrutiny over the issue of how post-liberal values differ from their liberal counterparts. Included in the credo of Critical Legal scholarship are the beliefs in experimentation and imagination. The problems posed by this article arise out of our judgment of how current Western societies may be reconstructed along fundamentally new lines. Critical Legal writers tell us that reform is not an adequate response to social ills, for it fails to resolve the basic contradictions endemic in liberal legal thought.<sup>7</sup> To persuade us of the need for a revolutionary change in legal institutions, Critical Legal writers cannot merely be taken at their word that a new set of arrangements and values is inherently preferable once we learn what they are. The purpose of this article is to bring these proposals out into the open and to question the merits of each. The watchwords of Critical Legal discourse in this regard are "community" (and its cognates), "genuine" or "radical democracy", and "intersubjective" concern, debate and deliberation. The compelling idea is that the room for discussing and choosing among political values must be made as large and public as possible. The selection of fundamental values is not a task to be left to the relative enclaves of courts and legislatures. But having reached this point, the radical critique notoriously breaks off leaving relatively untreated the issue of which values we can, given our social and historical context, agree should be paramount at the level of principle and in cases of particular dispute. The Critical Legal approach is to claim the deeply political meaning of legal doctrines and assumptions

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<sup>6</sup>P. Brest, "The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship" (1981) 90 *Yale L.J.* 1063 at 1109.

<sup>7</sup>J. Jaff, "Radical Pluralism: A Proposed Theoretical Framework for the Conference on Critical Legal Studies" (1984) 72 *Geo. L.J.* 1143 at 1147.

yet acknowledge a self-conscious deferral of the task of defining the content and scope of political understanding.

The discussion begins with a brief account of those features of liberal democracy and its theory that have led to the legally-sustained oppression of many members of supposedly democratic societies. Part III presents in detail a portrait of what Critical Legal writers envision as an alternative basis for social and legal order. The variety of positions within the Movement is there revealed. Part IV is an extensive discussion of the difficulties surrounding the Critical Legal attempt to aid in the theoretical overthrow of existing institutions. These difficulties are so serious as to bring into question the ultimate success of the Critical Legal attack on conventional doctrine and theory.

## II. The Occlusion of Debate in Liberal Society

One of the main points of the Critical Legal condemnation of established ways of thinking is that our collective political imagination has been systematically stunted. This fact is largely hidden from us. We persist in believing that existing institutions reflect the best of all possible worlds. What we fail to realize are the defects in our practices and in the theory by which these practices are explained. Raising to the surface of our consciousness an awareness of these defects is one of the crucial emancipatory goals of the Critical Legal Movement. A major part of the Critical Legal project is the promotion of communitarian values and processes. It is therefore worthwhile to look at the failures of our current structures so that the stage is properly set for describing the virtues of the Critical Legal premises that serve as an alternative to legal liberalism.

It is important to keep in mind that institutions of representative democracy have for the most part been repudiated by Critical Legal writers. In societies where the mass of citizens participate in politics only to the extent of casting a vote every few years during elections for each level of government, democracy as practiced is a mere shadow of what form genuine democracy ought to take. This regrettable situation, in which most members of a society are politically apathetic, is not even justified on the ground of expediency. As one critic notes:

For most liberal democrats, representative government is not at all a concession to the difficulties of practical political life, but is itself the ideal.<sup>8</sup>

The doubt raised by radical critiques of modern liberal democracies is whether they really amount to democracies in anything but name. A form

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<sup>8</sup>A. Levine, *Liberal Democracy: A Critique of the Theory* (New York: Columbia University Press, 1981) at 142.

of government in which non-participation by most is tolerated or even encouraged is not truly democratic. "Participation" in this context ought to mean more than just filling out a ballot. The ideal ought to be the maximum opportunity for all citizens to engage in meaningful debate over values that affect them all.<sup>9</sup> The vocation of politics should not be restricted to those seeking representative office; it should be practiced by every person who wants to be a citizen and not just a subject.<sup>10</sup> This has not, however, been the way political participation has been conceived by liberal writers.<sup>11</sup>

Debate over fundamental values has thus been generally withdrawn from public gatherings that involve any member of a society who wishes to contribute. Instead, it has been carried on at the level of legislative deliberation, bureaucratic administration or legal adjudication. This development has minimized the importance of the mere private individual's statement of personal values. Thus, according to Critical Legal thinking, while liberal democracies are supposed to devote themselves to the recognition of individual preferences, in fact the system works against taking into account such preferences at all. Decision-making on many fundamental issues is effectively insulated from widespread contribution.<sup>12</sup> The Critical Legal attack has been directed particularly at the claim that courts have a privileged insight into the shared values that somehow form the basis of a polity and its ideal social practices.<sup>13</sup> Such a liberal view has been unremittently challenged on the grounds that there are no such values and that the liberal account itself assumes this lack of shared values as one of its major premises.<sup>14</sup> The choice of judges to perform the job of protecting the

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<sup>9</sup>See Brest, *supra*, note 6 at 1107.

<sup>10</sup>See Levine, *supra*, note 8 at 145. This sort of criticism is not, of course, an invention of Critical Legal writing. See, for instance, the evidence and arguments contained in the following works: J. Cohen & J. Rogers, *On Democracy: Toward a Transformation of American Society* (New York: Penguin Books, 1983); B.R. Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley, Calif.: University of California Press, 1984); R. Mason, *Participatory and Workplace Democracy* (Carbondale: Southern Illinois University Press, 1982); A. Carter, *Direct Action and Liberal Democracy* (London: Routledge & Kegan Paul, 1973); and J.R. Lucas, *Democracy and Participation* (Harmondsworth, Eng.: Penguin Books, 1975).

<sup>11</sup>See M. Tushnet, "Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory" (1980) 89 Yale L.J. 1037 at 1047-48 and M.J. Sandel, "The Procedural Republic and the Unencumbered Self" (1984) 12 Pol. Theory 81.

<sup>12</sup>See G. Frug, "The Ideology of Bureaucracy in American Law" (1984) 97 Harv. L. Rev. 1276.

<sup>13</sup>This claim is frequently associated by Critical Legal writers with the jurisprudence of Dworkin: see R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977) and his *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1986).

<sup>14</sup>See the following comment by James Boyle in "The Politics of Reason: Critical Legal Theory and Local Social Thought" (1985) 133 U. Pa. L. Rev. 685 at 703, n. 54:

The most fascinating successor to legal realism is Ronald Dworkin. Dworkin claims there are clear, unambiguous, and coherent *political* rights that pre-exist law and

moral basis of our society is interpreted by Critical Legal writers as a tacit admission by liberals that the public is not to be burdened with the problem of deciding issues affecting the common good.<sup>15</sup>

The Critical Legal account makes great play out of what it sees as a principal assumption of liberal thinking: that there is no widespread, shared conception of what is to be valued in our social and political life. No single value or set of values commands our respect. The values we in fact hold conflict with one another and there is no metatheory available to us by which we can sort out which values are defeasible in light of superior ones.<sup>16</sup> The radical critic takes this premise and tries to turn it back upon any effort by a liberal ideologue to construct a moral or legal theory that purports to show how communal life is possible despite this missing vital element. The insidious assumption of radical individualism is discovered again and again, we are told, at the foundations of political practice and legal doctrine. Critical Legal writers refuse to accept this state of affairs as inevitable or as part of the human condition. Even though legislators and courts may not be able to arrive at an adequate conception of the common good, this does not mean that such a conception cannot be fashioned by some other, non-liberal political means. The invocation of the ideal of communal dependence and dialectic is intended to show how shared values may be achieved. This ideal, which includes at its core the overriding concern for the public or social good, is supposed to release us from liberalism's "predatory and vicious conception of politics".<sup>17</sup>

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that judges enforce. Since the legal system's need for neutrality is *premised* on the unstable, conflicting, and indeterminate nature of non-legal value judgments, Dworkin's move is breathtaking in its audacity and implausibility. It is almost as if contemporary philosophers of science had answered skepticism about scientific objectivity by claiming to have received their knowledge directly from God. [emphasis in the original]

Boyle's characterization of the purpose of a legal system is very tendentious in this context, but that issue will not be pursued here. For a more illuminating comparison of the different root principles that separate Dworkin from his Critical Legal detractors, see A. Altman, "Legal Realism, Critical Legal Studies, and Dworkin" (1986) 15 *Phil. & Pub. Aff.* 205.

<sup>15</sup>See Brest, *supra*, note 6 at 1106.

<sup>16</sup>This is one of the consequences of the Critical Legal view of individualism. It should be emphasized that such a view incorporates several different meanings of "individualism", drawn from absolutely distinct contexts. On the variety possible, see P. Pettit, *Judging Justice* (London: Routledge & Kegan Paul, 1980) at 65-68 and S. Lukes, *Individualism* (Oxford: Basil Blackwell, 1973).

<sup>17</sup>M.J. Horwitz, "The History of the Public-Private Distinction" (1982) 130 *U. Pa. L. Rev.* 1423 at 1427. Although this article does not tackle the question whether liberal theory and liberal politics should be conflated for the purposes of a critique, it is a useful exercise to contrast Horwitz's denunciation of liberal politics with the analysis of "neutrality" as a liberal desideratum in Thomas Morawetz, "Persons Without History: Liberal Theory and Human Experience" (1986) 66 *B.U.L. Rev.* 1013.

One of the objections to the liberal doctrine of individual rights is that the relationship between persons and the community in which they are active is "reified". Instead of trying to understand and describe the particular circumstances of a person seeking meaning and fulfillment in a deeply social context, the courts, by relying on a rhetoric of abstract rights, manage to ignore the peculiar aspects of specific cases.<sup>18</sup> Only a formal sort of justice is thereby achieved. The language of rights again serves to reinforce the separation between the public role of the citizen and his or her private life. Most rights protected under liberal regimes are directed at freeing the individual from interference by others, and particularly from state action. Self-fulfillment is thus implicitly assumed to be a matter of freedom to do as one chooses in the private sphere, where the virtues of fellowship, love and cooperation are supreme. By contrast, the public sphere is perceived as a threatening, competitive and impersonal environment.<sup>19</sup> This distinction between the two realms has been historically developed, the boundaries between them shifting constantly.<sup>20</sup> Moreover, it should not be assumed that the public sphere is delimitable simply as a matter of state activity. The evolution of liberal capitalist society into corporate-welfare forms has broken down the conventional distinctions separating public authority from private business.<sup>21</sup> The Critical Legal goal is not to reinvent these categories, possibly under the guise of contrasting community with autonomy, but instead to arrive at a conception of community that incorporates the criteria of what is to count as autonomy.<sup>22</sup> Freedom is to be achieved through, not despite, the matrix of group activity.

Legal doctrine in a liberal legal system does not seize on the possibility that there are alternative conceptions of human relationships. Instead, legal "ideas constrict the horizons of the possible by establishing within con-

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<sup>18</sup>M. Tushnet, "An Essay on Rights" (1984) 62 Tex. L. Rev. 1363 at 1382. The revolt against the "abstract", in contradistinction to tropes invoking the "concrete", is one of the recurrent rhetorical themes of the paradoxes of engagement and postponement. For an example of the critique of a project of abstraction, see M.J. Matsuda, "Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice" (1986) 16 N.M. L. Rev. 613. Critical Legal writing has itself been criticized for adopting "a characteristically modern tendency toward abstraction": see S. Sherry, "Civic Virtue and the Feminine Voice in Constitutional Adjudication" (1986) 72 Va. L. Rev. 543 at 569.

<sup>19</sup>See Tushnet, *ibid.* at 1392 and J.W. Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984) 94 Yale L.J. 1 at 69.

<sup>20</sup>See K. Klare, "The Public-Private Distinction in Labor Law" (1982) 130 U. Pa. L. Rev. 1358 and F. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harv. L. Rev. 1497.

<sup>21</sup>See A. Fraser, "The Legal Theory We Need Now" (1978) 40 Socialist Review 147 at 167.

<sup>22</sup>See K.M. Casebeer, "Toward a Critical Jurisprudence — A First Step by Way of the Public-Private Distinction in Constitutional Law" (1983) 37 U. Miami L. Rev. 379.

sciousness the boundaries of legitimate authority".<sup>23</sup> Thus law "mediates" political issues by purporting to resolve them in a "neutral" manner without the messy contentions involved in power struggles among political interest groups.<sup>24</sup> From the Critical Legal point of view, such mediation effectively masks the extent to which law itself is a political process deeply imbued with the stains of illegitimate power and corruption.

The Critical Legal account is somewhat ambiguous about whether law has contributed to the gradual disappearance of communal ties and affections. The imposition of the state, at least in its liberal democratic form, may be seen as a response to the liberal assumptions about individual egoism and struggle. Under one interpretation of liberalism, justification of government is based on the need for an agency which is able to regulate effectively the competitive relationships that spring up between individuals who each seek to maximize his or her own utilities. In the process, activities that formerly were controlled by communitarian notions of reciprocity, custom and fellowship became subject to legal forms of maintenance. This is one of the conventional observations of a certain type of anarchism, which as an ideology is aimed at demonstrating the dispensability of the state and its apparatus.<sup>25</sup> One of the driving mechanisms behind the Critical Legal emphasis on communal values could be this characterization of law as a factor in the alienation of the modern individual. The liberal state and its legal forms succeed in estranging members of the community who are blocked from realizing their common interests. This point of view would resemble in outline some of the Marxist literature on alienation as a widespread social phenomenon that results from capitalist economic relations.<sup>26</sup>

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<sup>23</sup>P. Gabel, Book Review of *Taking Rights Seriously*, by R. Dworkin (1977) 91 Harv. L. Rev. 302 at 313, note 18. See also A.D. Freeman, "Truth and Mystification in Legal Scholarship" (1981) 90 Yale L.J. 1229 at 1235.

<sup>24</sup>See M. Tushnet, "Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies" (1979) 57 Tex. L. Rev. 1307 at 1350 and S.B. Presser, "Subjects of Bargaining Under the NLRA and the Limits of Liberal Political Imagination" (1983) 97 Harv. L. Rev. 475 at 493.

<sup>25</sup>See M. Taylor, *Community, Anarchy and Liberty* (Cambridge: Cambridge University Press, 1982) at 53-58 and D. Miller, *Anarchism* (London: Dent, 1984) at 49-50. For a Critical Legal intimation of this approach to the question of how capitalist legality dissolves cultural traditions and values, "leaving the individual isolated and exposed in what appears to be an objectively meaningless world", see Fraser, *supra*, note 21 at 173.

<sup>26</sup>See K. Marx, "Economic and Philosophical Manuscripts [1844]" in D. McLellan, ed., *Karl Marx: Selected Writings* (Oxford: Oxford University Press, 1977) 75; B. Ollmann, *Alienation: Marx's Conception of Man in Capitalist Society*, 2d ed. (Cambridge: Cambridge University Press, 1976); and S. Lukes, "Alienation and Anomie" in P. Laslett & W.G. Runciman, eds, *Philosophy, Politics and Society, Third Series* (Oxford: Basil Blackwell, 1967) 134.

In contrast to this characterization is the argument that law as a mediating factor actually works to reduce or eliminate alienation. This point has been given its most detailed exposition by Trubek:

[T]he "mediative" perspective prepares us to grasp the full complexity and contradiction of legal life, and to avoid a series of errors that can stem from more simple-minded approaches. The mediative perspective asserts that a significant feature of legal life in liberal, capitalist societies is the simultaneous assertion and negation of basic ideals of equality, individuality, and community. The legal order neither guarantees these ideals, nor does it simply deny them: it does both.<sup>27</sup>

In this portrait of the operation of law, politically dominated classes are reconciled with the established social order in part because of the success of legal institutions in capturing communal as well as individual aspirations. The message of legal rhetoric is thus loaded with inherently contradictory values that both befuddle and appease the powerless. There is naturally a cost associated with the mechanism of mediation. This takes the form of political quiescence. The vast majority of subjects in a liberal democracy are denied clear-cut choices. This explains also the advantage for the entrenched power holders in keeping legal doctrine "complex" in the sense adopted by Trubek. Even on this latter theory, the radical critique is valuable for dispelling illusions. Although individuals may not be alienated in the classic, Marxist sense, they still must be freed from their intellectually captive state.

One way to achieve this emancipation is to make available the "visions" or "images" that reveal the shape of a non-liberal social order. The Critical Legal account on this score is, like the Platonic, strongly visual.<sup>28</sup> The usual Critical Legal agenda is to point out the ubiquity of liberal assumptions about social life and then to speculate on the shape of society that might be built on different assumptions. This employment of "irreconcilable visions of humanity and society" has been the force that generates illuminating doctrinal deconstruction in one part of the Critical Legal project.<sup>29</sup> The

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<sup>27</sup>D. Trubek, "Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law" (1977) 11 L. & Soc'y Rev. 529 at 543. A good source of insight into the complexity of state-sponsored forms of legality is the fortunes and operations of informal dispute processing: see B. de Sousa Santos, "Law and Community: The Changing Nature of State Power in Late Capitalism" (1980) 8 Int'l J. Soc. L. 379; R.L. Abel, ed., *The Politics of Informal Justice* (New York: Academic Press, 1982); and C.B. Harrington, *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court* (Westport: Greenwood Press, 1985)

<sup>28</sup>See S.S. Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought* (London: Allen and Unwin, 1961) at 17-19.

<sup>29</sup>D. Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 Harv. L. Rev. 1685 at 1685.

object is not to find a “balance” between opposing schemes, for Critical Legal thinking is wholly averse to the image of a balance in reaching judgment.<sup>30</sup> Rather, it is vital to retrieve conceptions that might have been suppressed due to the dominance of a single set of assumptions.

The goal of describing the conditions that prevail in a social order conjecturally different from our own has been stated in deep philosophical terms. There is a strain within Critical Legal thought that would see the emergence of a non-liberal metaphysics to accompany political transformation. The problems of arranging a social order that gives due weight to the communal aspirations of all its members is dressed up, on this way of thinking, as a philosophical problem involving the tension between recognition of self and understanding of others.<sup>31</sup>

The crucial idea behind this Critical Legal adjuration to take up the activity of polity-building is that there is no permanent or necessary political order. We must engage our political imagination and construct the system which approaches our progressive ideal. This is not of course a startlingly novel insight into the possibility of unfettered theorizing and human control over political forms. A similar level of recognition can be traced back at least as far as the Sophists, and by Plato’s time we have an example of the thorough exercise of speculative political vision.<sup>32</sup> Correspondingly, “reification”, in the sense of a belief that the current state of affairs is natural, outside of time and immune to manipulation, is also not a specifically liberal mode of thought, although Critical Legal writing often makes it appear that way.<sup>33</sup>

### III. A Communitarian Understanding of Law and Society

This part of the article is divided into two sections, the second of which is further sub-divided. The first section briefly considers the issue of how much we might reasonably demand from Critical Legal writers in the way of details about a post-liberal society. The second section contains a discussion of the different ways in which that society has been conceived. It will become clear as the various modes are presented that they are not perfectly congruent with one another. As the members of the Critical Legal Studies Movement are not knit tightly together by subscription to any particular party dogma, to encounter such variety is not surprising.

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<sup>30</sup>See Tushnet, *supra*, note 24 at 1322 and 1372-73.

<sup>31</sup>See Jaff, *supra*, note 7 at 1145.

<sup>32</sup>See Wolin, *supra*, note 28 at 31-32.

<sup>33</sup>The process of reification is inescapably associated with ideology: see J.B. Thompson, *Studies in the Theory of Ideology* (Cambridge: Cambridge University Press, 1984) at 130.

### A. *Is a Blueprint Possible?*

The question that heads this section can be answered firmly in the negative, at least so far as providing a blueprint means describing in minute detail the institutions, practices and values that will go to make up a society that rejects liberal principles of social order. Critical Legal writers refuse to be drawn into the game of imagining the precise contours of a progressive polity. There are at least two serious problems, from the Critical Legal perspective, associated with any attempt to indulge in "blueprintism". In the first place, there is no single form of social life that is logically bound to succeed existing liberal democracies. Critical Legal thought does not fall into the Hegelian trap of arguing that political history follows a developmental pattern that will culminate in a specific, transcendent state.<sup>34</sup> Secondly, to the extent that such transformation does occur, it will most likely be a matter of incremental progress. There is not necessarily an apocalyptic change guaranteed by the radical critique of law. Instead, critics of social theory and practice may be content to arrive at, and pass on to others, glimpses of utopian possibilities in the material being examined. A critical programme, in other words, does not necessarily dictate a comprehensive form of ideal social order.<sup>35</sup> Finally, to provide a description of the particular institutions in a post-liberal society would be antithetical to one of the core themes of Critical Legal thinking. The emphasis on the importance of universal participation in setting the values that will control a society is a familiar motif in the radical literature. The upshot of this is that Critical Legal writers are limited in their activity to detecting the inconsistencies, empirical mistakes and logical fallacies to be found in the liberal premises that justify existing legal and political practice. Those critics would violate their own strictures on democratic determination of social forms if they tried to spell out the specific values that ought to be given priority in a transformed polity. The social problem is not merely one of providing a legislative programme for a community that is created *in vacuo*. Rather, the task is to aid in the birth of a new psychological as well as a new political and legal orientation. It is not just a matter of promoting a new form of individualism where every member of a society is enculturated with traits of economic initiative and enterprise or is given scope to pursue the widest

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<sup>34</sup>See C. Taylor, *Hegel* (Cambridge: Cambridge University Press, 1975) at 428-61. There have been some recent interesting analyses that tend to revise our traditional reading of Hegel's theory of the state and political culture. See, for instance, K.-H. Ilting, "Hegel's Concept of the State and Marx's Early Critique" in Z.A. Pelczynski, ed., *The State and Civil Society: Studies in Hegel's Political Philosophy* (Cambridge: Cambridge University Press, 1984) 93.

<sup>35</sup>See Tushnet, *supra*, note 18 at 1400.

range of opportunity.<sup>36</sup> Such a form of individualism would merely amount to a successor form of liberalism. The real transformation arises out of a change in widespread consciousness whereby all members of a society grasp how individual welfare and freedom are tied indissolubly to the common good. Such a shift in consciousness cannot be mandated. Furthermore, once it occurs, there is no foretelling how it will issue in new structures of legal or political practice.

With the foregoing constraints in mind, it becomes clear that Critical Legal thought is "utopian" only in a special sense. Although those critics stress the role of imagination and speculation in political discussion, the point is not to discover a single, timelessly perfect set of political principles. The danger of the latter type of utopian enterprise is the closure it imposes on further discussion and experimentation. Interestingly, one group which espouses such a truncated theory is, to the Critical Legal eye, the practitioners of law-and-economic analysis. Their assumptions about rational self-interest and about efficiency as the product of legal entitlements and unimpeded markets represent the sort of intellectual sin Critical Legal thought abhors.<sup>37</sup>

The Critical Legal refusal to assert more than the general direction of a progressive legal theory and practice has assumed within the Movement two significant alternative theoretical forms. The first is to make opposition to current structures and practices a matter of principle. The second is to describe the search for post-liberal premises as a pragmatic exercise.

By elevating the practice of opposing governing conceptions of rights, the rule of law and constitutionalism to a guiding precept, Critical Legal writers hope to accomplish two tasks. First, they wish systematically to bring to light the suppressed possibilities that are buried within legal and political discourse and to make those possibilities once again live options. Therefore, even though a radical Critic might have some sympathy for certain aspects of liberal doctrines and institutions, the Critical programme requires that

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<sup>36</sup>For an expression of these goals, which one might say formed an essential part of the vision of the New Deal in the U.S., see J. Dewey, *Individualism Old and New* (London: George Allen and Unwin, 1931) at 79-83.

<sup>37</sup>See M. Kelman, "Trashing" (1984) 36 *Stan. L. Rev.* 293 at 306 and R. West, "Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner" (1985) 99 *Harv. L. Rev.* 384.

critic to subject all the outgrowths of liberalism to fundamental scrutiny.<sup>38</sup> Secondly, by belonging to an “oppositional community”, that is, to a group of like-minded inquirers who share doubts about how much justice our current legal system can achieve, Critical Legal writers can provide a model for what shape a post-liberal community might take. That is, it will be composed of members who are united by a common target of criticism and who are in a position to demonstrate (to some extent) in their own relationships and critical projects the virtues of undominated intellectual exchange.<sup>39</sup> Hence, there is a constant overtone in Critical Legal literature that the members of the Movement ought to recognize their own interdependence and live up to the communitarian ideals of care, mutual assistance and opposition to all forms of hierarchy, domination, sexism and racism. An examination of the literature within the Movement reveals the repeated invocation of these ideals.<sup>40</sup>

The second theoretical description of why only a vague outline of post-liberalism is possible may be labelled “pragmatism”. According to this view, we are recognized as the authors of our own social system and are capable of giving meaning to legal ideas, rather than being concerned about whether our inherited ideas are true (in some positivist sense). As Trubek notes:

While positivists look for the facts because they are the “true” reality and determinists think the facts represent the “only” reality, pragmatists seek to

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<sup>38</sup>See the remarks on “edifying discourse” (a concept borrowed from Richard Rorty) in Singer, *supra*, note 19 at 8. So long as radical theorists seek to engage in rethinking the grounds of human science and human activities, they should bear in mind the following useful counsel offered by Rorty:

I raise this banal point that education — even the education of the revolutionary or the prophet — needs to begin with acculturation and conformity merely to provide a cautionary complement to the “existentialist” claim that normal participation in normal discourse is merely one project, one way of being in the world. The caution amounts to saying that abnormal and “existential” discourse is always parasitic upon normal discourse, that the possibility of hermeneutics is always parasitic upon the possibility (and perhaps the actuality) of epistemology, and that edification always employs materials provided by the culture of the day. To attempt abnormal discourse *de novo*, without being able to recognize our own abnormality, is madness in the most literal and terrible sense.

See R. Rorty, *Philosophy and the Mirror of Nature* (Oxford: Basil Blackwell, 1980) 365. Rorty's reputation among leftist intellectuals is mixed. See R. Comay, “Interrupting the Conversation: Notes on Rorty” (1986) 69 *Telos* 119 at 123: “Rorty depoliticizes philosophy to the same degree, and by the same logic, as he aestheticizes politics”.

<sup>39</sup>For a discussion of this purpose, see Fraser, *supra*, note 21 at 183.

<sup>40</sup>See, e.g., J. Jaff, “An Open Letter to Critical Legal Studies” in *CLS: Newsletter of the Conference on Critical Legal Studies* (May 1987) at 9-10. Included in this remarkable public appeal to Movement members are some statements that do not easily square with pure altruism, such as:

It seems to me that, if I have to pay for all of CLS, then CLS *owes* me something in return. [emphasis in the original]

explore the way our provisional worlds work so that they can determine the consequences of the concepts we employ and the projects in which we are engaged.<sup>41</sup>

If the critic's goal is to commend the virtues of a society based on the values of community rather than individualism, the pragmatic course of theorizing requires the critic to suggest concepts or arrangements that might be adopted by a genuinely democratic polity. But this activity does not include a licence to construct particular institutions. It is essentially limited to testing the social effects of proposed concepts. Since that kind of test is only practicable in light of the actual circumstances of a future society, Critical Legal thinking's pragmatist aims are really no greater in scope than oppositionism.<sup>42</sup>

### *B. Angles of Approach to the Progressive Community*

This section should be understood as an initial attempt to isolate and describe some of the approximate shapes Critical Legal thinking has assumed on the issue of which non-liberal values lie at the foundation of a new social order. It bears emphasizing that most of the suggestions made in this regard have occurred primarily in the context of doctrinal criticism, not in the context of constructing a systematic social theory. The significant exception to this pattern has been Unger's work, the early parts of which at least nominally have served as the basis for much subsequent Critical Legal thinking. The first four sub-sections that follow each relate one particular vision of how a progressive community may be shaped using the full powers of our political imagination. In the order in which they will be discussed, these are: the socialist, the local, the civic republican and the intersubjective communication visions. The fifth and final sub-section assesses Unger's own conception of the ideal organic community.

#### 1. Socialist Organization

It is difficult to judge just how Marxist is the Critical Legal project. To a large extent, this would depend on an analysis of the Marxist or neo-Marxist elements in leading Critical Legal texts.<sup>43</sup> The issue will not detain

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<sup>41</sup>D. Trubek, "Where the Action Is: Critical Legal Studies and Empiricism" (1984) 36 *Stan. L. Rev.* 575 at 581.

<sup>42</sup>It has been argued that Critical Legal writers, or at least one branch among them, have misconstrued the point of philosophically sophisticated versions of pragmatism: see J. Stick, "Can Nihilism Be Pragmatic?" (1986) 100 *Harv. L. Rev.* 332.

<sup>43</sup>See, e.g., D.F. Brosnan, "Serious But Not Critical" (1987) 60 *So. Calif. L. Rev.* 259 at 271-332. For an instance of Critical Legal objections to some modern strains of Marxist analysis, see Fraser, *supra*, note 21 at 160-61. The following trenchant remark from A. Hunt, "The Theory of Critical Legal Studies" (1986) 6 *Oxford J. Leg. Stud.* 1 at 44 shows why generalizations about the affinity of Critical Legal writing to Marxism are not yet possible:

There is a paradox about critical legal writing which I am not certain this essay has

us here, for it is clear at least that Critical Legal thinking is sufficiently leftist that, in its account of the economic foundation of the existing legal order, capitalism is seen as evil. In particular, capitalist relations of production are seen as responsible for the destruction of the communal virtues of cooperation and fraternity. Moreover, capitalist organization itself has resulted in gross inequalities of economic and political power within liberal democracies. The development of class distinctions is assumed to be inimical to the requirements of a just community. The latter insight is, of course, not unique to Marxist-inspired critiques of modern social organization; it has also been expressed by writers such as Rousseau, who are difficult to pin down on any contemporary political spectrum.<sup>44</sup> The general consciousness that allows such relations to appear legitimate has been the subject of much Critical Legal discussion.<sup>45</sup>

There is no comprehensive, sustained description of how socialism provides the guidelines for a future progressive society.<sup>46</sup> Instead, there are only glimmerings within Critical Legal literature that such a model is the most desirable solution. There has been no attempt within that body of writing to point to any existing or past actual experiment with a socialist government as instructive or worthy of emulation. On the contrary, Gabel acknowledges that his conception of socialism has not yet been fully attempted anywhere.<sup>47</sup> The relevant remarks by Critical Legal writers have consisted for the most part in noting the conjunction between socialist ideals and the values of equality, common ownership of public goods and acces-

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fully grasped. Critical authors exhibit the concern with theory that characterizes modern radical and neo-Marxist scholarship and yet, at the same time, much of that concern is, either literally or metaphorically, footnoted.

Hunt thus identifies a prime deficiency in many articles exhibiting a Critical Legal outlook. They incorporate, often through blanket citations to difficult texts, extremely controversial arguments that a legally-trained readership will usually be unable to assess without the good fortune of some first-hand knowledge. I have had trouble deciding whether this pattern is best interpreted as a reaction against the "normal" eschewal of non-legal sources in law review literature or, more interestingly, is instead a *reductio ad absurdum* of the awful stylistic habits amusingly blasted in F. Rodell, "Goodbye to Law Reviews" (1936) 23 Va. L. Rev. 38 and reprinted with additional comment by the same author in "Goodbye to Law Reviews — Revisited" (1962) 48 Va. L. Rev. 279.

<sup>44</sup>See, e.g., R.D. Masters, *The Political Philosophy of Rousseau* (Princeton: Princeton University Press, 1968) at 205-54.

<sup>45</sup>See *infra*, note 170.

<sup>46</sup>There are no grounds for inferring that Critical Legal writers feel, like Castoriadis, that "socialism" as a convenient label for the emancipatory programme of the left must be abandoned: see C. Castoriadis, "Socialism and Autonomous Society" (1980) 43 Telos 91.

<sup>47</sup>See Gabel, *supra*, note 23 at 315. Abel also has taken notice of various forms of experimentation in worker control of productive enterprises in various political cultures: see R.L. Abel, "A Socialist Approach to Risk" (1982) 41 Md. L. Rev. 695, but he acknowledges that no extant society realizes a socialist ideal throughout.

sibility to power. There is also no indication among these writers that socialism is likely to be a realistic political option in, for example, the United States. This is a prime example of Critical Legal scholars' refusal to descend to the level of participating in actual party politics. Instead, they conduct their analysis on the basis of what principles judges might be persuaded to apply in adjudicating cases of great moment. Tushnet, for instance, points out a possible socialist interpretation of the U.S. constitution. The idea behind this proposal is that the seeds for such an interpretation are already in the developed case law.<sup>48</sup> But these are acknowledged by Tushnet to be rare elements within the body of public law, and that generally "socialism is not on the agenda of contemporary public law scholarship".<sup>49</sup> This observation is borne out particularly by the Critical Legal analysis of the judicial interpretation of collective bargaining legislation, where it becomes clear that liberal conceptions of work, labour and capitalist control still predominate.<sup>50</sup>

Perhaps the principal reason that socialism is not the automatic model for a post-liberal society is that Critical Legal writers are concerned with issues that transcend the organization of productive relations within a polity. This is without question an important issue to be addressed in the process of transforming current modes of thinking, but it is not the dominant issue. Critical legal writing often stresses the concern for conceiving new forms of life that have nothing to do with productivity or with markets. Also important, of course, are questions about who should control the distribution of goods and entitlements within a particular society. The version of socialist thinking that would assign this task to an overseeing and coercive state is bound to antagonize those Critical Legal writers who advocate an idea of community that makes such state functions unnecessary and possibly pernicious.

## 2. Local Organization

Local organization, as an alternative type of thinking about the general shape of a progressive community, is not opposed to such socialist ideals as economic, political or educational equality. It differs, however, over the emphasis on the role of the large, powerful state as guarantor of such values. There is an antipathy on this score to paternalist state intervention into the

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<sup>48</sup>M. Tushnet, "Dia-Tribe" (1980) 78 Mich. L. Rev. 694 at 697.

<sup>49</sup>Tushnet, *supra*, note 24 at 1347.

<sup>50</sup>See, e.g., K. Klare, "The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law" (1982) 61 Or. L. Rev. 157 at 163.

course of life that individuals or small groups choose to follow.<sup>51</sup> This is not a libertarian sentiment, for Critical Legal objections to such a megalithic role for the state have to do with promoting the ideal of democratic group decision, even down to the level of politics within the family. It is not based on some notion of absolute or generally inviolable individual autonomy.

A second rationale for favouring a concept of localized, decentralized community is prompted by the Critical Legal theory of mediation. One effect of this process is that political discussion is channeled through representative, bureaucratic or legal institutions. Popular deliberation is held to be either unworkable in practice or untrustworthy in that reason is sacrificed to mass will or opinion. By setting the debate within a local context, where the persons participating are able to have a concrete grasp of the issue and the consequences that will flow from the different possible decisions, a type of democracy can be achieved that transcends liberal notions. This process would satisfy a cardinal Critical Legal aim: to reduce "abstract universals to concrete social settings" and thus to "expose as ideology what appears to be positive fact or ethical norm".<sup>52</sup> To illustrate how this process of direct decision-making can help resolve basic tensions within liberal legal thought, Tushnet cites the First Amendment protection of free speech. By conceiving of this protection as a fundamental right that should presumptively prevail over any state action that attempts to circumscribe it, liberal constitutional thinking gets into deep trouble with such potential rights-claimants as Nazis or pornographers.<sup>53</sup> In a localized setting, the arguments that could be made on behalf of the effects on communal life would be more obvious. The particular historical circumstances of the activity in question would not be refined out of the adjudicative process. Instead, the concrete consequences to group life would be retained as a focal issue. To make this sort of decision procedure possible, Tushnet and other Critical Legal writers seem to adhere to a conception of community that would permit such direct, political resolution of disputes that touch immediately on the lives of those in the community. Although they do not specify what might be the optimal size of a community in which this kind of politics can flourish, it appears that it must be much smaller than anything familiar to us from looking at most contemporary Western democracies. It must certainly be smaller than any U.S. state capital and may indeed be something in the order of an urban

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<sup>51</sup>For an expression of reasons against such intervention, see Olsen, *supra*, note 20 at 1528. An example of the use of history to recover some sense of how social ordering can be achieved on a local scale, without a fully developed legal apparatus, is J.S. Auerbach, *Justice Without Law?* (New York: Oxford University Press, 1983).

<sup>52</sup>Freeman, *supra*, note 23 at 1236. The historical and ideological background to the liberal reluctance to decentralize power is given in G.E. Frug, "The City as a Legal Concept" (1980) 93 Harv. L. Rev. 1059.

<sup>53</sup>Tushnet, *supra*, note 18 at 1383-84.

neighbourhood or a rural village. Tushnet suggests a concept of federalism that would help communities deal with larger coordination problems, but that suggestion introduces a host of new problems that communitarian democracy cannot easily handle.<sup>54</sup>

The ideal of a local community as the primary social unit also appeals to that strand of Critical Legal thinking that would limit the application of law. The realization that there are many ways to structure relationships other than on legal models is inherent in the critical understanding of law. The notion of customary regulation of social practices is important as an antidote to the claim that all relationships can be analyzed using legal criteria. Once it is accepted that modern liberal societies tend to fragment into smaller communities that contend over national policies, then the way is paved for adjusting our conception of the relevance of legal control and sanctions.<sup>55</sup>

Critical Legal writers do not directly address the question of whether representative or bureaucratic institutions should be incorporated into a progressive society. The logical implication of their claims about the necessity for mass participation in the determination of controlling social values would be that those institutions should be jettisoned. The value of participation in local public affairs is not just that by doing so the individual citizen becomes more capable of understanding and possibly participating in national political life.<sup>56</sup> Local participation is both a good thing in itself and is necessary for a genuine democracy to work. The Critical Legal thesis on this issue is potentially radical, because "local" in this context can be interpreted to mean not just community-wide politics, but also smaller constituent settings such as the workplace, the school and the home. All of these contexts require their members to be able to contribute to any debate concerning the values that should be implemented in that specific setting.<sup>57</sup> If the communitarian impulse were followed to its ultimate conclusion, there may not be such a thing as national politics. A further implication of this stress on the worth of local participation is that politics potentially becomes an all-penetrating activity. Critical Legal writing so far has been concerned to shine a strong light upon the convenient uses of the liberal distinction between public and private spheres. Under liberal ideology, the private world of family, personal relationships and love becomes the most satisfying for

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<sup>54</sup>See Tushnet, *supra*, note 48 at 706.

<sup>55</sup>See L. Mazer, "The Crisis of Liberal Legalism" (1972) 81 Yale L.J. 1032 at 1046-47 for a discussion of the rise and meaning of "veto-communities".

<sup>56</sup>This is one argument set forth in, for example, C. Pateman, *Participation and Democratic Theory* (Cambridge: Cambridge University Press, 1970) at 34 and 42. On the relationship between the level of participation and the size of the political system, see R.A. Dahl & E.R. Tuft, *Size and Democracy* (Stanford: Stanford University Press, 1974) at 41-65.

<sup>57</sup>See Boyle, *supra*, note 14 at 739.

individual development. To counteract this division of experience, Critical Legal arguments have been aimed at politicizing even the most intense forms of personal experience. The danger, of course, is that by readjusting the characterization, Critical Legal writers will get rid of the private realm altogether. In Part IV, I will have occasion to question whether this is going too far.

### 3. Civic Republicanism

The Critical Legal appeal to a notion of civic virtue as the motive force in a workable conception of community is essentially an argument based on history. It links up with the vision of a local polity discussed in the preceding sub-section. In both, the value of citizen participation in political activities is underscored. Unlike the different visions treated above, however, the civic republican ideal is restorative.<sup>58</sup> The Critical Legal use of this concept is to reintroduce into the continuing discussion of political values many of the goals and aspirations that once held centre stage, particularly at the time of the debates surrounding the formation of the U.S. Republic.<sup>59</sup> The vital elements of this earlier tradition that bear some meaning for current Critical Legal attempts to describe, even if opaquely, the form of a post-liberal society have been noted in the following passage:

My approach is to take seriously and work from (while, no doubt, revising) the classical conception of a republic, including its elements of relative equality, mobilization of the citizenry, and civic virtue.<sup>60</sup>

This interest in the possibility of reviving civic republicanism as a model for a revised notion of politics coincides with the substantial work recently produced in the historical study of political theory which reveals how the tradition of civic virtue managed to survive for several centuries, even though it was eventually eclipsed by conceptions of politics derived

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<sup>58</sup>On strategies that are "restorative" rather than "revolutionary", see C. Johnson, *Revolutionary Change*, 2d ed. (Boston: Little, Brown, 1982) at 124.

<sup>59</sup>This reflects a general movement away from some of the formerly dominant depictions of pre-Revolutionary America as essentially guided by Lockean ideas in political conceptions. The older tradition is represented best by L. Hartz, *The Liberal Tradition in America* (New York: Harcourt, 1955). An attempt of a different kind to recast the conventional story about the provenance and influence of liberalism in the U.S. is made in F.M. Coleman, *Hobbes and America: Exploring the Constitutional Foundations* (Toronto: University of Toronto Press, 1977).

<sup>60</sup>R.B. Parker, "The Past of Constitutional History — And Its Future" (1981) 42 Ohio St. L.J. 223 at 258, n. 146.

from Hobbes and Locke.<sup>61</sup> The origins of the republican tradition can be traced ultimately to Aristotle and the criteria he laid down for realizing human potential through participation in the public life of the *polis*.<sup>62</sup> This tactic of discovering the ideal community in the ancient Greek *polis* has always been prone to the problem of idealization, whether the writer be Dante or the German philosopher of the nineteenth century.<sup>63</sup>

Critical Legal writers themselves have referred only indirectly to the civic republican tradition. There is little explicit indication how the ideas associated with that tradition can be realized under the conditions faced in a modern society. We mostly have vague allusions to the "classical conception of citizenship" or to the "intersubjective nature of social life".<sup>64</sup> The

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<sup>61</sup>See in particular J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975) [hereinafter *The Machiavellian Moment*]; Q. Skinner, *The Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 1978); Wolin, *supra*, note 25; J.G.A. Pocock, "The Machiavellian Moment Revisited: A Study in History and Ideology" (1981) 53 *J. Mod. Hist.* 49; and I. Kramnick, "Republican Revisionism Revisited" (1982) 87 *Am. Hist. Rev.* 629. For a Critical Legal description of the elements of Hobbesian political theory (and the background of liberalism) see M. Tushnet, "Anti-Formalism in Recent Constitutional Theory" (1985) 83 *Mich. L. Rev.* 1502 at 1539.

<sup>62</sup>See Aristotle, *The Politics*, trans. E. Barker (Oxford: Oxford University Press, 1958) at 1323a14-1331b23. On the use of the *polis* as an ideal in Renaissance Florence, by which "virtue was not politicized", see Pocock, *The Machiavellian Moment*, *ibid.* at 74-75. A recent lament over the loss of agreement about what is good and virtuous present in the ancient *polis* can be found in A. MacIntyre, *After Virtue*, 2d ed. (London: Duckworth, 1981) at 146.

<sup>63</sup>On Dante, see J. Koffler, "Capital in Hell: Dante's Lesson on Usury" (1979) 32 *Rutgers L. Rev.* 608 at 618. On the use of the image of the *polis* by Herder, Schiller, and Hegel, see R. Plant, *Community and Ideology: An Essay in Applied Social Philosophy* (London: Routledge & Kegan Paul, 1974) at 16. Debate over the historical circumstances and operation of government in the ancient Greek city-states is still very much alive: contrast, for instance, the respective views forcibly articulated in G.E.M. de Ste. Croix, *The Class Struggle in the Ancient Greek World* (London: Duckworth, 1981) and M.I. Finley, *Democracy Ancient and Modern*, rev'd ed. (New Brunswick, N.J.: Rutgers University Press, 1985).

<sup>64</sup>See P. Brest, "Who Decides?" (1985) 58 *So. Calif. L. Rev.* 661 at 670 and Frug, *supra*, note 12 at 1295. An extensive attempt to demonstrate how a certain "republican tradition" animated lawyers in the nineteenth century and then died in the face of modern U.S. religious ideas and capitalist social relations has been made in A. Fraser, "Legal Amnesia: Modernism Versus the Republican Tradition in American Legal Thought" (1984) 60 *Telos* 15. But even Fraser's discussion fails to overcome the problems of vagueness, as illustrated in the following passage at page 52:

[O]ur moral identity is rooted in patterns of practical intersubjectivity which cannot be reduced to the autonomous and instrumental logic of a system of socialized value production without threatening the very foundation of that identity. It may be said, therefore, that the hope of emancipation lies in our willingness to confront anew the problem of regenerating stable, well-ordered and virtuous republican polities within the corrupt and decaying body of Anglo-American civilization.

This is an anti-modernist rhetoric that fits neatly into its own tradition: see M. Berman, *All That Is Solid Melts Into Air: The Experience of Modernity* (New York: Simon & Schuster,

historical evolution of the tradition is an interesting and complicated topic in its own right. It is, of course, heavily influenced by the specific historical circumstances that accompanied its growth as both reflected and structured by changing emphases in the vocabulary of political discourse.<sup>65</sup> Pocock identifies its modern incarnation as a product of the period "after the civic universe had collapsed", when Machiavelli sought to provide guidance to the ruler who might try to shape political events through prudent action.<sup>66</sup> This description does not tell us much about the kind of political principles that constitute republicanism. The original ideas had to be refracted through the work of later theorists such as Harrington and Rousseau, before they began to take on the shape of a body of thought that prominently included the values of widespread civic participation and held that individual morality was intimately linked with the moral health of the whole community. In Pocock's words:

The "Machiavellian moment" of the eighteenth century, like that of the sixteenth, confronted civic virtue with corruption, and saw the latter in terms of a chaos of appetites, productive of dependence and loss of personal autonomy, flourishing in a world of rapid and irrational change.<sup>67</sup>

The tradition provided an important backcloth to the efforts by the U.S. Founding Fathers to establish the legitimacy of opposition to the theory and practice of eighteenth-century British politics. Pocock sums this up by saying: "Not all Americans were schooled in this tradition, but there was (it would almost appear) no alternative tradition in which to be schooled".<sup>68</sup> One of the interesting consequences of the discussions leading up to the establishment of the various state and federal constitutions in the 1770s and 1780s is an eventual abandonment of the strict premises of the civic republican vision. Instead of creating the decentralized conditions for a multitude of small republics of virtue, the early U.S. constitution builders rationalized the creation of multiple forms of central representation and administration.<sup>69</sup> In Pocock's description, theorists abandoned the idea that

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1982). It lacks, however, or at least it fails to communicate, a positive vision of much substance. A good antidote to the nostalgic strategy employed by Fraser is the following pair of recent articles: Z. Bauman, "The Left as the Counter-Culture of Modernity" (1986-87) 70 *Telos* 81 and C. Offe, "The Utopia of Zero-Option — Modernity and Modernization as Normative Political Criteria" (1987) 7 *Praxis Int'l* 1.

<sup>65</sup>See the very clear appraisal of Pocock's success in conveying a sense of the shifting language and implicit paradigms of politics in J.H. Hexter, *On Historians* (Cambridge, Mass.: Harvard University Press, 1979) 255.

<sup>66</sup>See Pocock, *The Machiavellian Moment*, *supra*, note 61 at 269.

<sup>67</sup>*Ibid.* at 486.

<sup>68</sup>*Ibid.* at 507.

<sup>69</sup>The history of this gradual abandonment of the austere republican vision is recounted at length in G.S. Wood, *The Creation of the American Republic, 1776-1787* (New York: Norton, 1969).

citizens were capable of perceiving the common good and substituted instead the idea that each citizen could only perceive his or her own particular interest.<sup>70</sup> In the final analysis,

the republic asked too much of the individual in the form of austerity and autonomy, participation and virtue, and the diversification of life by commerce and the arts offered him the world of Pericles in place of that of Lycurgus, a choice worth paying for with a little corruption.<sup>71</sup>

This final allusion to political corruption as the contrast to civic virtue helps explain one of the more notorious comments in Critical Legal debate, in which Tushnet accused Tribe of this peculiarly eighteenth-century vice.<sup>72</sup> It is a slightly ironic criticism, since on a civic republican model, a scholar's desire to serve in a more public capacity, such as in the judiciary, is not by itself corrupt. Far from it, such an ambition is probably more defensible than remaining simply a "private" individual. The issue really turns on how "austere" (to use Pocock's adjective) is one's notion of a republic. In a significant sense, the few occasions where Critical Legal writers have appealed to the notion of civic virtue recall the orators of the late Roman Republic who spiced their arguments with invidious comparisons to some early period of the Republic, glorious for the selfless devotion of its puritanical and patriotic heroes.<sup>73</sup>

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<sup>70</sup>See Pocock *The Machiavellian Moment*, *supra*, note 61 at 521, where he cites Madison's discussion of political factions in the tenth issue of *The Federalist* as expressing a sea-change in the fortunes of classical republicanism. For example, note these assertions by Madison:

So strong is this propensity of mankind to fall into mutual animosities that where no substantial occasion presents itself the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts.

The inference to which we are brought is that the *causes* of faction cannot be removed and that relief is only to be sought in the means of controlling its *effects*. [emphasis in the original]

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect and promises the cure for which we are seeking.

See A. Hamilton, J. Madison & J. Jay, *The Federalist Papers*, ed. by C. Rossiter (New York: New American Library, 1961) at 79, 80 and 81 respectively. For documentation and discussion of how the anti-Federalists favoured a small republic, guided by communitarian sentiments, see H. Storing, *What the Anti-Federalists Were For* (Chicago: University of Chicago Press, 1981) and J. Nedelsky, "Confirming Democratic Politics: Anti-Federalists, Federalists, and the Constitution" (1982) 96 Harv. L. Rev. 340. Consideration of these sources must now be supplemented by reference to F. McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence, Kansas: University Press of Kansas, 1985).

<sup>71</sup>Pocock, *supra*, note 66 at 551-52.

<sup>72</sup>Tushnet, *supra*, note 48 at 710.

<sup>73</sup>See, e.g., H.H. Scullard, *Roman Politics, 220-150 B.C.* (Oxford: Clarendon Press, 1951) at 153-76 on Cato the Censor.

#### 4. The Device of Intersubjective Rationality

The fourth type of vision propounded in Critical Legal writing differs from the first three in the sense that there is less of an attempt to explicate the notion of community by reference to the affective values of solidarity and fellowship, or to historical paradigms. The problem posed under this fourth head is to imagine a situation where members of a community might be enabled to reach some shared conception of the communal good and thus overcome the liberal premise that no such conception can or should become dominant. The Critical Legal interest is in defining the necessary and sufficient conditions that attend the process of making such decisions.

The analogy occasionally drawn to show what Critical Legal theorists are seeking is Habermas's description of the ideal speech situation. This is a very technical and difficult construct to understand. It has been appropriated even though Critical Legal writers have not gone to any great trouble to show the relationship between their projects and the work that has been done under the aegis of Frankfurt School critical theory.<sup>74</sup> If they had, the curious result might have been a deeper explanation about the varieties of opinion within the Frankfurt School. Adorno's views on the purposes of reflection and the evaluation of social and cultural practices form a strong contrast with Habermas's more recent work devoted to the same issues.<sup>75</sup>

Habermas's theory of the ideal speech situation is intended to have an evaluative or normative purpose. It is a device for determining what reflective agents might agree are the types of consciousness that could only have been developed under coercive conditions. Reaching this conclusion is the same as casting off that consciousness. To achieve the level of understanding at which such a rational reconstruction can take place, Habermas has to provide a philosophical justification that, in some sense, every communication presupposes the possibility of a form of life free from un-

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<sup>74</sup>A lapse lamented in Trubek, *supra*, note 41 at 598, n. 74. To reach a subtle appreciation of Habermas's attempts to introduce normative content to his formal analysis of the conditions of democracy, a radical critic must take account of such crucial guides as J. Cohen, "Why More Political Theory?" (1979) 40 *Telos* 70.

<sup>75</sup>See R. Geuss, *The Idea of Critical Theory: Habermas and the Frankfurt School* (Cambridge: Cambridge University Press, 1981) at 63-64 and A. Honneth, "Communication and Reconciliation: Habermas' Critique of Adorno" (1979) 10 *Telos* 43. And, it might be added, Habermas himself has significantly elaborated and partly changed his position on these questions in the past two decades: for an overview see R.J. Bernstein, "Introduction" in R.J. Bernstein, ed., *Habermas and Modernity* (Oxford: Basil Blackwell, 1985)1.

warranted domination.<sup>76</sup> This is a transcendental undertaking in the sense explained in the following:

Like Kant's transcendental philosophy, universal pragmatics aims at disclosing conditions of possibility, but the focus shifts from the possibility of experiencing objects to the possibility of reaching understanding in ordinary language communication.<sup>77</sup>

Although Habermas is aware of the transcendental tack this project takes, the information used to test the reconstructive hypotheses is gathered empirically by observation or by report of language-users. The practical value of Habermas's construct is evident in this summary of the ideal speech situation, for it

will serve Habermas as a transcendental criterion of truth, freedom, and rationality. Beliefs agents would agree on in the ideal speech situation are *ipso facto* "true beliefs", preferences they would agree are "rational preferences", interests they would agree on are "real interests".<sup>78</sup>

For Critical Legal purposes, the practical or ethical side of this project has been exemplary. It seems to offer the prospect of a rational, consensual grounding for values within a community. It would therefore defeat the challenge of relativism that liberalism poses, namely that no such consensus is possible because all moral values are ultimately subjective and based on the individual agent's self-interest. The key is that the ideal speech situation presupposes that agents are capable of engaging in unconstrained dialogue to reach agreement about ethical values. Habermas's discursive model does not presuppose any particular principles but leaves that sort of normative content to be produced through general discussion. Moreover, Habermas does not give much indication of the institutional aspects that would satisfy the requirements for an ideal speech community, beyond pointing out that some form of democracy is necessary.<sup>79</sup>

This last notion of a radical form of democracy permitting the discussion of public issues directly without the interposition of liberal institutions, is one of the links between Habermas's ideal and the Critical Legal project to free all of us from illegitimate forms of domination. For Critical Legal theorists, legal structures, insofar as they rest on assumptions about subjectivism, the value of individualism and the legitimacy of some forms of

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<sup>76</sup>The first comprehensive delineation of his theory was given in J. Habermas, "What is Universal Pragmatics?" in his *Communication and the Evolution of Society*, trans. T. McCarthy (Boston: Beacon Press, 1979) 1. See T. McCarthy, *The Critical Theory of Jurgen Habermas* (London: Hutchinson, 1978) at 272-91 for a useful discussion of Habermas's construction and defence of a universal pragmatics.

<sup>77</sup>McCarthy, *ibid.* at 278-79.

<sup>78</sup>Geuss, *supra*, note 75 at 66.

<sup>79</sup>On this topic, see McCarthy, *supra*, note 76 at 331-32.

inequality, represent the very constraints that make rational consensus impossible. Loosening the grip of liberal thought is a necessary step in the realization of a progressive form of community. This can be done at the level of consciousness in the Critical Legal account, because it is a matter of persuasion and rational interchange to undermine the preconceptions that hinder our agreeing on a conception of what is in the interest of all of us.

It is important to recognize that the Critical Legal use of this model does not promise to disclose what is the form of the good in the Aristotelian sense.<sup>80</sup> Rather, like Habermas's transcendental scheme, the device of intersubjective rationality is designed to show how members of a community can reach some consensus on moral issues. Habermas applies his formulation generally, that is, across all types of communicative action. Critical Legal writers are especially interested in the bearings of this attempt at philosophical reconstruction upon the choice of ethical values. The following description by Habermas is brought into relation with the activities of legal and political discourse:

Coming to an understanding is the process of bringing about an agreement on the presupposed basis of validity claims that can be mutually recognized. In everyday life we start from a background consensus pertaining to those interpretations taken for granted among participants. As soon as this consensus is shaken, and the presupposition that certain validity claims are satisfied (or could be vindicated) is suspended, the task of mutual interpretation is to achieve a new definition of the situation which all participants can share.<sup>81</sup>

Habermas's explanation of how normative conceptions can be shared and, in the event of breakdown of consensus, re-fashioned so as to extend the continuity of the communicative community, has proved powerfully suggestive for Critical Legal writers. Just as Habermas has aimed his critique at the methods of positivist understanding based ultimately on a form of solipsism, some Critical Legal writing would wish to see the device of intersubjective understanding replace the individualist assumptions of liberal social theory.<sup>82</sup> With this radically socialized account of the normative foun-

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<sup>80</sup>See W.F.R. Hardie, *Aristotle's Ethical Theory*, 2d ed. (Oxford: Clarendon Press, 1980) at 46-67.

<sup>81</sup>See J. Habermas, *Knowledge and Human Interests*, trans. J. Shapiro (Boston: Beacon Press, 1971) at 71-90.

<sup>82</sup>And especially would they replace the epistemological presuppositions of liberal theory. As Habermas has more recently noted, the current philosophical moment is strikingly anti-epistemological and anti-foundational in the sense that philosophers, under the influence of pragmatic and hermeneutical inquiries, now tend to

emphasize the web of everyday life and communication surrounding "our" cognitive achievements. The latter are intrinsically intersubjective and cooperative. Just how this web is conceptualized, whether as "form of life", "life world", "practice", "linguistically mediated interaction", "language game", "convention", "cultural back-

dations of law and other forms of human understanding and action at its disposal, Critical Legal writing has tried to illuminate (or at least intimate) the ideal conditions under which social decisions should be made and legitimate authority exercised. Judges can presumably call upon definite principles in arriving at judgments in difficult cases of practical morality and legislators do not have to be indifferent about what sort of life is best to lead.

This type of argument has ordinarily been made in less philosophically ambitious terms by Critical Legal writers. By some, the mechanism of "conversation" or "dialogue" is treated as the key element in surmounting liberal legal conceptions.<sup>83</sup> For them, the authority of Habermas is only rarely invoked.<sup>84</sup> This pattern of argument invites some very serious questions and reservations. Habermas has used his refined system of universal pragmatics for the overtly political purpose of testing claims for validity and legitimacy.<sup>85</sup> This is a complicated procedure that does not appear to have any counterpart in Critical Legal analysis. The ideal speech situation is rather adopted as a suggestive analogy with no full-fledged justification being offered for how it may be put to use to decide among contestable legal claims. Instead, Critical Legal writers are content to stress the virtues of rational discussion *tout court* that is not distorted by differences in power, status or education among participants. There is no systematic presentation of the criteria for accepting and weighing evidence or for determining what a "consensus" means in situations of disputed moral questions. If a transcendental test is possible, then to some extent a group may arrive at a rational conception of the common good that should be applicable for all communities in the same situation. That is, one should be able to universalize the form of the good. This result, however, would offend the central Critical Legal theme that different communities should be free to determine their own governing values. There are no universally valid principles that

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ground", "tradition", "effective history", or what have you, is unimportant. The important thing is that these commonsensical ideas, though they may function quite differently, attain a status that used to be reserved for the basic concepts of epistemology.

See J. Habermas, "Philosophy as Stand-In and Interpreter" in K. Baynes *et al.*, eds, *After Philosophy: End or Transformation?* (Cambridge, Mass.: MIT Press, 1987) 296 at 304.

<sup>83</sup>See, e.g., A. Hyde, "Is Liberalism Possible?" (1982) 57 N.Y.U. L. Rev. 1031 at 1038-39; M. Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles" (1983) 96 Harv. L. Rev. 781 at 825-26; and Fraser, *supra*, note 21 at 149 and 183-84.

<sup>84</sup>See, e.g., A. Hyde, "The Concept of Legitimation in the Sociology of Law" [1983] Wis. L. Rev. 379 at 399-400 and Tushnet, *supra*, note 18 at 1394-95.

<sup>85</sup>See J. Habermas, *Legitimation Crisis*, trans. T. McCarthy (Boston: Beacon Press, 1975) at 95-110 and the discussion in McCarthy, *supra*, note 76 at 358-86.

can apply across communities. A further difficulty with the Critical Legal use of the notion of a set of counterfactual conditions for possible communication is that Habermas's conception is an evaluative device. It is not necessarily meant to provide the model of an attainable society.<sup>86</sup> It is instead a standard for measuring the principles that an actual society might adopt. In this sense, it bears a curious resemblance to the theory of the "original position" hypothesized by Rawls as a method for isolating the conditions of justice in modern societies.<sup>87</sup> The critique from the left of Rawlsian theory has borne down heavily on the idea that "disembodied individuals", with no self-knowledge of their history or possessions of wealth or personality, could be used as a heuristic device for distinguishing principles of justice.<sup>88</sup> The abstractness of the procedure and its *a priori* nature, in other words, are serious faults. Yet, to adopt Habermas's transcendental procedure may amount to the commission of a similar error in logic. This is not to say that Rawls's and Habermas's theories are on all fours with each other on any material issues. It is only to point out that there is a danger of falling into what some Critical Legal writers have claimed is a liberal trap.<sup>89</sup>

A final point that should be raised in this context is whether a major philosophical theory is needed to justify the Critical Legal claims about the possibility of intersubjective agreement and understanding. As we shall see in Part IV, there is a significant sense in which the developed law already constitutes one mode of a "community of understanding". We already have embodied in the process of legal interpretation a "parable of conversation" which Tushnet thinks ought to be central to the task of arriving at shared

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<sup>86</sup>On the meaning of "counterfactual" in the setting of critical analysis of social norms, see G. Kortian, *Metacritique: the philosophical argument of Jurgen Habermas* (Cambridge: Cambridge University Press, 1980) at 78. For a critical, though sympathetic, response to Habermas's goal of a reconstructive science, see D. Cornell, "Two Lectures on the Normative Dimensions of Community in the Law" (1987) 54 *Tenn. L. Rev.* 327 at 333.

<sup>87</sup>See J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971) at 118-92.

<sup>88</sup>See, e.g., R. Miller, "Rawls and Marxism" in N. Daniels, ed., *Reading Rawls* (Oxford: Blackwell, 1975) at 206-30 and M.J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).

<sup>89</sup>See C.E. Baker, "Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection" (1983) 131 *U. Pa. L. Rev.* 933 at 950, and "Sandel on Rawls" (1985) 133 *U. Pa. L. Rev.* 895. The latter article, it should be noted, argues that it is wrong to attribute to Rawls, though not perhaps to other liberal theorists, an individualist theory of the person. Further astute commentary in this vein is contained in M.J. Perry, "A Critique of the 'Liberal' Political-Philosophical Project" (1987) 28 *Wm & Mary L. Rev.* 205 at 215-19.

moral conceptions.<sup>90</sup> Limiting notions of what it means to make and defend a claim, to appeal to a recognized principle and to present evidence in support of a claim, are all part of the social practices that constitute the process of adjudication. The ideal speech situation, in the hands of Critical Legal writers who depend on a variation of this notion, would largely incorporate conditions which are already embedded in both legal and other contexts where rational arguments are deployed.

##### 5. Unger's Early Theory of Organic Groups and Recent Description of Empowered Democracy

Roberto Unger occupies a singular position within the Movement. There are two odd features that distinguish his involvement with the Critical Legal project. His writing in the mid-1970s has proved to be an essential part of the groundwork for the task of identifying and criticizing the liberal presuppositions of law and legal institutions. At least, the frequency of citations to his synthetic reconstruction of liberal social and political theory would indicate Unger's seminal influence. Yet his work generally and, in particular, its recent excursion into specific proposals for the recasting of contemporary societies, both western capitalist and Third World, has been little remarked on by other Critical Legal writers. The second feature worth noting is that Unger's own discussion of the alternatives to existing social structures and to reigning social theory takes conspicuously little account of the great volume of Critical Legal efforts to describe the flaws of our legal imagination. Unger appears to be following a trajectory he has set for himself with only incidental reference to the somewhat parallel course inscribed by fellow members of the Movement. His is a solitary enterprise in the service of high, communitarian ideals.

The time is ripe for a thorough assessment and appreciation of Unger's work to date. Such an overview would have to trace through his writing various themes and arguments that have become richly textured as they have been treated in philosophical, political, historical, psychological and comparative contexts. This section of the present discussion does not take on that ambitious analysis. It concentrates on some key ideas first adumbrated in his work on the interrelationship between epistemology and political theory and more recently given a detailed exposition in his treatise

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<sup>90</sup>See Tushnet, *supra*, note 83 at 825-26. The literature that examines the Critical Legal use of the techniques of literary and philosophical deconstruction also raises curious questions about the compatibility of these techniques with the normative implications of a communitarian understanding of legal and political action: see, e.g., K. Hegland, "Goodbye to Deconstruction" (1985) 58 S. Cal. L. Rev. 1203; D. Coruelli, "The Poststructuralist Challenge to the Ideal of Community" (1987) 8 Cardozo L. Rev. 989; and J.C. Williams, "Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells" (1987) 62 N.Y.U.L. Rev. 429.

of three volumes published under the general title *Politics*.<sup>91</sup> As the following presentation reveals, Unger has made some advances beyond the initial position set forth a decade ago. The comparison between his earlier and more recent work can be used to create a contrapuntal effect. Unger, with his restless intelligence and his dialectical flair, has so far been his own ablest critic.

The point of departure for Unger's earliest treatment of the shape of post-liberal social arrangements is how the concept of community contrasts with that of autonomy.<sup>92</sup> The liberal tradition is wedded to the value of the individual being the basic unit of society and his or her being accorded an inalienable form of autonomy. From this notion flow many of the principles that shape existing institutions. The pronounced emphasis on the value of autonomy has, according to Unger, both distorted social life and hampered the possibilities of a continuous process of revision and transformation of its form. Community, in this part of Unger's discussion, bears heavy religious overtones but as he candidly admits, sacred and secular thought are inevitably mixed in his vision of the alternative ideal to current modes of theorizing.<sup>93</sup> Not only in the invocation of such terms as immanence and transcendence but also in characterizing evil as a deprivation, Unger is following some well-worn tracks of religious argumentation, in the latter case drawing obviously on Augustinian theodicy.<sup>94</sup> His description of Christianity as evolving from a hierarchical order to a recognition of the primary value of autonomy (exemplified in the Protestant Reformation) shows how his picture of the growth of liberal political thought has analogies in many areas of social life.<sup>95</sup>

The method of analogy is crucial for the justification of Unger's project. It provides a bridge for moving from philosophical speculation to political practice. The one endeavour supplies the theory which the other attempts to realize through the process or faculty of prudence.<sup>96</sup> This last term, with its connotations of practical reason, represents the method of giving content

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<sup>91</sup>R.M. Unger, *Politics: A Work in Constructive Social Theory* (Cambridge: Cambridge University Press, 1987). The individual volumes are entitled: Volume 1: *Social Theory: Its Situation and Its Task*; Volume 2: *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy*; Volume 3: *Plasticity into Power: Comparative-Historical Studies on the Institutional Conditions of Economic and Military Success*. Hereinafter, the texts will be referred to by their brief titles as *Social Theory*, *False Necessity*, or *Plasticity into Power*.

<sup>92</sup>See Unger, *supra*, note 4 at 236ff.

<sup>93</sup>*Ibid.*, at 231-35. This becomes even clearer in his attempt to retrieve what he calls the "Christian-Romantic image of man" in R.M. Unger, *Passion: An Essay on Personality* (New York: Free Press, 1984).

<sup>94</sup>Unger, *supra*, note 4 at 246-48.

<sup>95</sup>*Ibid.* at 159-60.

<sup>96</sup>*Ibid.* at 254-59.

to what theory has determined is the good. It becomes a necessary component in the life of post-liberal community.

The significance of community is revealed by Unger's original attempt to describe a doctrine of organic groups. It is through these groups that the antinomies generated by liberal thought can be resolved. Organic groups constitute the hope for an escape from the institutional paralysis that currently bedevils liberal democracies. Unger's conception of such groups is not the only way a community might possibly be envisioned. Traditionally, adherents of various political persuasions have epitomized their respective theories by defining their ideal community and distinguishing it from the reigning social order.<sup>97</sup> Unger's vision purports to be more penetrating than any of these however, for it seeks to show how the relation between each member's self and his or her community can be metaphysically, as well as politically explicated. Unger invokes notions of the concrete universal (with its Aristotelian and Hegelian echoes) and of species nature as exemplified in each person (in this respect echoing the early Marx).<sup>98</sup> His recent treatment of the theme of how a regenerative form of society might be imagined explicitly denies many of the premises that inform one type of Marxist social theory and philosophy of history. Unger is now careful to contrapose his own thinking on the revisable nature of our social contexts with what he calls the "deep-logic" or "deep-structure" social theories that would envision ready-made sequences of social orders. The latter type of theory is correct insofar as it denies what Unger calls the pervasive "naturalistic premise" about society. In Unger's words, it "represents a denial of the conditionality of social worlds".<sup>99</sup> But deep-logic theories err by failing to capture what has actually occurred in modern social evolution and, more importantly, by placing limits on our capacity to rearrange the formative contexts of our own history. These formative contexts are, according to Unger, always capable of being "put up for grabs".<sup>100</sup>

In his earlier writing, Unger does not attempt to give many details about the optimal size, internal organization, external features or productive relations of the imagined community. His discussion on prudence dictates that it is left to each organic group's collective judgment to determine such features.<sup>101</sup> He only mentions that the membership should be small enough

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<sup>97</sup>*Ibid.* at 249-53.

<sup>98</sup>The relationship of the universal to the particular is an essential backdrop of all of Unger's attempts to resolve the antinomies of liberal thinking. In many respects Unger adopts an Aristotelian vision of how persons exemplify their species' characteristics. He expressly repudiates, of course, the doctrine of intelligible essences that was a leading feature of Aristotle's own account of epistemology and the philosophy of language: see *ibid.* at 93 and 133ff.

<sup>99</sup>See Unger, *Social Theory*, *supra*, note 91 at 23-24.

<sup>100</sup>*Ibid.* at 92-93. See also Unger, *False Necessity*, *supra*, note 91 at 449.

<sup>101</sup>Unger, *supra*, note 4 at 273.

that the choice over shared values can be accomplished and that members can come to know one another outside their occupational roles as producers within the community.<sup>102</sup> In addition, Unger specifies that there must be a plurality and diversity of sub-groups within the community and a democratic process for resolving differences.<sup>103</sup> By this means, values will come to be shared by group members. Those who disagree with the choice of values should be able to leave one community in order to re-establish themselves in a more congenial one. Freedom of expression and free movement between groups become, in Unger's view, essential liberties for communitarian politics.<sup>104</sup>

This organization into communities which become the basic political units out of which nation-states may be formed, does not entail that all life occurs in the public realm. Unger appears to place significant value on keeping some matters outside the public sphere, though precisely which issues are private and which are public at any given time will depend on how boundaries have been shifted around as each community evolves.<sup>105</sup>

There is no highest form of community, no utopian vision of the pre-eminent form of social life. In *Knowledge and Politics*, Unger offers his doctrine of organic groups solely as a "regulative ideal" and not as a recipe for any future society.<sup>106</sup> Moreover, this doctrine does not automatically spell the doom of the state. Unger seems prepared to leave in place the possibility of political action at the levels of national society and beyond. This remains an admitted defect of his theory, which can only be remedied by the eventual institution of a world state. As this aspiration approaches too near the utopian vision Unger rejects, it appears that communitarian goals must be content with something less than such radical transformation for the time being.<sup>107</sup>

These communities require experimentation before any accurate judgment can be made about their efficacy and the likelihood of their resisting the potential slide into undemocratic and oppressive political forms. This is the third level of judgment that Unger sees: what one learns in practice will inevitably modify what prudence dictated on the basis of theoretical insight. The concept of community can provide a vision of overcoming the major drawback of liberal thought, namely domination. This progress is

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<sup>102</sup>*Ibid.* at 245 and 280. Unger's depiction of the conditions of an ideal social group bear some likeness, at least for me, to the type of progressive community envisioned in W. Morris, *Political Writings*, ed. by A.L. Morton (London: Lawrence and Wishart, 1984).

<sup>103</sup>Unger, *supra*, note 4 at 297.

<sup>104</sup>*Ibid.* at 281.

<sup>105</sup>*Ibid.* at 274.

<sup>106</sup>*Ibid.* at 260.

<sup>107</sup>*Ibid.* at 282-86.

conceived by Unger in metaphorical terms. He employs the figure of a spiral to illustrate the reciprocal relationship between domination and community.<sup>108</sup> There are no universal ends; there is no ultimate resting place for the transformation of social life. Man's imaginative capacities cannot foresee what any final good might be. The image of the spiral as representing progress in the direction of man's realizing the infinite possibilities of his species' nature is meant to capture this advance beyond limited liberal thinking. In other contexts, Unger relies upon the notion of an image that lies beyond one's field of vision as illustrating the kind of quest involved in escaping liberal modes of thought.<sup>109</sup>

To this point in the description of Unger's project, primarily as it was presented in its earliest phase, the emphasis has been on how social and political institutions generally might be arranged so as to achieve the intellectual and practical liberation envisioned by Unger. His project began as a treatment of certain jurisprudential issues and then assumed the much larger proportions of a "total critique". The implication of that critique for law was later spelled out at length by Unger. Just as in *Knowledge and Politics* he has traced the rise of certain modes of thought that culminate in the liberal vision, so in a companion volume, *Law in Modern Society*, Unger performs the Weberian task of delineating the transformation of societies through various stages of development, examining in particular how modern Western social life may be significantly contrasted with those forms arising out of other cultures in different eras. Unger's analysis forms the prolegomenon for his commendation of a legal system that rejects the limitations imposed by the prevailing doctrine of instrumentalism.<sup>110</sup> The consequences of this doctrine, and of various ethical, political and economic theories nourished by it, are the disintegration of community and the ascendancy of the view that society is an association of individuals. What Unger calls "positive law" is the outgrowth of the still-ruling ideology that the rule of law provides freedom and order in the predominantly individualistic Western societies.

In contrast to this is Unger's early vision about how to reconcile the inherent contradictions at the root of Western legal thinking. Against the instrumentalist doctrine Unger puts the doctrine of consensus and its attendant value of anti-hierarchic and anti-bureaucratic solidarity.<sup>111</sup> The concept on which Unger relies to explicate the goal of his radical revision of fundamental legal thinking is that of "custom".<sup>112</sup> This he derives from an

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<sup>108</sup>*Ibid.* at 243-44.

<sup>109</sup>*Ibid.* at 262.

<sup>110</sup>R.M. Unger, *Law in Modern Society* (New York: Free Press, 1976) at 30 and 127-28.

<sup>111</sup>*Ibid.* at 29.

<sup>112</sup>*Ibid.* at 24.

analysis of how tribal societies (considered as an ideal type) differ from liberal societies. In the former, social relations are based on a communal bond, solidarity, and most importantly, a common vision of the good. This means that there is only a minimal role for explicit rules and bureaucratic structures in order to regulate conduct. Instead, members of the community have an ingrained sense of what is the proper relationship between themselves and others as well as a socially-conditioned sense of self. Custom accomplishes in the legal context what communitarian political activities achieve for the state as a whole. Again, the lesson is that there is no natural or immanent order in society to which systems of positive law more or less conform. Unger detects, to some degree, the germ of a recognition that there is such a communal underpinning in all law. Distinguishing black letter law from senses of equity and solidarity manifested in all legal systems, Unger characterizes the latter as "latent and living law" and as the "elementary code of human interaction".<sup>113</sup> It may be found in legal analysis already but, on the argument in *Law in Modern Society*, it deserves to be raised to a fully conscious level in which it provides the model for all law. The values of community, which provide the background to this more enlightened regime of law, reconcile freedom with the rule of law. Unger once again compares them with their opposite by means of a spiral. In this instance, the opposite doctrines are those of instrumentalism and individualism.<sup>114</sup>

Between his earlier work on the epistemological foundations of social and political theory and his most recent attempt to portray the essential features of a post-liberal and post-modernist society, Unger has apparently seen the need for revising his own understanding of the possibility and limits of utopian theorizing. Without actually repudiating his earlier writing, he has lately approached the task of social reconstruction from a standpoint that acknowledges the necessity of some description of institutions and processes. Although the soundness of his work ultimately rests on the theoretical premises sketched out in *Knowledge and Politics* and in his more recent *Social Theory*, Unger seems to have felt the urgency of doing something more than simply "inverting" the existing structures of social life, which is the strategy of "utopian dreamers".<sup>115</sup> The shape of his imaginative reformulation of contemporary social and political institutions was first

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<sup>113</sup>*Ibid.* at 241-42.

<sup>114</sup>*Ibid.* at 239. Unger has been taken to task for neglecting to learn from ancient Chinese history how this goal of reconciling community with autonomy might be accomplished in ways that do not rely upon mechanisms from advanced Western societies: see W.P. Alford, "The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past" (1986) 64 Tex. L. Rev. 915.

<sup>115</sup>See Unger, *Social Theory*, *supra*, note 91 at 208 and *False Necessity*, *supra*, note 91 at 10.

disclosed in his long essay on Critical Legal Studies<sup>116</sup> and has now been developed at greater length in *False Necessity*.

The potential for destabilization has emerged as a cardinal virtue in Unger's scheme.<sup>117</sup> He is interested in the possibilities of our being free to reconceive perpetually the social structures we live within. Unger claims to have developed a programme that will ensure not a violent revolution that would smash our current institutions but instead their continual revolutionary reform.<sup>118</sup> His notion of "transformative activity" involves the unending and purposeful redesign of our "formative contexts".<sup>119</sup> One of the most curious aspects of his theory is that he no longer envisions the demise of liberalism under the burden of its own contradictions, an event he implied was to be welcomed in *Knowledge and Politics*. His recent tack is to cast his programmatic proposals as the institutional forms that liberalism always promised but never delivered. Similarly, he advocates his vision of empowered democracy as the rational successor to both mature communist regimes and developing Third World political styles.<sup>120</sup> This resurrection or redemption of both liberal and leftist ideals involves the application of our imagination to determine what forms such traditional institutions as markets, rights and democracy might take in a different social context. Unger is fond of pointing out that the terms of such reconstruction are already in some form present before us.

Although generally critical of the school of thought which reduces law to a reflection of moral imperatives embodied by the existing order, Unger is himself pushed in the direction of having his envisioned legal system protect four fundamental rights. These are: destabilization rights, immunity rights, market rights and solidarity rights.<sup>121</sup> The first category of these is necessitated by the desire to ensure that established institutions do not become entrenched to the point of resisting further change. Immunity rights cover a range of political and civic freedoms, including rights of free expression, freedom to withdraw from the polity or from any group within it, and

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<sup>116</sup>R.M. Unger, *The Critical Legal Studies Movement* (Cambridge, Mass.: Harvard University Press, 1986).

<sup>117</sup>See *ibid.* at 39 and Unger, *False Necessity*, *supra*, note 91 at 530-35.

<sup>118</sup>See Unger, *Social Theory*, *supra*, note 91 at 163.

<sup>119</sup>*Ibid.* at 5-6 and 154-56.

<sup>120</sup>In Unger's view, *ibid.* at 200,

[t]he development of an antinecessitarian social theory contributes to the advancement of the radical project — the cause that liberals, leftists, and modernists (those radicals of personal relations) confusedly share. Such a social theory promotes the radical cause because it helps form a social understanding freer from the taints of institutional and structure fetishism.

<sup>121</sup>See Unger, *supra*, note 116 at 39-40 and Unger, *False Necessity*, *supra*, note 91 at 508-39.

access to welfare entitlements. They are designed to secure the individual against unwarranted interference by the state or other individuals. Market rights are supposed to ensure that each citizen, and not just the accumulator of private capital, has the economic wherewithal to engage in economic transactions and to flourish in a revised democracy. Solidarity rights are a legal expression of the expectations held by members that communal values, such as mutual reliance and vulnerability, will be respected. These limited categories of rights are commended by Unger as a practical necessity. They should not be confused with the conception of legal rights prevalent in existing liberal democracies. Unfortunately, that conception is based on the picture of a zone of discretion surrounding each rightholder that is inviolable and deserves protection by the law.<sup>122</sup> The paradigm of such rights is the "consolidated property right". Even entitlements not analogous to property ownership have been fitted into current legal systems with this Western vision of what a right amounts to. The possibility of solidarity or community here, as elsewhere, is meant to provide a countervision to the aspect of domination exhibited by traditional ways of legal thinking.<sup>123</sup>

The institutional details supplied by Unger in *Politics* are vitally important to the issue of whether Critical Legal thinking can lean towards or is even capable of providing an alternative scheme of political association that reflects radical principles. In comparison to his early work, where many issues of practice and institutional form were left unexplored, Unger has recently struggled to deal with such questions as the basic forms of production, distribution of wealth and power, incentives and the creation of opportunities for participation in politics, uses and limits of representative democracy as well as the agency by which radical social change can be achieved. He has tried to give concrete form to the type of economy that might best be used to promote the emancipatory ideals of freedom from dependence and domination. His retrieval of the petty bourgeois form of commodity production and exchange is, without doubt, a clearer conception of a key element of communal life than the vague intimations made in his earlier work.<sup>124</sup>

A further divergence from the theory of organic community portrayed in the assault on liberalism in *Knowledge and Politics* is the scope Unger now allows within his imagined polity for institutionalized conflict. His recent writing on "personalist politics" and on modern theories of personality have led him to challenge the notion that communitarianism is built

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<sup>122</sup>Unger, *supra*, note 116 at 36-37.

<sup>123</sup>See Unger, *False Necessity*, *supra*, note 91 at 21-23, 130-33, and 196-207.

<sup>124</sup>This retrieval again exemplifies one mode of radical insight: the seeking out of alternative programs, structures or styles of radical will that were suppressed in the triumph of opposing ideologies. On petty bourgeois radicalism, see Unger, *False Necessity*, *supra*, note 91 at 21-31.

on the belief that members of a social group should come to share certain basic values. He emphasizes instead that the communal ideal ought to incorporate a model of human association that "recognizes the benefits of conflict and insists upon the priority of heightened vulnerability and mutual acceptance".<sup>125</sup> This ideal is supposed to be consonant with the power of each individual to engage in the transformative activity of context-breaking. Where the social portrait in *Knowledge and Politics* resembled a small, self-sustaining community of devout believers in a common faith, the image of political cohesion in *Politics* is one of profound tenuousness, ceaseless suggestions of unorthodoxy and new forms of protection for economic competition. It is pluralistic liberalism with a vengeance.

This institutionalization and personalization of what Unger calls the capacity for "negative capability" (here uprooted from its Keatsian origins) is meant to indicate and serve the indeterminate varieties of social transformation.<sup>126</sup> The most concise summary of the vision propounded by Unger is contained in his text on criticizing legal doctrine:

The program I have described is neither just another variant of the mythic, antiliberal republic nor much less some preposterous synthesis of the established democracies with their imaginative opposite. Instead, it represents a *superliberalism*. It pushes the liberal premises about state and society, about freedom from dependence and governance of social relations by the will, to the point at which they merge into a larger ambition: the building of a social world less alien to a self that can always violate the generative rules of its own mental or social constructs and puts other rules and other constructs in their place.

A less contentious way to define the superliberalism of the program is to say that it represents an effort to make social life resemble more closely what politics (narrowly and traditionally defined) are already largely like in the liberal democracies: a series of transitory and fragmentary groups. [emphasis added]<sup>127</sup>

This appears at first blush to be an astonishing reversal of the critique worked out in *Knowledge and Politics*. An explanation perhaps lies in Unger's failure in his earlier work to state clearly how the communities were to be organized or how they might be expected to relate to one another. Little space was given to considering the model of democracy that might best be followed in those communities.<sup>128</sup> All Unger could do by way of excusing this omission was to point to the need for experience and experimentation. However, the problem is not one that can long resist some prescriptive treatment if Unger wishes to avoid the charge of advocating

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<sup>125</sup>*Ibid.* at 104 and 562.

<sup>126</sup>*Supra*, note 116 at 93-94.

<sup>127</sup>*Supra*, note 116 at 41. See also Unger, *False Necessity*, *supra*, note 91 at 588.

<sup>128</sup>See C.B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977) for a treatment of the several different models that are available.

inherently authoritarian social structures. Hence, Unger has slid back into the language and goals of liberal democracy, albeit on a supposedly higher plane. If Unger is correct that the “naturalistic premise” is on the wane and the notion of society-as-artifact and the slogan, “it’s all politics”, must be pushed through to their logical conclusions, then he has implicitly diagnosed one of the main drawbacks of the radical critique that has emerged with respect to legal doctrine. The next question is whether his own programme, encompassing a proposed large-scale organization of government, the economy and the workplace alongside a theory of undominated personal attachments and social roles, does indeed complete the radical agenda.

In his earlier work, there was a distinct failure on Unger’s part to treat in any detail the problem of the state. Unger appears to have in mind some notion that the state and civil society (in the form of communities) are necessarily separable, but he neglects to clarify how the one relates to the other. The situation is in some respects similar to the dilemma faced by Lenin in the period during which he wrote *The State and Revolution*.<sup>129</sup> Lenin was forced to reconcile the assumption of state power by his victorious faction with the ideal, to which he paid lip service, that all power would be distributed among the workers’ soviets. While purporting to preside over the demise of the state, Lenin was really engaging in the tortured logic that tolled the death knell for politics as a democratic activity. The soviets resemble to a significant degree the organic groups postulated by Unger. One would have thought that the ultimate consequences of the vision of politics harboured by Unger in his earlier writing would have meant the eventual disappearance of the state as yet another doomed liberal institution. Instead, Unger appears to have retreated from the brink of this conclusion and therefore avoids the need to give an account of why the state and its legal apparatus serve to obstruct the realization of a genuinely organic community.

As we have noticed, in Unger’s earlier work the organic group would appear to be anarchical, acephalous and for the most part above the problems of bureaucratic authority. His recent work refocuses on those conclusions and arguably proposes a quite different scheme which specifically deals with and purports to improve on political arrangements preferred by classical liberals, libertarians, social democrats and traditional Marxists. In *Knowledge and Politics*, the concept of the market is identified as a prime liberal notion that would be superseded in a post-liberal reconstruction of

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<sup>129</sup>V.I. Lenin, *The State and Revolution* (Peking: Foreign Language Press, 1976). On the various political interpretations assignable to this document, see A.J. Polan, *Lenin and the End of Politics* (London: Methuen, 1984) and Neil Harding, *Lenin’s Political Thought: Theory and Practice in the Democratic and Socialist Revolutions*, vol. 2 (London: Macmillan, 1977-1981) at 123-41.

society. In his earlier discussions of contract doctrine, Unger focussed on market imagery as a principal defect in current conceptions of how interpersonal relations ought to be regulated. It is therefore curious to see Unger now arguing for the protection of market rights for each individual. These are something less than rights in property that have served liberal political theory as the supposed paradigm of all rights. Nevertheless, the market right and such economic structures as the "rotating capital fund" or certain principles that resemble anti-trust measures naturally lead to questions about the vision of a small community Unger appeared to have once harboured.<sup>130</sup> It no longer appears to be the self-limiting, deeply spiritual and harmonious body or polity dedicated to fostering such affective relations as love rather than rivalry. This shift may possibly owe something to a new tone of gradualism that has crept into his writing. It may no longer be necessary in his view for society to be reconstituted by the intentional separation of persons into small communities. Instead, the way to post-liberal redemption lies along the road to an internal change in our existing institutions so that they are held to the standards which were originally promised by liberal apologists. It is incumbent upon other Critical Legal writers, who have tended for so long to cite Unger's *Knowledge and Politics* as the last word in the demolition of liberal political thought, to take account of this evolution in Unger's work. No adequate account has yet surfaced.<sup>131</sup>

It should be kept in mind that Unger's scheme has been deliberately fashioned to keep alive the central issues of political debate and struggle, not to impose closure on them. In the foreground throughout his discussion in *Politics* is the necessity to construct institutions that preserve and even enhance the possibility of the collective reconstruction of social life. This

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<sup>130</sup>See Unger, *supra*, note 116 at 35-36. It has been argued that the economic aspects of Unger's programme will not necessarily do away with problems of large bureaucracy or lack of political access or participation: see I.R. Macneil, "Bureaucracy, Liberalism, and Community — American Style" (1984-85) 79 Nw. U. L. Rev. 900 at 919-29.

<sup>131</sup>The article by A. Asaro, "The Public-Private Distinction in American Liberal Thought: Unger's Critique and Synthesis" (1983) 28 Am. J. Juris. 118 did not have the benefit of Unger's essay on Critical Legal Studies, and so fails to deal with his arguments that seek to redeem, rather than to repudiate, liberalism. For a recognition of the changes in Unger's approach to the construction and use of social theory and, in particular, to how social theoretical understanding can be applied to the political uses of legal forms, see H. Collins, "Roberto Unger and the Critical Legal Studies Movement" (1987) 13 J. Law & Soc'y 387. In A.C. Hutchinson & P.J. Monahan, "The 'Rights Stuff': Roberto Unger and Beyond" (1984) 62 Tex. L. Rev. 1477 an attempt is made to point out the difficulties that Unger's theory of context-revision confronts. The solution proposed by those authors rests in a reformulated theory of human personality in which it is recognized that the "capacity for imaginative reconstruction is also historically situated". That claim is, of course, caught by the paradox of postponement. A more philosophically adequate approach to the critique of Unger's unfolding project is outlined in D. Cornell, "Toward a Modern/Postmodern Reconstruction of Ethics" (1985) 133 U. Pa. L. Rev. 291 at 327-58.

is the nerve of his social theory and his programme. Over this point there is a deeply-ingrained tension within his recommendations for reconstruction. Indeed, details of the programme appear to touch on the central problems of politics. Unger's task, however, is not to solve those problems but to envision a context in which they might be solved. In other words, despite the appearance that questions of rights, property, governmental competence, state authority and individual privacy have been finally explained and a defensible conception of each has been arrived at, the real lesson of *Politics* is that only a setting can be described for these questions. It is still up to the citizens of each polity to put the institutions of that setting to use in determining how their lives shall go. The possibility of mistake, corruption, elitism or authoritarianism continues to loom large. Unger acknowledges at the end of describing his programme of empowered democracy that:

Both our happiness and our virtue depend upon the particular institutional forms we give to the search for plasticity. Just as the quest for empowerment through plasticity may enable us to live out more fully our context-transcending identity, so, too, it may subject us to a despotism less messy or violent but more thoroughgoing than any yet known.<sup>132</sup>

The net result of Unger's expansive treatment of political and social theory, including its legal dimensions, is that genuinely democratic debate must be postponed until the institutional structures he commends have been adopted through collective mobilization. The critic's role is confined to suggesting or prophesying the actual forms political life might take. This rhetoric of prophecy is the dominant form of discourse Unger has chosen for himself. The role of the prophet is not, however, suited very well to the immediate concerns of political debate or practice. The prophet's address is directed at future generations who might be disposed to learn from one with a privileged vantage point in the past. By redefining politics as the proper concern of futurity, Unger has given the cleverest expression yet to the paradoxes of engagement and postponement.

#### IV. Problems with Reconstituting Community

As the discussion to this point has tried to make clear, the use of such words as "community" or "communal" or even "common good" is fairly meaningless by itself. The terms themselves do not disclose any particular programme for social or political transformation. To be useful as an analytical or programmatic tool, a conception of community must be elaborated in sufficient detail that the contrast between critical and liberal theory becomes vivid. This may even require the use of such capacities as exaggeration, invention or fancy. Wolin, for example, sees this as a time-honoured

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<sup>132</sup>Unger, *False Necessity*, *supra*, note 91 at 592.

technique of political theory, a conscious attempt to “transcend history”.<sup>133</sup> The concept of community has also been used for other purposes: for example, as an analytical device in literary criticism and literary theory.<sup>134</sup> The preceding sections of this article have shown some of the possible visions that are found within Critical Legal thought. This final Part raises some of the difficulties associated with the scope and meaning of those proposals.

The problems that will be discussed hereafter are: the indeterminate outlines of the Critical Legal use of community as a normative concept; the question of whether Critical Legal writers ignore the elements of communal value already present in conventional legal practice and theory; the issue of whether the civic republican ideal can be retrieved; the scope for meaningful political debate in the projected post-liberal community; and, finally, the subtle question of who are to be the designated agents of the transformation and how the answer to this question reflects upon the current institutional role of radical critics of the law.

#### A. *Progressive or Conservative Communitarianism*

One of the most interesting aspects of an appeal to a communitarian ideal is that it can be used by different theorists whose political orientations may be fundamentally opposed.<sup>135</sup> Critical Legal writers can trace the breakdown of communal ties and values to historical changes in economic relations during the early modern period. The invocation of these values is part of the project of restoring to the arena of political debate all of the possible conceptions of social order. The pattern of argument is restorative, though not necessarily nostalgic. By the same token, conservative thinkers have occasionally appealed to the same presence within our political experience of a strong sense of community and of the significance of the collective good. This appeal can be plainly sentimental, as in the case of Tönnies with his idea of the replacement of *Gemeinschaft* by *Gesellschaft*, or it can simply be based on an overriding sense of a living tradition that should never be suddenly overturned.<sup>136</sup> This latter view is essentially Bur-

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<sup>133</sup>See Wolin, *supra*, note 28 at 18-19.

<sup>134</sup>See, e.g., R. Williams, *Culture and Society, 1780-1950* (Harmondsworth, Eng: Penguin Books, 1958); S. Graver, *George Eliot and Community* (Berkeley, Calif.: University of California Press, 1984); and S. Fish, *Is There a Text in This Class?* (Cambridge, Mass.: Harvard University Press, 1980).

<sup>135</sup>See the exemplary account of the various orientations giving rise to an appeal to the existence or desirability of a community in C.J. Friedrich, “The Concept of Community in the History of Political and Legal Philosophy” in C.J. Friedrich, ed., *Nomos II: Community* (New York: The Liberal Arts Press, 1959) 3.

<sup>136</sup>See F. Tönnies, *Community and Society*, trans. C.P. Lounis (East Lansing, Mich.: Michigan State University Press, 1957).

kean communitarianism.<sup>137</sup> The Critical Legal approach is to stress the virtues of solidarity, intersubjective communication and cooperation, but of course it is sternly opposed to any reconstitution of society based on such communal notions as differentiated power, hierarchical dependency or the dominance of tradition as a bonding or legitimating force. Such static conceptions of social organization are part of the Critical Legal target.

In addition to this communitarian conception, another tendency of modern social theory vies with the Critical Legal use of community. Sociologists have in this century sought to find communal notions lurking in contexts other than the general social life of a nation or other grouping. The substitute for communal bonding is to be found at the macro level in large organizations such as the corporation or the administrative bureaucracy.<sup>138</sup> This conception of a communal setting within a larger liberal, individualist society is not compatible with the Critical Legal picture of alienation in the modern state. Employment in a corporate or public sector bureaucracy is no adequate substitute for the virtues of full participation in a genuinely democratic political process where members of a community are enabled to define their own conditions of productive activity without the distortions of authority and unequal power.

These examples show that the concept of community can be as vulnerable to abuse and misconstruction as any other political notion. Tushnet's comments on the use of a notion of a community extending through several generations of constitutional history exemplify how such a misconception can take hold.<sup>139</sup> Tushnet attacks the theory of constitutional "interpretivism" on that ground. A theory of non-interpretivism such as that advanced by Critical Legal writers would point up the active creation, rather than the mere inheritance, of a community of understanding.

Having made this distinction between the conservative or nostalgic versions of communitarianism and the radically creative or transformative version of Critical Legal Studies, it should be noted that these versions are not always properly separated in Critical Legal writing. On occasion it appears as if some earlier historical period provides, in the type of relations among persons at a local level or even within a closed community, the model of a post-liberal grouping. Unger's two earliest books on social theory are particularly at fault in this regard.

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<sup>137</sup>See E. Burke, *Reflections on the Revolution in France*, ed. by C.C. O'Brien (Harmondsworth: Penguin, 1969).

<sup>138</sup>For a description of this kind of theory and its chief exponents, see Wolin, *supra*, note 28 at 412.

<sup>139</sup>See Tushnet, *supra*, note 83 at 785.

It does seem that there is some specific strategy behind the Critical Legal appeal to communal virtues. This has at least four bases. First, the appeal is grounded in the empirical claim that persons do not develop except within a social setting, and that the social influences pressing upon them are determinative of personality. Second, men and women both are naturally political animals in the sense preached by Aristotle (who, of course, excluded women from his generalization). Only by participating in the public daily life of the polity do persons fulfill their potential as rational agents. Third, at this juncture, given the liberal emphasis on individual autonomy and the subjective basis of values, the radical critic must redress the balance by reminding us of the significance of communal values. Finally, harmony itself becomes a vital social desideratum which, if promoted sufficiently, will lessen the need for coercive control through legal instruments. The object is to find the conditions under which conflict can be controlled or, better yet, transcended.

The foregoing reasons taken together seem to constitute the best interpretation of the Critical Legal emphasis on community as a political conception. The problem that remains is whether liberalism cannot share, precisely, some of the very same premises that Critical Legal writers claim as their own. In other words, if a liberal theorist can lay hold of the notions of the social development of individuality, the importance of political participation, the communal nature of morality and the ideal of a relatively harmonious society, then the sting is to a large extent removed from the Critical Legal attack.<sup>140</sup>

### ***B. Our Legal Communities***

One of the great ironies at the root of the Critical Legal critique of doctrine is the degree of uniformity imputed to the members and theorists of liberal democracies who all act under the same delusive consciousness. Yet, at the same time, the Critical Legal account attributes a radically fragmented nature to the values held by those same individuals. The situation loses its ironic cast if one agrees with the Critical Legal claim that the uniformity of thought has been achieved by illegitimate means. That is, the values held by most citizens are imposed through the forces of hegemony rather than being freely chosen. Not all communities of interpretation or understanding are *ipso facto* desirable or progressive.

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<sup>140</sup>Compare the cogent arguments raised in two of the best recent interrogations of the contemporary communitarian school of thought: H.N. Hirsch, "The Threnody of Liberalism: Constitutional Liberty and the Renewal of Community" (1986) 14 *Pol. Theory* 423 and A. Gutmann, "Communitarian Critics of Liberalism" (1985) 14 *Phil. & Pub. Aff.* 308.

This critique based on consciousness requires that we sacrifice almost totally as a prescriptive ideal the notion of a continuous legal culture. For a theorist to rely upon the idea of enduring values that underlie the articulation of principles, particularly by judges, is to commit the unforgivable sin of freezing the potential public debate over those values. To carry this radical argument to its ultimate conclusion, we might say that the community which must reinterpret its own tradition is never the same community afterwards. A change in identity is always achieved because interpretations will inevitably fluctuate as socio-political conditions change. This means that even the most minor issues require members to work continuously to destroy and then to reconstitute their community. It seems a reasonable question whether this notion of perpetual flux does not subvert the idea of community altogether.<sup>141</sup> It is not sufficient simply to assert this conception without greater elaboration as to the degree to which the conception reflects actual social or legal practices. The pre-eminent example of this kind of evaluative procedure is Dworkin's recent work on law as interpretation.<sup>142</sup> A further instance of discussion of the claims of community in the context of U.S. constitutional law, bearing particularly on the doctrine of substantive due process, is to be found in the writing of Tribe.<sup>143</sup>

Much work remains to be done on coming to grips with the variety of senses in which contemporary laws already reflect or arguably might be interpreted to reflect a communitarian spirit. Legal structures based on liberal assumptions may not be entirely in the ascendant now, nor possibly have they ever been dominant in the way claimed by radical historians of the common law. One could cite literature to this effect from both within and without the Movement. The evolution of contract law has given examples of the recognition by courts of the necessity of interpersonal bonds of respect and trust.<sup>144</sup> Tort law, it has been claimed, should encompass a

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<sup>141</sup>For an argument that Unger's theory of context-transcendence has difficulty with controlling the implications of perpetual change, see E.J. Weinrib, "Enduring Passion" (1985) 94 *Yale L.J.* 1825 at 1835-36.

<sup>142</sup>See R. Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986).

<sup>143</sup>See L. Tribe, "Structural Due Process" (1975) 10 *Harv. C.R.-C.L. L. Rev.* 269 and *Constitutional Choices* (Cambridge, Mass.: Harvard University Press, 1985) at 9-20.

<sup>144</sup>See, e.g., D. Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power" (1982) 41 *Md L. Rev.* 563; J.M. Feinman, "The Meaning of Reliance: A Historical Perspective [1984] *Wis. L. Rev.* 1373; R.W. Gordon, "Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law" [1985] *Wis. L. Rev.* 565; and H. Collins, *The Law of Contract* (London: Weidenfeld and Nicolson, 1986) at 45-47. The contentious point is over how these communal values deviate from the "official" values, to use the term used by Gordon in his article at 576, and are therefore subversive of the dominant ideological images created and sustained by legal doctrine. The nub of the dispute is over the sense in which these alternative values disrupt our community as opposed to continuing the normative conversation already entwined in legal dispute.

concept of a remediable harm to be called "destruction of community".<sup>145</sup> Constitutional law, particularly as it incorporates notions designed to protect rights of free assembly, can be made as compatible with communitarian ideology as it can with frankly liberal conceptions of individual expression as the mark of a healthy society. The dialectic between competing social visions is discernible within these and other doctrinal topics. The Critical Legal writer, in his or her frequently demonstrated capacity as *scriptor ludens*, might even make imaginative play with the "common" law as multi-textured communality.

A point of real difficulty for the radical critique is reached where claims are made for the inevitable closure that a legal system or body of principles is supposed to involve. One aspect of Unger's notion of a formative context is that the legal principles employed to create and secure institutional arrangements are "characteristically ambiguous and contradictory".<sup>146</sup> Although dominant principles reflect a model of human association that informs all parts of social relations, there are also present recessive principles that tend to influence the application of so-called determinative rules. Unger therefore concedes the partly communal content of existing bodies of doctrine. His view of the process of "internal argument" (which he relates to a general point about the practice of routines) is that it ought to "incorporate more of the characteristics that we traditionally attribute to visionary thought".<sup>147</sup> This recommendation depends on a theory about how normative argument tends to work within a settled framework that is never, insofar as the activity is "normal", subjected to fundamental challenge. Such a conception of the way legal argument proceeds rests heavily on the assumption that liberal legal theory is necessarily embarrassed by elements of incoherence, contradiction or inconsistency. But not all "rationalizers" of contemporary systems of common law, as Unger has called mainstream legal theorists,<sup>148</sup> would see the same implications in the claim that a body of developed legal doctrine contains ambiguous or competing principles.<sup>149</sup> Non-radical theorists generally are neither naive positivists nor blinkered from the relationship that legal rules bear to other values in our particular

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<sup>145</sup>R. Lewis, "The Destruction of Community" (1986) 35 Buffalo L. Rev. 365.

<sup>146</sup>Unger, *False Necessity*, *supra*, note 91 at 101.

<sup>147</sup>*Ibid.* at 367.

<sup>148</sup>See Unger, *Social Theory*, *supra*, note 91 at 147.

<sup>149</sup>Nor is it true that every Critical Legal writer would see the same implications: see J.M. Balkin, "The Crystalline Structure of Legal Thought" (1986) 39 Rutgers L. Rev. 1 at 76:

I do not believe that our moral and legal consciousness is dialectically structured because it is Liberal consciousness, so that if we could free ourselves from Liberal institutions our moral and legal debates would no longer display a crystalline structure. Our legal institutions and our system of moral values are Liberal, but the contradictions of our thought are not Liberal contradictions, but are only manifested in our Liberalism.

social contexts. It may be that Critical Legal writers have a different sense from mainstream theorists of the defining characteristics that separate the pathological and the normal so far as legal argument is concerned.<sup>150</sup>

If it is acknowledged, as Unger has, that current legal doctrines contain the seed of new frameworks for political and personal change, then what impact does this recognition have on the necessity of deep social change? Evidently, projecting the countervisions of communal aspiration and mutual vulnerability and reliance is not sufficient as a campaign for mass political enlightenment. Something more is required. This is the point at which the radical critique must question whether intellectual experiments in discovering the suppressed possibilities of political and legal history are enough. On top of this must be formulated some strategy for the collective mobilization of the citizens either of existing states or of conjectural polities that have yet to coalesce.

The Critical Legal project can play perhaps two instructive roles in this respect. The first is to offer an example of how continual progressive revolution applies to the attempt by Movement members to unite into a community of their own. But in what sense have centrifugal forces overwhelmed conjunctive ones? Have the values that animated the Movement at its founding changed significantly? Does it show a history of a single community extending over time or is it now a successor community that itself is destined to submit to the forces of fragmentation and realignment? Can it relevantly be asked whether Movement members are not torn between allegiances to the several communities in which they participate (take, for example, the law professor who at once belongs to a departmental or university community, a local community, a national community, a community of law scholars, as well as to the Conference on Critical Legal Studies)? We are most of us interested parties in several layers of community life from the local and specific to the national and international. How are the various duties and responsibilities of a conscientious citizen to fit together? By looking at these questions the Movement might find within its midst its own laboratory for social experimentation. The observer might focus on the types and degree of conflict and consensus, the activities of Critical Legal writers as civic participants and the sensitivity and sensibility of each toward the mutual vulnerability of both members and non-members of the Movement. All these would be important dimensions for measuring the chances of

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<sup>150</sup>See M. Krygier, "Critical Legal Studies and Social Theory — A Response to Alan Hunt" (1987) 7 *Oxford J. Leg. Stud.* 26 at 34-37 for a socio-historical explanation about the presence and meaning of inconsistency in legal doctrine. A most sensitive treatment, from a radical point of view, of the variety of theories of meaning and their implications for accounts of legal practice is contained in the work of D. Cornell: see, e.g., her "'Convention' and Critique" (1986) 7 *Cardozo L. Rev.* 679 and *supra*, note 86.

success of the radical project in its goal of fighting dependency and domination.

Secondly, Critical Legal writers might begin to examine their own strictures on what is to count as an emancipatory exercise in legal analysis. The lines between internal argument, in the sense in which "normal" legal discourse takes place, context-smashing argument and revolutionary argument may not be as easily drawn as some radical writers suggest. Critical Legal writing, in practising doctrinal criticism, often resembles the most acute form of internal argument particularly where it reveals a number of incompatible assumptions that stand behind a legal rule. Most of the criticisms of legal structures have taken the form of bringing to the surface of the debate the controversial content that legal rules, by their appearance as settled directives, tend to disguise. In its paradigmatic form, the radical critique raises the alternative principles to prominence and tries to put them into a political perspective that either denies that those principles are consistent with the liberal impulse or else reveals the meaning they bear for a reconstructed social and personal life. This strategy is something less than revolutionary. The critic does not reject outright the pull that established legal doctrine exerts. The point of this description is to remind us that the bulk of Critical Legal writing is still closer to the best samples of internally critical argument that have distinguished legal academic commentary than it is to context-revising argument. One of the points of serious critical commentary, regardless of political motivation, is in some sense to resist the given and to attempt to understand doctrinal questions in light of higher-order inquiries into value and purpose. But this, while a normative activity, should not necessarily be construed as inherently radical.

### C. *Retrieving the Republican Vision*

The principal difficulty with the Critical Legal attempt to summon out of Western political thought the ideal of civic republicanism is that that ideal is not self-evidently free from the taint of liberal assumptions. The example of Rousseau illustrates this point nicely.<sup>151</sup> On the one hand, Rousseau wished to devise a theory that would demonstrate how a "close communion" among persons in an egalitarian society could be achieved so that each member would become dependent on the society as a whole and be freed from personal dependence on each other.<sup>152</sup> On the other hand, he based his theory on assumptions about a hypothetical social contract which persons in their pre-citizen capacity entered into for prudential reasons. As

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<sup>151</sup>See J.J. Rousseau, *The Social Contract*, trans. M. Cranston (Harmondsworth: Penguin Books, 1968).

<sup>152</sup>See Wolin, *supra*, note 28 at 371-72 and J.N. Shklar, *Men and Citizens: A Study of Rousseau's Social Theory*, 2d ed. (Cambridge: Cambridge University Press, 1985).

an Enlightenment thinker, Rousseau held the contracting parties' autonomy and rationality to be primary requisites. Thus, Rousseau's version of republicanism, which is perhaps the purest account of the political value of civic virtue and expression through concerted action, is shot through with so-called liberal features ordinarily repudiated by Critical Legal writers. This example should put us on notice that republicanism by itself is not entailed by wholly communitarian premises.

The possibility that contemporary liberal commentators can continue to draw on republican notions, even if only rhetorically, has impressed Tushnet, but he has expressed doubts whether civic republicanism is in fact recoverable.<sup>153</sup> As a result, Tushnet gives cogent reasons for dismissing the relevance of a republican vision. For instance, he sees a failure in that tradition to provide any content to the public values it defends.<sup>154</sup>

The most important judgment that could be made about the relevance of the republican tradition, from the Critical Legal point of view, is that as an historical phenomenon we cannot expect it to survive the conditions in which it was born and developed. Roman republicanism was not the same as Florentine civic humanism; likewise the debates of 1776 could not be held under the conditions operating in the U.S. in 1988. The continual change of socio-political circumstances means that institutions must adapt and even transform completely their character.<sup>155</sup> This perspective has been summed up as follows:

The partition of sovereignties and obligations tacitly implied in the classical language of republican politics is no longer possible for us. Today, the price of that highest of republican virtues — patriotism — would be the destruction of all cities. Today, the uninterested consequences of our consumption choices within the city gates are visited on the whole ecology of the globe. We have inherited a language of political allegiance which no longer speaks for the needs we have, not as citizens, but as members of a common species.<sup>156</sup>

Moreover, classical republicanism or images of civic virtue are not themselves adequate foundations for a theory of community, as opposed to a theory of democracy. As Selznick has pointed out, “[c]ivic virtue is best understood as a way of fulfilling the *promise* of community”. It presumes

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<sup>153</sup>See Tushnet, *supra*, note 61 at 1508. The foremost example of an attempt to show the contemporary relevance of civic republican ideals to liberal democratic structures is F.I. Michelman, “Foreword: Traces of Self-Government” (1986) 100 Harv. L. Rev. 4.

<sup>154</sup>Tushnet, *supra*, note 61 at 1540.

<sup>155</sup>For some penetrating criticism about the actual historical dominance of republican theories, see D. Herzog, “Some Questions for Republicans” (1986) 14 Pol. Theory 473.

<sup>156</sup>M. Ignatieff, *The Needs of Strangers* (London: Chatto & Windus, 1984) at 130. See also Unger, *False Necessity*, *supra*, note 91 at 587.

that a community already exists.<sup>157</sup> Civic republicanism is not itself a master key that will unlock the potential for our communal reorganization of existing social structures. At best it is only a partial vision that lures us in the general direction of progressive re-definition of our practices. It is not a consuming vision that provides the sum of all values needed to secure the common good in a post-liberal age.<sup>158</sup>

#### *D. Discarding Political Issues in the Name of Transformative Politics*

This section touches on a very sensitive topic within any radical proposal for reconstructing the entire shape of an existing society. By noting the conflict-ridden, interest-dominated conception of liberal politics, Critical Legal writers imply that a new harmony is attainable only if certain assumptions about human relationships were abandoned. The problem which tends to arise in such a radical prescription is whether the vitality of politics generally, not just that associated with liberal democratic structures, is being suppressed in the process of such transcendence. The sticking point on this issue is reached when Critical Legal writers plead for the replacement of current "forms of life" by a new moral order; about the specific contours of this order these writers are agnostic. That is, radical writers hold back on principle from the attempt to describe which particular values or principles will animate the progressive society. There is a great danger that this refusal to interfere with the decisions that require democratic determination amounts to an abdication of political theory. Politics, as conceived along this model, is a concrete, local, community-wide process that gives no special authority to the Critical Legal commentator who renounces any claim to political expertise or special insight into what the common good might be.<sup>159</sup> Attempts to specify the principles of justice that ought to govern political and legal decision-making, such as the theory advanced by Rawls, are condemned for foisting a specific conception of political values onto a polity when the members of that polity should be free to work out through discussion their own version of just principles based on circumstances known intimately and peculiarly to them.

This renunciation takes in a great deal of what we conventionally think of as political theory. It means that issues such as the following do not have

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<sup>157</sup>P. Selznick, "The Idea of a Communitarian Morality" (1987) 75 Calif. L. Rev. 445 at 457 [emphasis in the original].

<sup>158</sup> See Unger, *False Necessity*, *supra*, note 91 at 587. It is surely wrong to claim that "[o]ppositional ideologies such as classical republicanism and revolutionary Marxism describe a concrete set of arrangements for the state and thus define the utopian goal of a remade social world": J. Boyle, "Modernist Social Theory: Roberto Unger's *Passion*" (1985) 98 Harv. L. Rev. 1066 at 1079.

<sup>159</sup>See an expression of this attitude in M. Tushnet, "The Dilemmas of Liberal Constitutionalism" (1981) 42 Ohio St. L.J. 411 at 424-25.

to be expounded upon by Critical Legal writers. Gone is the need for arriving at a defensible conception of distributive justice. Critical Legal writing is generally suspicious of the tradition by which liberal theorists (encompassing all classic and modern liberals as well as libertarians and social democrats) set out to give a rational account of the conditions under which economic goods are both initially held and thereafter redistributed, either by voluntary, private transfers among individuals or through the intervention of the state.<sup>160</sup> Critical Legal thought favours a radical notion of equality, but as we have seen in discussing the socialist strain in the Movement, the institutional consequences of this political preference have yet to be treated systematically. A second issue concerns the many dimensions of this radical conception of equality. In addition to economic equality, Critical Legal writers have been wary of imposing a precise notion of political, legal or educational equality. On this, as on many other contestable political ideas, their strategy has mainly been to provide an oppositional voice. Therefore, our understanding of their alternative position is based to a great extent on inference rather than on positive assertion. This same observation applies to the inchoate discussions within the Movement about the place of fundamental rights in a transformed society. This is a problem that bedevils leftist critiques generally. But so far there has been no distinctive Critical Legal solution appearing on the horizon.<sup>161</sup> At most, Critical Legal writing on this area is searching for the outline of a new theory of communal rights, rather than property rights, as the conceptual paradigm.<sup>162</sup> For the most part, as at least some Critical Legal authors acknowledge, the Movement lags behind other contemporary projects to re-define the post-liberal underpinnings of protected rights.<sup>163</sup>

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<sup>160</sup>Critical Legal writing in this area therefore tends not to differentiate carefully among such contemporary treatments as: Rawls, *supra*, note 87; R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974); R. Dworkin, "What is Equality?" (1981) 10 *Phil. and Pub. Aff.* 185, 283; M. Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Oxford: Basil Blackwell, 1983); and D. Miller, *Social Justice* (Oxford: Clarendon Press, 1976). All of these works are assimilable on the Critical Legal account and a close exegesis of any of them is impliedly not worth the effort. An example of the rewards to be had from such a review is found in L. Alexander & M. Schwarzschild, "Liberalism, Neutrality, and Equality of Welfare vs. Equality of Resources" (1987) 16 *Phil. & Pub. Aff.* 85.

<sup>161</sup>See, e.g., R. Keat, "Liberal Rights and Socialism" in K. Graham, ed., *Contemporary Political Philosophy* (Cambridge: Cambridge University Press, 1982) 60; T. Campbell, *The Left and Rights: A Conceptual Analysis of Socialist Rights* (London: Routledge & Kegan Paul, 1982); C.M. Sypnowich, "Law as a Vehicle of Altruism" (1986) 5 *Oxford J. Leg. Stud.* 276; and P.Q. Hirst, *Law, Socialism and Democracy* (London: Allen & Unwin, 1986).

<sup>162</sup>See Hyde, *supra*, note 83 at 1049 and S. Lynd, "Communal Rights" (1984) 62 *Tex. L. Rev.* 1417.

<sup>163</sup>See A. Chase, "The Left on Rights: An Introduction" (1984) 62 *Tex. L. Rev.* 1541 at 1560-61. Chase's discussion recognizes that "rights-talk" can be serious and can survive the demise of liberal thought. This is more credible than the claim that the "logic of rights is a human

A further major defect of the Critical Legal description of the communitarian ideal is that it omits discussion of the central political problems of legitimacy, authority and obligation. These are in some sense understood to be issues uniquely associated with liberalism. Once the individual citizen sees his or her interests as essentially intertwined with the good of the community, then such issues are supposed to dissolve. Yet, as the close examination of Unger's theory in Part III revealed, each community, because it wishes to preserve the possibility of dissension and destabilization, is inevitably going to encounter exactly these issues. Unger's more recent attempts to define new categories of rights presumably have something to do with such a recognition. To deny that these problems will persist is, in an ominous way, to try to exclude classic political questions from the arena of political discussion. It is in this sense that it may urgently be asked whether the Critical Legal attitude to a new era of unconstrained political discussion is not a modern version of Plato's attempt to make mass politics itself unnecessary because a community is so distinguished by its harmonious structure.<sup>164</sup>

It is also at this point that we can see clearly how far from mainstream legal philosophy Critical Legal thinking diverges. As recent essays in the foundations of law illustrate, radical theorists have no exclusive patent on the use of a conception of community. For example, Finnis has discussed how an understanding of the "most intense form of community", friendship, can be used to come to grips with the idea of political obligation and with Finnis's special interest, the traditions of natural law.<sup>165</sup> Dworkin's recent work also depends, in explaining legal and political obligation, on an analogy between the conditions of fraternal association and the conditions of political association.<sup>166</sup> Both Finnis and Dworkin follow in an ancient tradition whereby "friendship also seems to hold political communities together".<sup>167</sup> These attempts to discover suggestive possibilities for what ought to be the content and values of a legal system illustrate how unfortunately peremptory

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invention whose purpose is to preserve us from the notion that we must make political and moral choices": J.W. Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" [1982] *Wis. L. Rev.* 975 at 1059 [emphasis in the original].

<sup>164</sup>For a slightly similar argument in respect of Marx, see Wolin, *supra*, note 28 at 416-17. On the Platonic attempt to render citizenship unnecessary for moral development, see Wolin, *supra* at 41-56.

<sup>165</sup>See J.M. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 141-56 especially, and J.M. Finnis, "On 'The Critical Legal Studies Movement'" (1985) 30 *Am. J. Juris.* 21 at 35-36.

<sup>166</sup>See Dworkin, *supra*, note 142 at 195-216.

<sup>167</sup>Aristotle, *Nicomachean Ethics*, trans. M. Ostwald (Indianapolis: Bobbs-Merrill, 1962) at 1155a22-23. See B. Yack, "Community and Conflict in Aristotle's Political Philosophy" (1985) 47 *Rev. of Pol.* 92, an article devoted to correcting a common view of the harmony of Aristotle's ideal *polis*. This view is attributed to MacIntyre, *supra*, note 62.

has been the Critical Legal dismissal of most modern jurisprudential writing as apologetic liberalism. Writers outside the radical camp continue to try to appropriate communitarian values in support of their own proposed configuration of the purposes, limits and potency of liberal democracies. They differ from their Critical Legal counterparts by rejecting the illusion that establishing a community in which beliefs and predispositions are shared is necessarily a utopian enterprise which can never be approximated in current Western democratic conditions.

For these several reasons, then, we may justifiably entertain serious doubts about the merits of the radical political alternative that has largely appeared in Critical Legal literature. Like Hegel, these writers posit an ideal situation in which

[t]he happiest, unalienated life for man, which the Greeks enjoyed, is where the norms and ends expressed in the public life of a society are the most important ones by which its members define their identity as human beings. For them the institutional matrix in which they cannot help living is not felt to be foreign. Rather it is the essence, the "substance" of life.<sup>168</sup>

The question comes down to whether this attractive ideal spells the beginning or the end of significant political debate. From the Critical Legal perspective, it is the arrival of a situation where citizens can start addressing in a proper public-minded spirit the institutional issues of social order. The cost of achieving this communitarian vision, however, seems to be that the range of questions we ordinarily think of as political *par excellence* has played no part in shaping this community. Everything is up for grabs, yet the community is settled. One would have thought that a degree of consensus on basic values is required at the time the community is formed. It should not be just a matter of working out some details of principle. This paradox of postponement is both startling and unnerving.

### *E. Who Are the Agents of Transformation?*

This final section is best viewed as a prelude to a topic that deserves lengthier treatment: how does Critical Legal thinking on the organization and practice of legal education serve to illustrate larger claims about how real community can be achieved? It becomes clear from surveying even a small part of the burgeoning Critical Legal literature that radical critics see the law school as the public space in which the seeds of social transformation are being sown. The sweeping change required by a communitarian theory is not automatic. The causative force is not simply an inevitable conjunction of circumstances that arises out of the demise of capitalism and its attendant

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<sup>168</sup>C. Taylor, *Hegel and Modern Society* (Cambridge: Cambridge University Press, 1979) at 90.

legal order. Although historicism is an integral part of the Critical Legal understanding of social institutions, this is not to be confused with some kind of economic determinism. That is, the human subjects who operate and make choices within history are still at the focus of political analysis. The individual agent has not been dissolved in favour of existing ideological or class formations. This leaves room for the possibility of revolutionary creativity.<sup>169</sup>

There are two ways of picturing the triumph of a new political and legal order. The first is more benign than the second. According to the first scheme, the immediate cause of the projected transformation would be a widespread shift in consciousness under which communitarian ideals and values would gain intellectual ascendancy over liberal assumptions. This might eventually be a mass shift, but initially at least an elite cadre of theorists would have to bring these ideals into legal, political, educational and occupational forums. This issue is complicated by the relatively hazy treatment Critical Legal writers have given to this important notion of consciousness.<sup>170</sup> Nevertheless, there is no doubting the significance of this process whereby a change at the level of ideas will be accompanied by institutional transformation:

If a society is in some sense constituted by the world views that give meaning to social interaction, then to change consciousness is to change society itself. This is the central tenet of the CLS creed, the grounding for its belief that scholarship is politics.<sup>171</sup>

Putting the issue this way means that Critical Legal thought has already assumed the answer to the hoary question of how the theory of a shape for transformed society will relate to a revolutionary practice. On the Critical Legal account, the activity of theorizing in which fundamental liberal legal assumptions are challenged is putting into practice the ideals that are identified with the successor society. This interpretation thus permits the university teacher to see writing, lecturing and dealing with colleagues as a fundamentally important political contribution.<sup>172</sup> Releasing students' and colleagues' minds from the grip of liberal political notions is, like psycho-

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<sup>169</sup>See Thompson, *supra*, note 33 at 251-52.

<sup>170</sup>As noted at the outset of this article, the concept of "legal consciousness" is crucial to much of the early literature of Critical Legal Studies, especially that done by Duncan Kennedy. See, for example, D. Kennedy, "Toward a Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940" in S. Spitzer, ed., *Research in Law and Sociology*, vol. 3 (Greenwich, Conn.: JAI Press, 1980) 3, and D. Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 *Buffalo L. Rev.* 205. The most often quoted definition of "legal consciousness" as it is used in radical critique can be found in K. Klare, "Contracts Jurisprudence and the First-Year Casebook" (1979) 54 *N.Y.U. L. Rev.* 876 at 876 n. 2.

<sup>171</sup>Trubek, *supra*, note 41 at 592.

<sup>172</sup>See Tushnet, *supra*, note 24 at 1359 and Boyle, *supra*, note 14 at 746.

analysis to which Critical Legal writers sometimes compare their project, not just preliminary to the task of devising a new way of treating human relationships. That is, the unmasking of constricting thought structures amounts to an achieved reconstruction.<sup>173</sup> Social transformation interpreted as a drastic change in consciousness thus leads to a new recognition of the communal values of fellowship, cooperation and dedication to the common good. If all or most persons are assumed to have come around to this recognition, then there is no call for specifying the social or political arrangements that will reflect those values. The enlightened community can be assumed to resolve the practical and political difficulties for itself in such a way that no severe friction will disrupt the shared recognition of inter-subjective dependence and solidarity. This conception of revolution via persuasion and rational discussion is one of the major motifs in Critical Legal thinking; it is clear that the agents of enlightenment will be anti-liberal law teachers, lawyers and judges. The success of their efforts to identify the failings of liberalism and to articulate the values of communal life will depend on their capacity to show the dark side of our existing institutions and of current legal doctrine. The normal modes of discussion — law review articles, classroom instruction and discussion, treatise-writing, conference and seminar participation — are assumed to be sufficient for the revolutionary task. Once the image or vision of a post-liberal community is presented, Critical Legal writers appear to assume that such an image or vision will inevitably convince everyone to abandon their liberal presuppositions and to change their form of life.

The second possible mode for understanding how the communitarian change will occur is less dependent on the pure persuasiveness of the dialectical or immanent criticism of liberal theory. It also implies less of an armchair or lectern role for the legal commentator as revolutionary agent. This second scheme depicts the building of a reconstituted community as a matter of first overthrowing, by some sort of violence, the established legal and political order. The proponents of this view would criticize the first scheme, described above, as the result of being mesmerized by the romantic view of spontaneously arising, harmonious communities.<sup>174</sup> The second view, by contrast, takes seriously the idea that the constitution of a community must nearly always involve some form of coercion or even violence against both the enemies of community and also the members of the community. It could be that Critical Legal writers such as Tushnet actually foresee the need for furious mass upheaval involving physical and personal destruction. The hints are present. Or it may be that the term “violence” is being used in a more neutral, social scientific sense, for ex-

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<sup>173</sup>See Trubek, *supra*, note 41 at 608.

<sup>174</sup>See Tushnet, *supra*, note 61 at 1527-29.

ample, defined as “action that deliberately or unintentionally disorients the behavior of others”.<sup>175</sup> On this definition, simply to engage in “antisocial” or hostile behaviour may be enough to qualify as violence. Efforts by Critical Legal law teachers to upset the established patterns of teaching and collegiality within their university faculty would therefore be an example of violent behaviour, possibly construable as a type of “provocative terrorism” which aims at

short-circuiting efforts to bring about conservative change, eliminating reformers within the embattled administration, and forcing the defenders to adopt policies of intransigence.<sup>176</sup>

This second view thus appears to be tough-minded when compared with the model of change built on the rational interchange of ideas in which members of the dominant class might themselves come to realize that a new egalitarian social structure is necessary. The danger with the second view is that it, too, is liable to succumb to a romantic corruption. Violence as a revolutionary tactic has always appealed to a debased impatience with the process of politics.<sup>177</sup> This strategy is almost invariably rationalized on the ground that violence is just another form of politics. In fact, it is the substitute for genuine political activity.<sup>178</sup> Some Critical Legal writing hovers on the edge of this fallacy. It is therefore difficult to accede to the usual Critical Legal reassurance that a progressive transformation, because it is already immanent within our established patterns of thought, is a result of eminently rational discussion and empathy as opposed to a struggle for power in which fundamental human interests might be harmed in the realization of a new community.

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<sup>175</sup>Johnson, *supra*, note 58 at 8.

<sup>176</sup>*Ibid.* at 156.

<sup>177</sup>Using the term “politics” here in the sense elaborated in B. Crick, *In Defence of Politics*, 2d ed. (Harmondsworth, Eng.: Penguin Books, 1982).

<sup>178</sup>See generally, M. Merleau-Ponty, *Humanism and Terror*, trans. J. O’Neill (Boston: Beacon Press, 1969). In the words of Arendt, who was very clear about the limitations of politics:

It is because of this silence that violence is a marginal phenomenon in the political realm; . . . The point here is that violence itself is incapable of speech, and not merely that speech is helpless when confronted with violence. Because of this speechlessness political theory has little to say about the phenomenon of violence and must leave its discussion to the technicians.

See H. Arendt, *On Revolution* (Harmondsworth, Eng.: Penguin Books, 1973) at 18-19; P. Fuss, “Hannah Arendt’s Conception of Political Community” in M.A. Hill, ed., *Hannah Arendt: The Recovery of the Public World* (New York: St. Martin’s Press, 1979) at 157-76; and H. Arendt, *Crisis of the Republic* (New York: Harcourt Brace Jovanovich, 1972) at 105-98.

## V. Conclusion

Critical Legal writers face a political dilemma: should they lend legitimacy to the existing political structures by participating through them in the continuing tasks of government, and thereby invite the disillusionments of gradualism, or should they abandon the process as fatally infected by liberal lies and disingenuous apologies. The escape from this dilemma has been to move the locus of political action to a level of theory, analysis and commentary. The discursive role of the radical critic predominantly involves the imaginative interpretation of legal texts to illuminate the hidden implications for progressive social change. To this extent, the Critical Legal writer has been content to practice visionary or prophetic politics, to assume the role of a diviner or inspired commentator whose research agenda is to describe the ideal conditions of political and personal life. That project stops short of any engagement, attachment or commitment to a particular scheme of political organization.

It may perhaps be premature to claim that there has been an irreversible retreat from the agitational form of 1960's radicalism to the academic form represented by Critical Legal Studies, or that the latter is a mutation of the former.<sup>179</sup> One of the most interesting topics for Critical Legal writers that has not thus far been investigated is the place of the Movement within the twentieth-century history of leftist activity in the West, particularly in the United States. A fascinating account remains to be written about the conditions of contemporary radical practice in light of the types of repression and backsliding that have affected the radical cause. The sources already available that begin to sum up the dynamics of the intellectual left would provide a starting point for Critical Legal writers to reflect upon the efficacy and aspirations of their own enterprise.<sup>180</sup> In addition, in searching for a foundation on which to build a transformative practice as well as a radical theory, members of the Movement might recall the literature that has dealt

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<sup>179</sup>Schlegel does not relate the growth of Critical Legal Studies to the upheavals on U.S. campuses in the late 1960s: see J.H. Schlegel, "Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies" (1984) 36 *Stan. L. Rev.* 391.

<sup>180</sup>Some of the more useful among these are: C. Lasch, *The Agony of the American Left* (New York: Knopf, 1969); G. Statera, *Death of a Utopia: The Development and Decline of Student Movements in Europe* (New York: Oxford University Press, 1975); J. Weinstein, *Ambiguous Legacy: The Left in American Politics* (New York: New Viewpoints, 1975); D. Aaron, *Writers of the Left* (New York: Oxford University Press-Galaxy Book, 1977); R.J. Brym, *Intellectuals and Politics* (London: Allen & Unwin, 1980); M.E. Kann, *The American Left: Failures and Fortunes* (New York: Praeger, 1982); P. Clecak, *America's Quest for the Ideal Self: Dissent and Fulfillment in the 60s and 70s* (New York: Oxford University Press, 1983); A. Wright, *Socialisms: Theories and Practices* (Oxford: Oxford University Press, 1986); M. Isserman, *If I Had a Hammer: The Death of the Old Left and the Birth of the New Left* (New York: Basic Books, 1987); and J. Miller, *"Democracy in the Streets": From Port Huron to the Siege of Chicago* (New York: Simon and Schuster, 1987).

with the practical aspects of grassroots organization.<sup>181</sup> This is to be understood as something more than alternative styles of handling legal or other materials in the classroom. If the values that ought to animate political choice in a progressive polity are only discoverable at the level of free debate within a community marked by individual equality and independence, then the task still remaining after the critique of our institutional life is to work at fostering that community, to set oneself "to the dirty, monotonous, heart-breaking job of building People's Organizations".<sup>182</sup>

The Critical Legal attempt to address the shortcomings of liberal institutions has not led to planning a campaign for collective mobilization. Instead, we are left with only adjurations that, owing to the artifactual nature of society and the plasticity of political arrangements, we are free to reshape our existing institutions into whatever we as a group determine are the forms most conducive to our flourishing as independent, yet mutually vulnerable, persons. Such a confinement of the scope of politics to describing the institutional outline that will empower and promote such creative activities leaves large political issues untouched.

Some of these political issues have been alluded to in the body of this article. For suggestions on which political routes would help unravel the paradoxes of engagement and postponement, one might turn to Gramsci. He provides what is perhaps the most interesting modern treatment of the role that an intellectual vanguard might play in the transformation of the concrete relations in a society. First, radical writers might portray the process of moving toward a political objective in terms of "the qualities, characteristics, duties and requirements of a concrete individual".<sup>183</sup> For Gramsci, this meant a portrait in terms of a political party. Successful revolutionary political action requires that the party become the dramatic touchstone for all conflicts. In this way, political argument is not a "cold and pedantic exposition".<sup>184</sup> Secondly, the problem of leadership is inescapable; it is an irreducible political fact. The images of communitarianism presented in the Critical Legal literature for the most part avoid the issue of what qualifies certain members of the envisioned community for leadership and what should be the safeguards that will prevent abuse of this position. Will the leaders of parties within a community be the most eligible candidates for leadership of the whole community? What opportunities will be present for the political factions to influence moral and cultural life? Thirdly, in order

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<sup>181</sup>See M. Walzer, *Political Action: A Practical Guide to Movement Politics* (Chicago: Quadrangle Books, 1971) and S.D. Alinsky, *Reveille for Radicals* (New York: Vintage Books, 1969).

<sup>182</sup>Alinsky, *ibid.* at 203.

<sup>183</sup>A. Gramsci, *Selections from the Prison Notebooks*, ed. and trans. Q. Hoare & G.N. Smith (New York: International Publishers, 1971) at 125.

<sup>184</sup>*Ibid.* at 133.

for the transformative activity to have hope of success and to achieve this democratically, there must be a campaign to create among the masses a consciousness of their power to change institutional values. It is not sufficient that there be an intellectual cadre who claim to represent the masses. This is one of the degenerations from genuinely progressive elements that Gramsci notes. In his view, one has to

stimulate the formation of homogeneous, compact social blocs, which will give birth to their own intellectuals, their own commandos, their own vanguard — who in turn will react upon those blocs in order to develop them, and not merely so as to perpetuate their gypsy domination.<sup>185</sup>

In the continuation of their radical project, Critical Legal writers must begin to spell out the practical political ramifications of their ideals. These questions are both prudential and institutional. The strategies they commend or follow, the leadership styles they exhibit, the compromises they are willing to entertain, will all reveal the substance of the Critical Legal proposals. Credible political action requires some stake in the outcome of the process Critical Legal writers envision.<sup>186</sup>

There persists the lingering question of whether significant social change, to be achieved in the direction that the radical critique prefers, does not require forms of political practice that go beyond writing in professional journals, teaching what is arguably an elite audience or holding forth in academic conferences.<sup>187</sup> The Critical Legal concentration on doctrine as providing the materials for novel insights into the plasticity of social structures fits poorly with a conception of political study based on grasping an

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<sup>185</sup>*Ibid.* at 204-205.

<sup>186</sup>As some Critical Legal writers concede, their visions of a progressive community are utopian and consequently might be subjected to the critique Engels launched against the early European socialists: see F. Engels, *Socialism: Utopian and Scientific* (Moscow: Progress Publishers, 1968). It has been suggested by M.A. Foley, "Critical Legal Studies: New Wave Utopian Socialism" (1986) 91 *Dick. L. Rev.* 467 that Critical Legal Studies bears comparison with the work of Fourier and Owen.

<sup>187</sup>These are among the "methodological constraints" of Critical Legal Studies that arguably duplicate the very constraints radicals criticize as limiting the practice of conventional legal scholarship: see F. Munger & C. Seron, "Critical Legal Studies versus Critical Legal Theory: A Comment on Method" (1984) 6 *L. & Policy* 257. Often the debate over "what is to be done (next)?" takes the form of whether a "generalising statement of the critical project" can or should be made: see A. Hunt, "The Critique of Law: What is 'Critical' about Critical Legal Theory?" in P. Fitzpatrick & A. Hunt, eds, *Critical Legal Studies* (Oxford: Basil Blackwell, 1987) 5. The answer to this issue, though related to the ultimate shape as well as the impact of the Movement as a school of legal thought, does not settle questions about the politics of the project.

understanding of the whole context in which laws are formed. Doctrinal sources frequently cannot penetrate to this level of understanding.<sup>188</sup>

The most urgent question facing Critical Legal writers, from the point of view of communitarian ideals, is how they are to accommodate their interest in sweeping social change with their acceptance within the main community of legal academics. Various strategies might be proposed. In one, the task of the Movement should be to place its members in strategic spots within existing hierarchies, where they could practice "sly, collective tactics ... to confront, outflank, sabotage or manipulate the bad guys and build the possibility of something better".<sup>189</sup> In another, the Movement might set itself up as a claustral community on the fringe of events, biding its time until the proper conjunctural circumstances give it an opening to move to the centre of the political stage. These are political issues, to be debated as practical initiatives with vast implications for the message being sent out to the citizens who would be invited to join a collective reconstruction of established institutions.<sup>190</sup>

The paradox of engagement constitutes a peril and a blemish for the current situation of Critical Legal Studies. By continuing to defer the job of bringing their communitarian vision into line with the central questions of political philosophy, by failing to commit themselves to any particular scheme of values, Critical Legal writers' claims about the inescapably political nature of law add up to an apolitical quiescence. The paradox of postponement similarly rigs the terms of political debate. It allows the Critical Legal side of the argument to avoid dealing with the nature of the structures that should serve chosen values. Calling for these further tasks to be done is only fair in light of the Critical Legal fondness for the immanent critique of liberal politics. Readers of the radical literature should have the

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<sup>188</sup>This is one of the problems I have with "local critiques" as they have been offered by Critical Legal writers. They partly allow for heterogeneity in critical approaches and are partly to compensate for the admitted lack of a total vision. A superbly accessible example of such a local critique, which is conscious of its own limits, is R.W. Gordon, "Unfreezing Legal Reality: Critical Approaches to Law" (1987) 15 Fla. St. U.L. Rev. 195.

<sup>189</sup>D. Kennedy, "Rebels from Principle: Changing the Corporate Law Firm from Within" (1981) 33:1 Harv. L.S. Bull. 36 at 39.

<sup>190</sup>These conspiratorial possibilities are mentioned as a way of highlighting the active political choices that Movement members might face. I do not imply that the horrible things being said by opponents of the radical critique about professors, often identified as Critical Legal leaders, at elite U.S. law schools are necessarily true: see J. Frug, "McCarthyism and Critical Legal Studies" (1987) 22 Harv. C.R.-C.L. L. Rev. 665.

chance to compare the principles espoused by Critical Legal Studies with the actual forms of social and political life to which those principles are supposed to lead. Where what is at stake involves how we teach, how we practice and how we explain, turnabout is only fair play.<sup>191</sup>

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<sup>191</sup>The irony to be found here is also present in the Critical Legal tactic diagnosed recently by Don Herzog in which "CLS authors read legal doctrine politically, but they read liberal doctrine apolitically": see D. Herzog, "As Many As Six Impossible Things Before Breakfast" (1987) 75 Calif. L. Rev. 609 at 611.