The critical jurist and the moment of theory

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A donation of theory

We are in a world—or, to be more GPS-specific about location, in a corner of that world—occupied by the law section in the basement of Blackwell’s bookshop in Oxford. It appears a perfectly regular disciplinary setting . . . until you take a book from the law shelf and find—on the very first page—that you are reading about ‘madness’. Law and ‘madness’, it seems, are in ‘an unstable, disrupting, indeterminate yet constitutive relation—the relation between that which is imagined as law and that which is withheld or masked as something other than law—in order to produce that imagining’.1 The coupling of these separate orders is designed as a novel event, an unanticipated encounter to seriously unsettle your habit of mind. To be sure, Austin Sarat and his co-editors advise that it is not ‘the claim of this volume that law is in some way definitionally “mad”’. And they add—metaphors may have much to answer for—that ‘we use the trope of “madness”’ to signal the aforementioned ‘relation’ and ‘imagining’. Yet, there is a confident certainty about ‘what must be disavowed or forgotten for law to be sustained’. There might be an ‘appearance of [legal] authority’ in this world, but it is only an appearance. So, the onus is squarely on the reader to grasp that the authority of law—or, the authority of ‘that which is imagined as law’—is contingent upon an exclusion of ‘madness’. The reader, now perhaps unsettled, is given little option: join the line for ‘madness’ and against the law, or else!

If this were the whole picture, those of us legists who want to learn about the order or rule of law might begin to worry at an account of law that has hardly any practical content. Am I equal to the task of treating the legal order as an ‘imagining’? Must I now become the sort of person who can take an unscripted ‘madness’ as the necessary reference for what I had mistakenly taken to be law’s authority? Do I now have to face up to a lifetime of denial? Of course it is worrying. Even as we lift weightlessly above the mundane legal circus on the rising tide of ‘that [madness] which is repressed as something other than law’, we would surely want to ask: are we now inside a circle of another sort?

A feature of our time—the ‘moment of theory’—is that these things have been being said by critical legal thinkers. On the one hand, this could mark a victory over bonehead black-lettered lawyer-empiricists for certain critical jurists. On the other hand, if your case is going to be decided by someone
committed to ‘the mutual permeability of law and madness’, there may be cause for worry. So what formation is appropriate for the jurist, as distinct from the priest or the philosopher? Professional legal training was previously acquired outside the academy, in England and Australia. The subsequent ‘academicising’ of law—and of other professional fields and artistic activities—has been promoted, in part, by an imperative infusion of theory-based presuppositions.

‘Law and madness’ exemplifies infusion of contemporary legal studies by theory, with the humanities academy as donor. Yet, the power of a donation depends on a recipient’s willingness to receive. A donated theory can be refused. For a recent American instance, there is Richard Posner snappily answering the question ‘what has literary theory to offer law’ with a single word: ‘nothing’. This is pretty clear, but a bit abrupt towards a theory that legal scholars outside Posner’s own ‘law and economics’ school take quite seriously. A ‘law and madness’ school—were such an entity to emerge—might receive a similarly abrupt dismissal. In fact, not every critical legal scholar has hung their sign on a literary notion of ‘madness’ or ‘delirium’. The ‘moment of theory’ has also brought substantively weighty issues—moral and political—into the ambit of legal studies. Austin Sarat’s own work on legal, infra-legal and extra-legal dimensions of America’s use of the death penalty is a case in point.

Not that a Posner’s offhand indifference to literary theory’s donation to law has slowed the theory production line in the humanities academy, at least judging by the scene in Blackwell’s bookshop in Oxford where we began. At the entrance to the ‘literature’ section—‘literature’ is on a higher floor, law in the basement—three current textbooks are displayed: Beginning Theory, How to Do Theory, and After Theory. Taken together, these titles would seem to touch just about all the bases. The theory spring has not run dry.

Historically speaking, the legal field has long been the scene of donations—and, sometimes, of receptions—of extra-legal theories. The contents list of a current textbook of jurisprudence, The Blackwell Guide to the Philosophy of Law and Legal Theory, indicates some current exchanges between legal and extra-legal fields.

Part I of the Guide presents students with six ‘contending schools of thought’ as paradigm theories in today’s legal science: natural law theory, legal positivism, American legal realism, economic rationality in the analysis of legal rules and institutions, critical legal theory, and feminist legal theory. It is a perfectly conventional listing, denying separate categories to left-legal theory or race theory (these can be placed within critical legal theory), or to religion (which could be treated under natural law theory, in its neo-Thomist and post-Protestant modes). Feminist legal theory, though, gains a podium place, alongside the ‘economic rationality’ category of Posner’s zone.

Within this range, the ‘moment of theory’ can be most directly identified with ‘critical legal theory’, that is, with the Critical Legal Studies movement. It will not, however, be a matter of viewing the critical jurist through a grid that sets theory against law. Nor will there be a defence of law against theory. Strict doctrinal treatment of legal issues, after all, rests on a theory as to its
purpose and value. Moreover, the historical record discourages such dualism. In the European ‘romano-canonist’ tradition and institutions, Roman law and Christian doctrine converged, a synthesis of legal administration and theological foundation.\(^7\)

To be sure—with the Henrician break from Rome—English common-law propagandists such as Christopher St German, Edward Coke and Matthew Hale rejected interference from whatever ‘higher right’ the civilian and canon lawyers might claim to convey. Yet, despite its reputed aversion to theorising, the common law—as Gerald Postema demonstrates\(^8\)—has its theory too. The polemic is perennial. In *Legal Theory and Legal History*, Brian Simpson distinguishes two options that have been adopted for dealing with ‘the disorderly and unmethodical appearance of the common law system’.\(^9\) The first option was prudential: to take a ‘practical approach to the disorderly condition of the law, to tidy it up, to systematise it’. Importantly, ‘no particular theoretical view of the nature of the common law was involved’. The second option meant working at an altogether higher level: ‘An alternative and essentially theoretical approach was to maintain that the law was already systematic, however improbable this claim might appear to the uninitiated.’\(^10\)

A similarly prudential avoidance of absolute principle sustains both Michael Foley’s defence of the early Stuart constitution for ‘keeping fundamental questions of political authority in a state of irresolution’ and Cass Sunstein’s defence of ‘incompletely theorised agreements’ in those areas of modern adjudication where divergent fundamental principles and values clash intractably. Foley identifies a seventeenth-century English ‘social acquiescence in the incompleteness of a constitution, a common reluctance to press the logic of argumentation on political authority to conclusive positions’, the purpose of this acquiescence being to allow the ‘maintenance of government’.\(^11\) For his part, Sunstein cautions against demanding final certainty in circumstances where value-conflict renders any ‘fully theorised’ agreement impossible.\(^12\) As for Foley’s early modern England, so for Sunstein’s contemporary America, the point is that fundamental differences are suspended, rather than settled. In this way, ‘constitutional practice could cater for ostensibly unmanageable positions’,\(^13\) thereby averting civil conflict, at least for a time. In fact it was ‘the threat of innovative clarity that posed the greatest danger’.\(^14\)

In this rejection of theoretical clarification, with its dream of achieving final consensus and absolute certainty, is there a lesson for those who lament the common law’s evasion of more theoretical issues? In some political contexts, it may be better to let the sleeping giants—or sleeping dogs—of theory lie. But such quietism was no panacea for the intellectual malaise arising in some parts of some American, English and Australian law schools at the ‘moment of theory’. Given common-law pragmatism’s conservative embrace of the status quo, how could one teach law in a truly serious manner in a setting dominated by guileless, ‘theory-free’ believers in the virtues of the law—as if the law was simply there, an unproblematic given? The question
was acute for those legal scholars aware of the contemporary humanities ‘theory boom’, who began to fashion modes of ‘critical legal studies’.15

**Critical legal studies**

From Cicero on, legal criticism has a long history. Within that history, ‘critical legal studies’ (CLS) constitutes a recent episode that turned on law’s theoretical re-engagement. Already by the mid-1980s, guides for the perplexed were being published for a new phenomenon—CLS—on the law block.16

In its own ‘official’ history, CLS memorialises a place and moment of foundation: the University of Wisconsin-Madison conference of 1977. Here emerged the American Critical Legal Conference, a gathering point for left-lawyers and anti-establishment but legally-minded radicals in the United States. It inspired a parallel British Critical Legal Conference. Roberto Unger and Duncan Kennedy were among the Americans; Costas Douzinas and Peter Goodrich among the British. The impact of these foundations flowed through to Australia, in particular to the Macquarie University Law School.

Though sharing a generational background in social activisms—civil rights advocacy, Vietnam protest, leftist critique—these scholars pursued a diversity of projects. The emphasis was dual: on ‘critique’ of existing law and legal education, and on ‘creation’ of new and emancipatory socio-legal relations, including curricula. Duncan Kennedy, a professor in the Harvard Law School, embraced both these tendencies, from his 1983 *Legal Education as Training for Hierarchy: A Polemic Against the System*17 to his 1997 *A Critique of Adjudication: Fin de Siècle*.18 The former work unmasks the contradiction between standard justifications of existing legal education in terms of fundamental principles or doctrines, and what is really going on behind the scenes in today’s American law school: the implanting of a disposition amenable to sustaining the hierarchy of the legal profession and, by extension, the political system that the profession supinely services. It also proposes—with rhetorical cheek and an irresistible smile that did not adorn many theoretical interventions by Marxist legal scholars—alternative procedures that would institute student selection by lottery, provide salary equality for all staff, basement janitor or law professor, and so on.

By 1997 and *A Critique of Adjudication*, Kennedy is looking backwards, referring to the book as ‘a critical legal studies manifesto after the fact’. He now says he is ‘trying to make sure those ideas don’t just disappear even though the movement is pretty much dead in the water at the moment’.19 The sense of an episode closing is manifest. At this threshold, much of the critical momentum has passed away from the first-wave CLS left-lawyer materialists and sociologists of law.20 A second wave of legal critics emerged, including scholars focused on gender-based and race-based matters of identity and status, drawing on feminist theory and critical race theory.21 Concerns of and with minorities displaced concerns of and with the working class.

Though distinct, these currents of legal critique share at least two common features. First, they indicate that CLS was never going to be one more
attempt to provide law and legal reason with a formal analytic foundation. That was a task undertaken by others—typically legal philosophers in various normative traditions or schools of thought—vocationally devoted to a view of law as rational, just or good, whatever the historical circumstances. Their company includes Joseph Raz, John Rawls, John Finnis and Ronald Dworkin. From a CLS viewpoint, normative legal philosophy is part of the problem: it furnishes theological, moral or rationalist justification for a legal system that—for CLS advocates—is an instrument of oppression by or exclusion from the present social hierarchy.

Second, CLS threatens positive legal knowledge by problematising the conditions of that knowledge. Conventional knowledge of law—the common law in particular—and the legal education on which it rests are deemed deficient because pre-theoretical and thus unable to grasp its own emergence through exclusions of ‘the other’—or simply because it lacked a higher-order dimension. At least in some zones of the academy, this proved a powerful and even frightening move. A Finnis or a Rawls, a Hart or a Dworkin are impressive presences in seminars debating the ideal nature or universal ground of law, but they are scarcely frightening. To the contrary, they promise the comfort of foundations, be these theological, philosophical or moral. By contrast, CLS theorising of law created anxiety and fear, in part by denying law any such comfort.

To be sure, in 2005 a memorious effort is required to recover the state of mind at ‘the height of the critical legal studies (cls) “Red scare” of the mid-1980s’, as Michael Fischl now puts it.22 Imagine: the critical thinkers about to take over the law school! Get real, we would now say. And yet, in Australia too, a certain ‘crisis through critique’ in the law school was played out at Macquarie, in the public media as well as through the usual academic channels of academic dispute.

Yet, for there to be such impact, theory-fear had to draw on some existing intellectual momentum. In the United States, momentum came in spades from the ‘legal realists’ of the 1930s and 1940s. Not that the American realists—Jerome Frank, Felix Cohen and Karl Llewellyn are major names—elevated theory about law into monster shape. To the contrary, theirs was an iconoclastic demolition of pretensions to ground law in anything like a unified higher-order norm or an objective legal science. As the antidote to such dreams, the realists propelled their readers towards a reckoning with grim reality—the reality of American law just the way it was—by satirising the other-worldly purity of legal theorists.

Where better to observe a realist dismantling of ‘transcendental nonsense’ than in Cohen’s image of juristic heaven, a place ‘reserved for the theoreticians of the law’, as revealed in dream to ‘a great German jurist’: von Jhering?23 Here at last ‘one met, face to face, the many concepts of jurisprudence in their absolute purity, freed from all entangling alliances with human life’. At last, the ‘most beautiful of legal problems’ could be solved:

Here one found a dialectic-hydraulic-interpretation press, which could press an indefinite number of meanings out of any text or statute, an apparatus for
constructing fictions, and a hair-splitting machine that could divide a single hair into 999,999 equal parts and, when operated by the most expert jurists, could split each of these parts into 999,999 equal parts. 24

Access to jurists’ heaven had one condition: you had to drink a draught of Lethe-water to erase the memory of the world. Yet, as Cohen writes, ‘for the most accomplished jurists the Lethean draught was entirely superfluous. They had nothing to forget.’ For the purist jurist, attaining oblivion is no problem. Nevertheless, ‘Von Jhering’s dream has been retold, in recent years, in the chapels of sociological, functional, institutional, scientific, experimental, realistic, and neo-realistic jurisprudence.’

This warning against getting a legal high on ‘pure ether’ in a jurisprudential chapel might not be fair, but—in keeping with the realist tradition—it is funny. Fun and intellectual energy together puncture previously reliable abstractions—formal rules and doctrine, norms and legal reason, absolute principles of right, imaginary foundations. Jurists might well cite these pure legal forms and envision a rule-governed universe. For the realists, though, such jurists were walkers on air, conjurors of magic words, delusional believers in a legal metaphysics. 26 No wonder an English positivist, the philosopher of law Herbert Hart, expressed a purist’s deep anxiety at what for him was the grim ‘nightmare’ of American legal realist ‘nihilism’. 27 Such anxiety made its contribution to the ‘fear of theory’ that critical legal studies inspired—locally and momentarily—in the later decades of last century.

At least three camps of critical legal scholars have emerged in those years. First, some embraced the realists’ commitment to exposing the hidden social workings of the law. Sometimes this has been refreshed with a new lexicon in which law’s ‘occlusions’—the power relations that law conceals and the alternatives that it suppresses—are brought to face the light of day. Talk of ‘the occluded’ is cousin to talk of ‘the repressed’. For a second camp, then, but with a psychoanalytic colouring, the aim became the critical recovery of law’s ‘unconscious’. 28 A third camp has addressed law’s ‘exclusions’: those subjects excluded from legal recognition in terms of their own professed sexual, racial and—more rarely—religious identities.

In these days of the demise of ‘the left’, it would be too easy to forget the impact of critiques of law by then Marxist scholars as different as Henri Lefèvre, Nicos Poulantzas and Bernard Edelman. In European academic settings, England included, their impact derived, in part, from their exposures of law’s complicities with the uneven distributions of wealth, power and human exploitation in class-based societies. But it lay also in an intellectual challenge: are you capable of rising to a new level of theoretical sophistication in the analysis of socio-legal relations? It might be mere nostalgia now to recall discussions of ‘the reproduction of the relations of production’, yet critical legal writing from the 1970s displayed an intellectual energy. The space of just three years saw the publication of Michel Maïille’s (1976) Une introduction critique au droit, Evgeni Pashukanis’s Law and Marxism: A General Theory, Nicos Poulantzas’s (1978) State, Power, Socialism, Bernard Edelman’s (1979) Ownership of the Image: Elements for a Marxist Theory of...
Law, and Paul Q Hirst’s (1979) *On Law and Ideology*. Historical materialists succeeded in implanting socio-theoretic abstraction into the study of law—for quite a time and even, locally at least, in England and Australia.

Interest in socio-economic ‘occlusions’ and political ‘exclusions’ could be fuelled by talk of hidden or excluded meanings. Literary theory and cultural studies donated such talk when promoting the ‘textualist turn’, a sort of exercise apparatus for critical jurists who wanted to disrupt standard legal hermeneutics. The gymnastic point was to practise unblocking conventional judicial interpretations that foreclosed on the wonderful yet useless meanings that a text could theoretically generate. Sometimes inspired by Derrida on *différance* or deferral, the critical unblocking called for a reader capable of opening themselves up to the ‘radical indeterminacy of meaning’, as it was put. Delaying arrival at a final meaning was sometimes metaphorised as a disruptive bodily transgression of limits arbitrarily imposed upon an illimitable creativity. In this setting, literary interpretation challenged juridical truth. Two hermeneutics clashed, the one as practised in the law schools and the nation’s courts, the other as drilled in literary seminars. Each hermeneutic sustains a specialised literate persona. The one could treat legal texts in self-confirming legal terms. The other could treat legal texts—judgments, reports and statutes—as literature, a performance that suspends commitment to the ostensible legal sense of things.

Critical jurists turned textualists deployed ‘radical indeterminacy’ to a second end: to argue the contingent nature of existing legal institutions and their practices. In a volume advertising itself as the ‘first work of contemporary jurisprudence systematically to apply critical philosophy to the common law’, founders of the British Critical Legal Conference make the ‘contingency of law’ central to uncovering the ‘political and cultural significance’ of the ‘substantive institutions of law’. In this manifesto, Douzinas, Goodrich and Hachamovitch announce ‘the breakdown of traditional conceptions of legal reason’ when confronted by ‘conceptions of the contingency of law and the plurality of legal experience’.

First, a congealed mentality is imputed to the common lawyers with their fixed belief in legal formal and objective reason. Second, the critical jurists confront this reified legality with law’s ‘contingency’, such that ‘[t]he demise of the various sciences of law and their accompanying substrate of systemic concepts throws legal theory back into the life-world’. Finally—as in a triptych of the soul’s passage to salvation—redeemed by this long-delayed opening to the ‘life-world’, the once dead law is resurrected into a higher-order but as yet ‘strange-sounding’ moral value:

To respond to the legality of the contingent is to formulate an account of the amorphous, incidental, fluid and indefinable realms of justice and judgement, carriage and miscarriage, politic and ethic of common law. This project is predicated upon a theoretical and political radicalism that returns to the specific histories and disciplines of common law and interrogates them in the strange-sounding name of justice.
Thus, ‘caught between the call to justice and a lack of any determinate criteria for ethical action, critical legal studies is left with responsibility—indeed, one might say it is left with the responsibility for responsibility’. Note the moves as the writers engage with the issue of ‘justice’: from radical indeterminacy to contingency of law to moral discourse. This is comforting, even religious.

Across the Atlantic, the critique of law has been less comforting, perhaps due to a resilient realist disposition. To end on CLS, I will say something on the group of scholars in the law school at the University of Colorado at Boulder: Pierre Schlag, Paul Campos and Stephen D Smith. Individually or together—as in their tri-authored *Against the Law*—Schlag, Campos and Smith have left as little as possible standing by way of unitary norms, moral or rational, that might furnish a higher-order justification for the actualities of American law.

For Schlag in particular, the target is the normative abstraction that academic legal scholars endlessly project on to law. His shorthand for this obsessive operation is ‘Langdellianism’. Like any non-incremental repetition, this laborious normative overloading is comic. The tracts continue to be written, as if capable of normatively guiding the judiciary. But—if Schlag is right—legislators, judges and the profession remain utterly indifferent to the scholars’ unusable theoretic industry. Do these guys never learn? Schlag thus remains the classic realist. His aim: to immunise students of law against the lure of higher-order principle.

It is worth staying with Schlag some paragraphs more, to grasp his *modus operandi*. The relentless academic rationalisers of legal judgments into higher-order norms might be enchanters—but they are themselves enchanted by the ethereal allures of a legal metaphysics and the high-sighted intellectual persona that legal reason promises. This is Schlag’s message in *The Enchantment of Reason*. Here are the opening lines:

> When one is enchanted by reason, it does not feel like enchantment at all. Instead, it feels quite reasonable. Suppose you were in thrall to the enchantment of reason, how would you know?... You would be trying to reason your way through everything. If you were subject to such an enchantment of reason, how could you tell?

Having extricated law from enchantment by reason, a realist conclusion is reached:

> Reason is unstable. Law is not benign. This is not a great combination. When reason runs out, but continues to rule, we get precisely what we see all around us—the excessive construction of a pervasively shallow form of life.

So, what does Schlag do next? Well, he just sort of stops, plays an amused gaze around the current legal landscape, and says no more. Not a very ‘whiggish’ thing to do, but then, are we any more convinced than him of law’s ineluctable advance to the promised land of reason, or for that matter, of humanity’s progress—with or without salvation—to a Habermasian transparent communication and cultural completion?
In critical legal studies Schlag-style, we see a juristic persona unwaveringly on target against the ‘obsession with normative questions (“What should the law be?”)” [that] undermines our capacity to comprehend the law that already is and our decidedly humble (if not entirely innocent) role in its operation’. This is one who would resist entrapment in any form of legal metaphysics in order to face the grim reality: the American legal system as it ‘already is’ is bad and beyond the pale of rationalist idealisation. Yet, bad though it is, the law itself is not the principal target. The attack is directed primarily at an intellectual ‘obsession’, the ‘messianic normativity’ of the doctrinal tradition.

We have reached Schlag’s threshold. Beyond the threshold lie the various othernesses, the territories of de-repressionists, anti-exclusionists and other CLS voices that Schlag might well include among the ‘perfectionist jurisprudences’ insofar as they preach a future ‘redemption’ for law. This is not his pitch:

As I see it, part of being an intellectual is having your own projects, your own intellectual agenda, your own sense of what to do—as opposed to simply following the default institutional paths laid out for you. Renouncing those default institutional paths, of course, is no easy matter.

The challenge is to proffer no normative program whatsoever for a motley American law that is ‘an admixture of thinking habits, jargons, ideals, anxieties, and canonical materials . . . reproduced with sufficient regularity . . . to produce the appearance of an intellectual discipline’. Schlag’s realist reticence can only disappoint those who seek for some higher law beyond the positive law:

Some legal thinkers are rendered quite anxious in the present moment. ‘What comes next?’ they want to know. ‘What will be next?’ they wonder. ‘What admirable vision of law will next capture the legal imagination?’ Maybe nothing. Maybe what comes next is that we stop treating ‘law’ as something to celebrate, expand, and worship.

In its way this is almost Epicurean: if we can’t know the gods, we therefore shouldn’t fight one another over higher-order truths. It is also Weber-like in its realism: facing the facts, as Weber wrote, is the only ethical question. Conversely, those other camps in CLS—the de-repressive and the anti-exclusionist—are voluble on accessing the ‘other’ of the law, be it the civilian or learned law tradition that the English common law has repressed, or the identities of subjects—African-American or Latino—whose disruptive narratives of personal experience American law has excluded from recognition.

Reluctant to commit to yet another ‘perfectionist jurisprudence’, Schlag warns against the ‘transcendental nonsense’ of making law seem good, let alone magically ‘the best it can be’. He closes the door on such normative inflations and moral idealisations. He issues memorable warnings against what is happening when liberal institutions are idealised as realisations of fundamental principle or when liberal legality is inflated to the status of a
higher law. And he shares his colleague Paul Campos’s incredulity at the
currency of the belief that ever more law will solve ever more social and
personal problems, an invasive ‘hypertrophic’ juridifying of American life
that Campos terms ‘jurismania’.47

Yet, isn’t there a yawning gap in all this? Schlag displays no interest
whatsoever in the historical liberal state and its prudential civil norms, for
instance an adherence to religious neutrality sustained—however im-
perfectly—by mundane lawyerly practices and administrative routines.
When Schlag describes the law as that ‘ugly bureaucratic noise that grinds
daily in the nation’s courts, legislatures, and agencies’,48 he is doing nothing
to recognise a juridical order that could be studied without an infusion of
theory-based presuppositions. But what would such a study look like?

A legal institution and a social theorist

Following two six-month periods spent observing the French Conseil d’Etat,
Bruno Latour’s *La fabrique du droit* proposes an ethnography of a public law
institutions at work. It is not without surprise. Early in the piece, Latour
admits to encountering among the lawyers of the Conseil a ‘subtlety without
need of foundations—even doctrinal—entirely typical of law yet capable of
constantly surprising the philosophically-minded ethnographer’.49 Here lies
the challenge. The intricate diversity of elements constituting the Conseil’s
regime—the multiple sections and offices (rapporteur, réviseur, commissaire
du gouvernement, président), the mix of technical procedures and legal
arguments, the citation of texts and precedents, the writing of opinions and
judgments, the court’s institutional proprieties, all the while working ‘dans
l’urgence’ (58)—suggests that ‘the work of the law’ will prove immune to
explanation in philosophical or social-theoretical terms. They are public
officials at work within the framework of a state, yet these French lawyers are
anything but Max Weber’s ‘automatons of the [civil-law] paragraph’:

> We have seen how, in the space of a few minutes, reasoning can pass through
political considerations, economic interests, open admissions of prejudice,
preoccupations with the opportunity, with justice, with good administration,
the whole of this serving to inflect, disturb, suspend the elaboration of law. And
yet, each time, the presence of all these elements is of itself insufficient: with one
word, the signal is given that now, it’s necessary to ‘begin to do some law’. (280)

Already by one-third distance, the ‘philosophically-minded’ observer of
French administrative law in operation displays symptoms of unease. It is as
if something is eluding his gaze:

> How is it possible? Is there really nothing higher than these infinitesimal
discussions on words and texts in this so-called ‘supreme’ court?, the
ethnographer asks himself . . . ‘Is there really nothing higher than the laws?’ (79)

It seems not. ‘Beyond this rather derisory institution, [there is] nothing that is
better, quicker, more effective, more economic—in particular, nothing that is
more just’ (80). Further observation of the Conseil’s management of legal
dossiers brings the ethnographer to the mid-point of his research. He is now growing suspicious of two standard social-theoretic perspectives on law and lawyers (152–154). The first perspective—associated with Pierre Bourdieu—sees law as an armature of the power relations in society. In this light, the lawyers of the Conseil would represent an ‘elaborate camouflage for relations of power that we must learn to overturn’. The second perspective would reduce the work of law to the application of a rule in a purely formal apparatus.

To embrace these two perspectives—sociologism and formalism—would entail ‘abandoning the sinuous pathways of [juridical] practice to follow a different reality, invisible to the eyes of the [legal] actors yet offering the explanation of their conduct: that of society and its violations; that of the rule and its own logic’ (153). The question arises: are these allegedly relational conditions of law’s possibility—social dissimulation and epistemological formalism—‘any more real than the law they’re claiming to explain’? An answer in the negative begins to form:

Far from following the sociologists’ and epistemologists’ contradictory advice to recover the deep reality of law, we’re choosing to remain on the surface, doggedly following the uncertain trail of the judgements in the course of which judges openly admit their prejudices while affirming that these don’t furnish the solution, or attach themselves passionately to the forms while constantly guarding against a fall into what they call ‘juridism’ or ‘formalism’. (154)

Only now, with this resolution to ‘remain on the surface’, can the ethnographer describe the work of the Conseil positively, that is, in its own terms as a mise en droit. The challenge is clear: ‘to make description of the law compatible with the practice of the judges’ (204). Various discoveries are made on the legal surface, including the officers’ trained ‘attitude of indifference’ (222, 250) and their reluctance to accord their conclusions ‘the grandiose air of the Undiscussable’ (253).

What has the once ‘philosophically-minded’ social theorist derived from his time with the Conseil? First, that explanations of the work of law by a ‘sociology of the social’ fail:

[How can law be explained by the influence of the social context, when law itself establishes an original form for the contextual relationships of persons, actions and texts, such that it is difficult to define the very notion of social context without having recourse to the legal apparatus. (278)]

In short, the reported explanation—‘society’—is weaker than the law it would explain.

A second lesson returns us to the issue of law and (deep) theory. ‘There is no point’, Latour writes, ‘in being profound in studying the law’ (284). To illustrate this, he refers to two cases resolved by the Conseil, on prescription of the ‘morning-after’ pill and on film censorship. In this work of the law, he finds:
nothing strong, nothing true, nothing sensational, nothing sentimental, nothing—in fact—just: instead, there is recall of a basic principle of non-contradiction, delicate and loose, always liable to review and reinterpretation, that avoids—in the present state of the texts—leaving too much incoherence in the scattered actions of humans. Nothing but surface. . . (286)

We are touching here on a crucial dimension of the rule of law in liberal constitutional states: legal relations 'hold and protect us—on condition that they remain on the surface, that they do not engage deeply, and that we too remain on the surface, not too deeply engaged, in order to follow and interpret them'.

At this juncture, though, 'the ethnographer despairs: will he ever be superficial enough to grasp the force of the law?' (286). This posture—and parable?—of indisposition towards theoretical 'deepening' serves Latour's intellectual platform. Suspending—and subverting?—the norms of existing social theory would advertise his own exceptional self-emancipation from such norms. It would also proclaim an unprecedented sensitivity—at last unmediated by abstraction—to the complex networks of manifold phenomena in the 'life-world'. But such transcendental trickery is another debate. Here Latour evidently nullifies the program of critical legal studies. He represents the law as an ultimately autonomous institution working away within its own internal logic, rather than exposed—contextually and historically—to multiple interferences. Yet, if a recent speculation is to be believed, one such interference has its relay in critical legal studies.

The jurist antinomian

'Today, a vast array of campaigns, with no apparent relation to the Christian project, such as, for example, the Critical Legal Studies Movement, side with protochristian anti-legalism.' Anton Schutz has something big in view: a cultural genealogy of legal critique whose dynamic is the relation of law and Christian anti-law (or gospel antinomianism). If he is right, normative antilegalism has been the main game for two millennia, since Paul's inauguration of the Christian campaign for love, freedom and faith, and against power, repression and the law that administers worldly life. Seen in this light, the 'foundational antinomianism of the Christian gospel' gains extraordinary credits, including the Critical Legal Studies movement:

Without the Pauline 'un-coupling from law' no Western Science, no Enlightenment anti-institutionalism, no socialist revolution, no post-modern human rights philosophy, can as much as be conceived, no social-peace-pampering Western-type 'civil society' as much as be dreamt of. (85, n 19)

The argument requires that we treat these diverse historical artefacts as effects of the one impulsion: the 'antinomian trend animating Western cultural evolution' (73). Generality aside, there is a specific provocation here for critical jurists and the theoretical moment. Anti-legal movements are to be seen as so many 'applications of the Christian effort of uncoupling-from-law'
To be sure, many of today’s ‘law-critical communities-in-campaign have since long ago disposed of any reference to their Christian or Pauline archetype’. Yet, though they deny it, ‘[i]n reality, of course, they are the living hallmarks of Christianity’s unique historical success’ (73). Seen in this optic, critical legal studies—whatever its theoretical claims—becomes one among other ‘spirituality-based alternatives to the injunctions of law’ (80).

By inviting us to wonder at ‘the exorbitant presence of Christian anti-institutionalism in the Western past and its necessary formative effects on the present’ (84), speculative history in this style too easily has us looking beyond the specificities of critical legal studies and the formation of the jurist in our own ‘moment of theory’. Yet, kept within bounds, it allows us to ask whether our ‘moment of theory’—as an anti-legal disposition—belongs to a longer antinomian history.

The ‘moment of theory’ has thus posed a classic question for our time: how is the jurist to be formed? Is to be a jurist to be shallow, or is it to be deep? Each alternative has its history.

Today’s offices of positive law define the persona they seek in terms of legal-technical attributes that are quarantined—at least in some measure—from the domains of religion and morality. In the Conseil d’Etat, for instance, ‘[t]he judge is not without conscience, but he puts his scruples elsewhere’.55 Perhaps in these state lawyers’ accomplished act of juristic self-separation we discern an echo of a particular European political-legal history: the secularisation of a legal framework as attempted by early modern jurists of the civilian *jus publicum*, mindful of the political need for a non-theocratic jurisprudence. For the English scene, we have Max Weber’s depiction of the estate of common lawyers as prudential casuists, the pragmatic creatures of a legal instruction that instills a positive capacity to work within the established juridical order. Theirs remains a capacity for superficial thinking that can skim—or simply evade—the depths of theoretical complexity. Such a persona is easily complicit with a legal positivism that would too neatly abstract law as an autonomous entity from its religious, moral and political settings.

The persona of the critical legal theorist—the anti-lawyer—demands something more contradictory. With the attributes of a hybrid or *persona duplex*, on the one side this persona rests upon a positive legal education in which theoretical ‘deepenings’ of law might play little or no role. On the other side, it rests upon an intellectual ‘uncoupling from law’ which allows access to critical reflections on law’s practice and context. And in its openness to donations from other disciplines, it seeks a space for the critical jurist to intervene in the training of tomorrow’s lawyers.

Does this critical ‘uncoupling from law’ have its particular genealogy? For Schutz, perhaps eccentrically, the genealogy is millennial Christian anti-legalism. The present article has raised a lesser possibility: with the academicising of professional legal education, we have witnessed a donation of humanities theorising and its reception in some parts of the legal academy. In this donation and reception, should we see another instance of Pauline antinomianism? One is almost tempted to answer yes, if only to recognise that
normative separations of law from its theological-moral roots have been historically incomplete, hence the ‘messianic normativity’ that provides Pierre Schlag’s hydra-headed adversary. Yet, given its plural origins, there is reason to hesitate before reducing the recent work of critical theorising in the domain of law to just another episode of Christian anti-institutional proselytising.

Notes

3 I am referring to the textually-oriented ‘Law and Literature’ school. With a certain virtuosity—and sometimes but not always with humour—the adherents of ‘Law and Economics’ seek to align the juridical order with market theory.  
10 Simpson, Legal Theory, p 282.  
13 Foley, Silence of Constitutions, p 23.  
14 Foley, Silence of Constitutions, p 34.  
15 In fact, in this period major inquiries were undertaken in respect of legal education reform. The 1983 Law and Learning/La droit et le savoir (the Arthurs Report) in Canada and the 1987  
16 The Silence of Constitutions, p 34.  
19 Left-legal and marxisant scholars have sustained substantial work in legal sociology and socio-legal research, ranging from empirical-statistical investigations to emancipatory visions of new social relations. Moves to study ‘law in context’ display both tendencies. Names include Ric Abel (in the American scene) and Alan Hunt (in the British).  
THE CRITICAL JURIST AND THE MOMENT OF THEORY

27 H L A Hart, ‘American Jurisprudence through English Eyes: The Nightmare and the Noble Dream’, Georgia Law Review 11(5), 1977, pp 969–989. The ‘nightmare’ was the realists’ recognition of adjudication as ‘essentially a form of lawmaking’ and their treatment of this state of affairs as the precondition of understanding the nature of law (pp 973–974). Specifically, in the nightmare vision, ‘legal rules are treated as displaceable presumptions or working hypotheses, to be modified or rejected if the predictable consequences of their application in a shifting social context proved unsatisfactory’ (p 976). Jerome Frank’s Law and the Modern Mind is singled out as a particular horror.
35 As Dean of the Harvard Law School in the late nineteenth century, Langdell pursued the academic project of an axiological science of law. Such a project was assisted by the rise of the federal jurisdiction, independent of the territorially bound localism of state laws.
37 Duncan Kennedy, ‘Pierre Schlag’s The Enchantment of Reason’, University of Miami Law Review 57, 2003, p 513, memorably characterises The Enchantment of Reason as ‘a book that so vigorously refuses not just political correctness but all concession to our desire that enlightenment should be politically edifying’.
39 Schlag, Enchantment, p 145.
42 Schlag, Laying Down the Law, p 10.
44 Schlag, Enchantment, p 12.
45 Schlag, Laying Down the Law, p 166.
46 The phrase is from Ronald Dworkin, ‘The 1984 McCorkle Lecture: Law’s Ambition for Itself’, Virginia Law Review 71, 1984, p 173. The magicians are the moral philosophers. It falls to them to work out ‘the purer form of law within and beyond the law we have’ (Ronald Dworkin, Law’s Empire, London: Fontana, 1986, p 407). Undaunted, Schlag suggests that the philosopher Dworkin, despite authoring Law’s Empire, could never get even a walk-on part in the down and dirty world of L.A. Law.
47 Paul Campos, Jurismania: The Madness of American Law, New York: Oxford University Press, 1998. Clearly, this is a different take on 'law and madness' from that cited at the outset of the present article.
48 Schlag, Laying Down the Law, p 5.
49 Bruno Latour, La Fabrique du droit. Une éthnographie du Conseil d’Etat, Paris: Editions La Découverte, 2002, p 26. All quotations from Latour are in my translation. Until otherwise indicated, all references are to this work, and are given as page numbers in parentheses in the text.
50 Latour dismisses Bourdieu's concept of an ‘autonomous juridical field’ as a ploy allowing the latter to deflect a charge of reductive ‘sociologism’ (152). For savage criticism of the damage done by ‘le sociologisme’ to French legal education since the 1960s, see Legendre, *Sur la question dogmatique*, pp 168–169, 188.

51 Alan Watson, *Failures of the Legal Imagination*, Philadelphia, PA: University of Philadelphia Press, 1988, p 20, presents a historically grounded version of the hypothesis that, from the juridical point of view, nothing necessarily follows from the mere fact of social change:

The proposition is that in any country, approaches to lawmaking (whether by legislators, judges or jurists), the applicability of law to social institutions, the structure of the legal system, the formulation and scope of legal rules are all in very large measure the result of past history and overwhelmingly the result of past legal history, and that the input of other even contemporary societal forces is correspondingly slight.

Societal forces change, but for the most part law ‘remains, not because of any particular message, but simply because it is there’ (55).

52 For Schlag, *Enchantment*, p 44, ‘shallowness is particularly troublesome for those intellectuals whose ambition is to perfect thinking’.

53 Anton Schutz, ‘“Legal Critique”: Elements for a Genealogy’, *Law and Critique* 16, 2005, p 81. Until otherwise indicated, all references are to this work, and are given as page numbers in parentheses in the text.

54 Schutz acknowledges Pierre Legendre’s account of ‘christian-postchristian anti-legalism as the protagonist of Western culture’ (87).
