DEMYSTIFYING CRITICAL LEGAL STUDIES

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A THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

ADELAIDE LAW SCHOOL
THE UNIVERSITY OF ADELAIDE

FEBRUARY 2019

DECLARATION

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THESIS ABSTRACT

This thesis makes the claim that Critical Legal Studies provides a way to demystify law but that Critical Legal Studies is itself mystified. In response to the duality of this claim, this thesis presents a series of demystifications for the (re)use of Critical Legal Studies. The approach taken in this thesis follows the work of Duncan Kennedy and is focused on the US-based Critical Legal Studies.

Starting broadly, the introductory chapter presents Critical Legal Studies as a legal-subculture. This framework contextualises the position of the Crits within law schools and the reactions they received from those in the dominant legal culture. This position is analysed through the lens of a moral panic.

To categorise the various "Critical Legal Studies", Chapter One presents a *Critical Legal Studies Family Tree*. Drawing from the foundational work of Margaret Davies, Costas Douzinas and Adam Gearey. The creation of this structure highlights the decline and death of Critical Legal Studies in the mid-1990s. However, the death does not end Critical Legal Studies, and this thesis argues instead that it creates two US-based Critical Legal Studies: cls1 and cls3. The second chapter analyses where the death of cls1 is discussed with a focus on generalist texts. These accounts of Critical Legal Studies are critically read and it is determined that the death of cls1 is usually ignored or overlooked.

In Chapters Three and Four, the death of cls1 and what this means for cls3 is investigated. First via a framework that presents cls1 as *haunting* cls3. Drawing a literary analogy to Charles Dickens *A Christmas Carol*, it is argued that cls1 *passively* haunts cls3, resulting in a constricted and regressive Critical Legal Studies. This haunting is then demonstrated through a comparative reading of a cls1 and cls3 text, addressing the similarities in theme, but the vast differences in application. Having outlined the issues with cls3, this thesis presents a series of critiques on cls1 to see what can be learnt about the original Critical Legal Studies. It is concluded that the pre-Critical Race Theorists provided the most useful critiques. Repurposing the work of Patricia J Williams, the final act of demystification presents a scale to relate cls1 works via their interaction with law or non-law.

This thesis argues that the demystification of Critical Legal Studies is a necessary step in reapplying and reusing its tools and approaches to critique contemporary law. The series of demystifications within this thesis provide a foundation for (re)using Critical Legal Studies as an effective mode of critique.

ACKNOWLEDGEMENTS

An engagement, several deaths, and the purchase of a miniature four-wheel-drive ensure that the period spent researching and writing this dissertation was filled with equally up, down, and banal memories from other facets of life.

My deepest gratitude and thanks to my family who have been a tremendous support during this process. To my father for his inspiration; my younger brother Angus and his partner Carly, who would ask "how's CLS?" whilst providing me with pastries; and especially my youngest brother, Rupert, who possesses an uncanny ability to make straight lines in word-processing software, truly the MVP.

To my darling fiancée, Elizabeth, who endured and continues to endure my rants on hierarchies and demystification. Your viticultural knowledge and ability to nod at my statements on Charles Dickens and Critical Legal Theory, means more than you will ever know.

To the often-overlooked menagerie of animals who don't (or can't) leave and have provided (willingly or not) both a sounding board for this thesis' arguments and a necessary reprieve from them: Bob, Lucifer, Winston, Hermione, Elfia, and Zeus – thank you.

Throughout the undertaking of this PhD, I have been privileged to have the support of those within the broad field of Critical Legal Studies My sincerest thanks to Peter Goodrich, whose willingness to discuss the content of this thesis, on several occasions, in different countries, has been invaluable. My thanks also to Bob Gordon and Peter Gabel, both of whom allowed me to better understand CLS as a pedagogical technique.

My sincerest thanks to the members of the Australasian Law Literature and Humanities Association and the Kent Summer School in Critical Theory who provide necessary forums and space to discuss these broad areas of law.

And last, but surely not least in any way, my supervisors Paul Babie and Peter Burdon who provided economic and intellectual support within the hierarchy of the law school. I thank you both for your time, effort, and bearing-with-it-ness of my drafts and ideas. Thank you for the support I have received throughout my candidature – Peter, thank you for the coffees. Additional thanks to the Adelaide Law School more generally for the resources and support during my PhD.

For Christina and Connor – both of whom should still be here to read this.

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GLOSSARY OF TERMS

CCLS – *The Conference on Critical Legal Studies*

CLC – *Critical Legal Conference*

CLS – Critical Legal Studies (undefined)

cls1 – *The US-based Critical Legal Studies 1977 – 1995*

cls2 – The British Critical Legal Studies 1984 – continuing

cls3 – The US-based Critical Legal Studies 1995 – continuing

Crit – *Proponents and practitioners of the US-based Critical Legal Studies*

Brit-Crit – *Proponents and practitioners of the British Critical Legal Studies*

Introduction

Demystifying Critical Legal Studies

'an intellectual critique is not a disembodied text but is rather always spoken or written by a living being who exerts his own presence through it and toward his listener or reader, and that it is on this meta-plane of reciprocity, of being-together and seeing the object of critique together in a new light, that a better world starts to be born each time that it happens'

Peter Gabel –
The force that through the green fuse drives the flower

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I. INTRODUCTION

Critical Legal Studies began with the Conference on Critical Legal Studies in 1977 in Madison, Wisconsin.[1] Drawing on the counterculture and progressive views of the time, as well as continental philosophy and the recent history of American Legal Realism, the conference spawned a network of anti-liberal legal scholars.[2] At the heart of the movement was a challenge to liberal law through a series of techniques aimed at uncovering hidden power structures.[3] The techniques created and used by the "Crits", commonly remembered as "trashing", "law as politics", and "the indeterminacy of law", were synonymous and often interchangeable with 'demystification',[4] deligitimation',[5] 'debunking',[6] and 'deconstruction'.[7] This terminology frames how Critical Legal Studies both saw and interacted with law. Using these, and other methods of legal critique and pedagogy, Critical Legal Studies sought to "demystify" dominant legal structures and institutions.

Throughout the 1980s the Critical Legal Studies Movement flourished, inspiring similar movements across the world.[8] However, leading into the 1990s, Critical Legal Studies experienced a sharp decline and by 1995 key Crits were openly declaring its death.[9] Despite its announced death, Critical Legal Studies continued, but in a notably reduced capacity; its present state a far cry from the impact and insight it once offered. This thesis proposes that Critical Legal Studies did not recover from this death and has stagnated. Taking this as the

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[1] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (New York University Press, 2004) 203; Tor Krever, Carl Lisberger and Max Utzschneider, 'Law on the Left: A Conversation with Duncan Kennedy' (2015) 10(1) *Unbound* 1, 21.

[2] Krever, Lisberger and Utzschneider, above n 1, 23.

[3] See eg, Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1989) 89 *Harvard Law Review* 1685.

[4] Alan D Freeman, 'Truth And Mystification In Legal Scholarship' (1981) 90(5) *The Yale Law Journal* 1229; Mark Tushnet, 'Critical Legal Studies: An Introduction to its Origins and Underpinnings' (1986) 36 *Journal of Legal Education* 505, 506 nn 7.

[5] Freeman, above n 4.

[6] Tushnet, 'Origins and Underpinnings', above n4.

[7] Relating to indeterminacy: Clare Dalton, 'An Essay In The Deconstruction Of Contract Doctrine' (1985) 94(5) *The Yale Law Journal* 997, 1007. Relating to trashing: see, Jerry L Anderson, 'Law School Enters The Matrix: Teaching Critical Legal Studies' (2004) 54(2) *Journal of Legal Education* 201, 209.

[8] See Chapter One, Part II The Critical Legal Studies Family Tree.

[9] Hope Yen, 'As HLS Mulls Its Mission, CLS Scholars Remain Quiet', *Harvard Law Record* (Cambridge), December 1 1995, 2; Hope Yen, 'Crits at HLS a Dying Breed?', *Harvard Law Record* (Cambridge), December 1 1995, 4.

current state of Critical Legal Studies, this thesis argues that Critical Legal Studies is itself "mystified". Aside from its stagnation, this thesis posits that the mystified nature of Critical Legal Studies is due to its non-doctrinal approach, its disparate subject matter, and the sheer number of "Critical Legal Studies" works. This thesis proposes that the mystification of Critical Legal Studies hinders any meaningful contemporary engagement with its tools or insights into law.

This thesis proposes that it is possible for Critical Legal Studies to be demystified. Taking a meta-view of Critical Legal Studies, this thesis identifies key points of mystification, before presenting strategies and proposals for their demystification. This thesis' aim is for these demystifications to challenge how Critical Legal Studies has been remembered and to offer new ways of interaction with Critical Legal Studies. To present the argument that Critical Legal Studies is mystified, it is necessary to return to its roots and the aims that early-Critical Legal Studies presented. Once this history has been discussed, this chapter will contextualise Critical Legal Studies as a legal-subculture, framing its position within the law school. The concept of a legal-subculture also highlights the types of reaction the Crits received, within the framework of a moral panic. Having presented this demystification, this chapter concludes with an overview of the arguments that make up this thesis.

II. THE ROOTS OF MYSTIFICATION

Critical Legal Studies, often reduced to "cls", was not a doctrinal approach to critiquing law, but a network[10] and political location[11] that gave like-minded legal scholars a place to converge. As the legal historian and early-Crit, Robert Gordon articulates:

[10] Krever, Lisberger and Utzschneider, above n 1, 23.
[11] Mark Tushnet, 'Critical Legal Studies: A Political History' (1991) 100(5) *Yale Law Journal* 1515, 1517.

> Critical Legal Studies is basically a movement of legal intellectuals, originating in intellectual quarrels with their own legal education. Most activist students of the 1960s who were involved in radical or left-liberal politics found the studiedly anti-political teaching of that time simply irrelevant to their concerns; they scrounged such slim practical pickings form law school as they could, got the degree, and moved on. But the 1960s law students who went on to form the core of cls mostly became teachers themselves, and so were motivated to engage with the content and style of orthodox doctrinal teaching and scholarship.[12]

Duncan Kennedy, a founder of Critical Legal Studies, adds to Gordon's explanation with a reflection on two branches of cls:

> I guess critical legal studies has two aspects. It's a scholarly literature and it has also been a network of people who were thinking of themselves as activists in law school politics. Initially, the scholarly literature was produced by the same people who were doing the law school activism. Critical legal studies is not a theory. It's basically this literature produced by this network of people.[13]

From both Gordon and Kennedy's accounts, a picture starts to develop of Critical Legal Studies as a network of left-wing activists, focused on legal education and law more generally. These initial observations manifest in Kennedy's seminal, self-published *Legal Education and the Reproduction of Hierarchy: a Polemic Against the System*.[14] As the title implies, the book challenged the systemic way American law schools taught and interacted with law and the legal profession. In the preface to the first edition, Kennedy presents an overview of the text, which affirms its position within the vision he and Gordon identified above:

> This is an essay about the role of legal education in American social life. It is a description of the ways in which legal education contributes to the reproduction of illegitimate hierarchy in the bar and in society.

[12] Robert W Gordon, 'Critical Legal Studies As A Teaching Method, Against The Background Of The Intellectual Politics Of Modern Legal Education In The United States' (1989) *Legal Education Review* 59, 75.
[13] Gerard J Clark, 'A Conversation With Duncan Kennedy' *The Suffolk University Law School Journal* (1994) 24(2) 56, 56.
[14] Kennedy, *Hierarchy*, above n 1.

> And it suggests ways in which left students and teachers who are determined not to let law school demobilize them can make the experience part of a left activist practice of social transformation.[15]

However, while Kennedy's *Legal Education and the Reproduction of Hierarchy* and Gordon's 'Critical Legal Studies as a Teaching Method' present these similar insights and critiques, Critical Legal Studies was not confined to one target or one method. Instead the network was rhizomatic in its development,[16] and refused to be static or easily defined. The Crits prided themselves on this, as fellow Crit Mark Kelman discusses when identifying the unique approach of cls: 'What differentiated 'Critical Legal Studies, especially in comparison with left academic movements of the past is its focus on ambiguity, its resolute refusal to see a synthesis in every set of contradictions'.[17] As Gordon confirms, the Crits applied this logic to the legal system itself:

> For perhaps the most central CLS tenet is that the legal system is not a single, integral system at all. Rather it is a teeming jungle of multiple, overlapping, contradictory systems, each pregnant at every historical moment with multiple alternative interpretations, possibilities and trajectories of future development. Each alternative is perfectly consistent with the system's operating premises and processing logic but only a few in any given moment are selected for adoption.[18]

Viewing "law" as a multifaceted and contradictory series of systems, rather than one unified or synthesised model, offers some explanation for the wide-berth of critiques which fell under the cls banner. In 1984 a sample of these various Critical Legal Studies' subjects and approaches were captured in the ambitious 'A Bibliography of Critical Legal Studies' compiled by Duncan Kennedy and Karl Klare. However, the variety in the works reflected Gordon's view of the legal system, with cls becoming a 'teeming jungle' of systems and approaches. In

[15] Ibid 15.
[16] Gilles Deleuze and Felix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (Brian Massumi trans, Bloomsbury, 2015) 10.
[17] Mark G Kelman, 'Trashing' (1984) 36(1/2) *Stanford Law Review* 293, 296.
[18] Gordon, above n 12, 77.

2005, China Miéville outlined this issue and the unwanted ramifications that came from such an approach, stating: 'there are lacunae and problems with … the CLS approach in general. One problem lies in the very eclecticism which some see as CLS's strength. This can lead to a blunting of analysis, as a plethora of conflicting influences are lumped together'.[19] Miéville takes his analysis further, outlining that the lack of a unified base, or a doctrinal method hinders cls: 'The sometimes indiscriminate attitude to theory comes at a price. The profusion of influences has left CLS scholars with powerful critical tools, but a poverty of systematic *theory*'.[20]

Miéville's critique of Critical Legal Studies is understandable, and while not unique,[21] it offers a way to address this issue through the implementation of the systemic or doctrinal grounding of Critical Legal Studies. However, any attempt to ground cls in this way, pulls it closer to the apparatuses it identified and railed against in other methods and institutions.[22] Even where cls reflected the varied and multiple systems in law itself, it never succumbed to a definitive structure. Kennedy reflects on this aspect of the organisation, seen in the Critical Legal Studies' approaches to critique and scholarship more broadly:

> Don't forget the brilliance of CLS scholarship and the creativity of the organizing strategy, which eschewed both formal organizational structure and the development of any kind of CLS program or manifesto but nonetheless managed to avoid being co-opted by the smug liberal elitists or destroyed by the authoritarians and random crazies who are drawn like flies to honey by apparently unboundaried left ventures.[23]

Kennedy's refection on this success in 2004, fails to consider or reconcile how the measures put in place to protect cls actively excluded, and continue to exclude, contemporary

[19] China Miéville, *Between Equal Rights: A Marxist Theory Of International Law* (Koninklijke Brill NV, 2005) 55.
[20] Ibid 56.
[21] See Chapter Five.
[22] Kennedy, *Hierarchy*, above n 1.
[23] Ibid 206.

applications by those sympathetic to its cause. One argument, presented by fellow founding Crit Roberto Unger, was that cls was only something temporary: 'Critical legal studies was never intended to generate a permanent genre of legal writing, or to take its place among a standing cast of schools of legal theory. It was a disruptive engagement in a particular circumstance'.[24] While one might respect this founding Crit's view on the "intention" of Critical Legal Studies, this position is not reflective of its impact or influence. Critical Legal Studies has had an expansive effect on law internationally,[25] it offers a body of work on a wide-berth of legal topics which are a source of methods and critique from a politically left location. This thesis proposes that an impasse sits between the Crit's original intent for cls and those sympathetic to cls who find its contemporary use blunted by its contradictions.[26] It is this state with which this thesis engages and offers a position on how this impasse may be resolved. This thesis does not offer the implementation of a doctrinal system or grounding of Critical Legal Studies, instead it posits that Critical Legal Studies is mystified and presents a number of ways in which it can be demystified.

The first demystification presented in this introductory chapter argues that Critical Legal Studies is a legal-subculture. The framework of a subculture and its implied relationship with the dominant culture, provides clarity around the self-proclaimed 'new left intelligentsia committed at once to theory and to practice'.[27] This framing of Critical Legal Studies offers a novel way of interacting with cls, demystifying issues around its position within the law school, the specific language it used, and the criticisms it received. This chapter outlines why a legal-subculture benefits the demystification of Critical Legal Studies, comparing it to other potential and existing categorisations, before addressing the subcultural effect of Critical Legal Studies as a moral panic. Having presented the rationale for framing Critical Legal Studies as a legal-

[24] Roberto Mangabeira Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso, 2015) 4.
[25] See Chapter One.
[26] Miéville, above n 19, 56.
[27] Duncan Kennedy, 'Critical Labor Law Theory: A Comment' (1981) 4 *Industrial Relations Law Journal* 503, 506.

subculture, this chapter then outlines how this thesis will proceed, addressing the further demystifications to be undertaken.

III. Counterculture, Minor Jurisprudence, and Legal-Subculture

This section will address the countercultural roots of Critical Legal Studies, before identifying the more appropriate categorisation as a legal-subculture. A legal-subculture will then be contrasted with minor jurisprudence, before demonstrating the benefits of a subcultural lens to understand the language and critiques of Critical Legal Studies. While not new, the categorisation of Critical Legal Studies as a legal-subculture is uncommon and might be applied more meaningfully. In a 1988 article offering assessment and advice to Critical Legal Studies,[28] Cornel West uses and repeats the phrase 'academic subcultures like critical legal studies'.[29] In context, West presents Critical Legal Studies as emblematic of left-wing disruptive approaches in academia. The use presented by West is logical in context and does not warrant any time or analysis on what this subculture might mean generally.

Similarly, there are other works which take a cultural studies' view of Critical Legal Studies, notably the 1995 *Legal Studies as Cultural Studies: a reader in (post)modern critical theory*,[30] which has several chapters addressing cls, none of which engage with it as a legal-subculture. The closest to a subcultural analysis Critical Legal Studies has received is in Peter Goodrich's *Law in the Courts of Love: Literature and Other Minor Jurisprudences*.[31] The book

[28] Cornel West, 'Reassessing The Critical Legal Studies Movement' (1988) 34 *Loyola Law Review* 265.
[29] Ibid 267.
[30] Jerry D Leonard (ed), *Legal studies as Cultural Studies: a reader in (post) modern critical theory* (State University of New York Press, 1995). Although it is focused on politics rather than culture, David Kairys (ed), *The Politics of Law* A *Progressive Critique* (Pantheon Books, revised ed, 1990) also covers similar ground.

[31] Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (Routledge, 1996).

presents a number of minor jurisprudences, including the final chapter: 'Sleeping With the Enemy: An Essay on the Politics of Critical Legal Studies in America'.[32]

The use of "subculture" in relation to cls is ostensibly rare, however, the Crits have used similar terminology to describe their roots, specifically with their involvement in the 1960s and 70s counterculture movement.[33] Addressing the development and connection between the early-Crits, Kennedy states that '[m]any had been activists or counterculturalists of one kind or another and/or had been exposed to critical theory in the humanities or social sciences in one of its myriad American forms of the 1970s'.[34] These roots also appear in critiques of cls, with Melissa Murray's review of Kennedy's *Legal Education and the Reproduction of Hierarchy*, referring to the original self-published version as 'an underground counterculture manifesto'.[35] However, a clear distinction needs to be made here, while similar, a counterculture and a subculture are not synonymous. As the names denote, a counterculture is in opposition to a dominant culture, it "counters" it, while a subculture occurs under or below the dominant culture. The location of Critical Legal Studies within university law schools, is problematic for a counterculture which 'poses itself in total opposition to the dominant culture. It takes the values of the dominant culture and redefines them negatively'.[36]

For Critical Legal Studies to be a true counterculture it needed to be positioned in opposition to law schools, and from a different location. Instead as Dick Hebdige states '[s]ubcultures represent "noise" (as opposed to sound) [and] interference in the orderly

[32] Ibid 185-219.
[33] See David Fraser, 'If I Had A Rocket Launcher: Critical Legal Studies As Moral Terrorism' (1989-1990) 41 *The Hastings Law Journal* 777, 777.
[34] Kennedy, *Hierarchy*, above n 1, 205.
[35] Melissa E Murray, '"I'd Like to Thank the Academy": Eminem, Duncan Kennedy, and the Limits of Critique' (2005) 55 (1/2) *Journal of Legal Education* 65, 66.
[36] Ralph W Larkin, 'Counterculture: 1960s and Beyond' (2015) 5 *International Encyclopedia of the Social & Behavioral Sciences 2nd Edition* 73, 73; For a more nuanced discussion on "counter" movements in legal research, see, Peter Burdon and James Martel, 'Environmentalism and an anarchist research method' in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law: A Handbook* (Elgar, 2017) 316, 323-336.

sequence';[37] subcultures are disruptive and challenging, but "under" the dominant culture. Importantly, there is a significant difference between cls as a counterculture and cls being inextricably linked to the 1960s-70s counterculture movement. This thesis argues that cls was not itself a counterculture, but the influence of the counterculture movement aided its development and current mystified status. This thesis proposes that cls was a legal-subculture heavily influenced by the counterculture movement.

Before presenting cls as a legal-subculture, the similar concept of minor jurisprudence will be addressed. A legally specific term, 'minor jurisprudence' was developed in the 1990s to recognise historic and contemporary 'rebels, critics, marginals, aliens, women and outsiders who over time repeatedly challenge the dominance of any singular system of legal norms'.[38] Given the similarities between minor jurisprudence and a legal-subculture, a distinction will be made as to why this thesis has proposed a legal-subculture in favour of a minor jurisprudence.

Peter Goodrich classified cls as a minor jurisprudence with its inclusion in his 1996 book *Law in the Courts of Love*. The chapter, 'Sleeping With the Enemy' was originally published as an article in 1993[39] and was republished in 1995's *Legal Studies as Cultural Studies*.[40] The article itself is a critique of cls, identifying where and how it 'failed in its radicalism'.[41] Whilst the article presents an astute critique of Critical Legal Studies, its importance here is due to its inclusion as a "minor jurisprudence". Minor jurisprudence can be traced from three sources leading to its application to Critical Legal Studies. Originating from the use of 'minor literature' by Gilles Deleuze and Félix Guattari,[42] the term was adapted and reimagined in its application to law as a "minor jurisprudence". This adaptation occurred

[37] Dick Hebdidge, *Subculture: The Meaning of Style* (Routledge, 1989) 90.
[38] Goodrich, *Law in the Courts of Love*, above n 31, 2.
[39] Peter Goodrich, 'Sleeping with the Enemy: An Essay on the Politics of Critical Legal Studies in America' (1993) 68(2) *New York University Law Review* 389.
[40] Leonard, above n 30.
[41] Goodrich, *Law in the Courts of Love*, above n 31, 186.
[42] Gilles Deleuze and Félix Guattari, "What is a Minor Literature?' (Robert Brinkley trans) (1983) 11(3) *Mississippi Review* 13, 16; See also Gilles Deleuze and Félix Guattari, *Kafka: Towards a Minor Literature* (Dana Polan, University of Minnesota Press, 1986) [trans of: *Kafka: pour une literature mineure* (first published 1975)].

separately by both Panu Minkkinen and Peter Goodrich, as its 'two distinct incarnations'.[43] All three sources aid in the positioning of Critical Legal Studies as a minor jurisprudence.

Deleuze and Guattari defined a minor literature with reference to Franz Kafka, as 'not the literature of a minor language but the literature a minority makes in a major language'.[44] The authors categorise minor literature with three characteristics: the deterritorialization of the language, the connection of the individual and the political, and the collective arrangement of utterances.[45] Chronologically, Minkkinen's adaptation came next,[46] and while he and Goodrich tackle the same original text, Minkkinen focused more on Kafka's role as a minor jurisprudent. Minkkinen sees the transition between literature and law as evident in Kafka's texts, stating that Kafka was able to 'unravel the essence of law and see the legal phenomenon as it truly is'.[47] Minkkinen continues: 'outside the realms of all major literary traditions, Kafka cannot be read merely as an author trying to describe a particular life and its circumstances but, rather, as the initiator of a political program.[48] Minkkinen or Deleuze and Guattari's readings of Kafka could be applied to Critical Legal Studies, however it is Goodrich's focus on law more generally, which creates the applicable framework:

> A minor jurisprudence is one which neither aspires nor pretends to be the only law or universal jurisprudence. Its referent is a law whose jurisdiction is neither jealous of other jurisdictions nor fearful of alternative disciplines. It represents the strangeness of language and so the possibilities of interpretation as also of plural forms of knowledge. A minor jurisprudence … is a challenge to the science of law and a threat to its monopoly of legal knowledge. *It challenges the law of masters, the genre and categories of the established institution of doctrine and its artificial and paper rules*.[49]

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[43] Christopher Tomlins, 'Law As …IV: Minor Jurisprudence in Historical Key. An Introduction' (2017) 17 *Law Text Culture* 1, 2.
[44] Deleuze and Guattari, 'What is a Minor Literature?', above n 42, 16.
[45] Ibid 18.
[46] Panu Minkkinen, 'The Radiance of Justice: On The Minor Jurisprudence of Franz Kafka' (1994) 3 *Social & Legal Studies* 349.
[47] Ibid 358.
[48] Ibid 357.
[49] Goodrich, *Law in the Courts of Love*, above n 31, 2 (my emphasis); See also Deleuze and Guattari, 'What is a Minor Literature?', above n 42, 17: and their use of "master".

For Critical Legal Studies, the application of the last line is the most pertinent, with those preceding to fit in certain, but not all applications. Thus, the application to Critical Legal Studies is good, but not perfect, with Goodrich's own chapter and critique of cls presented as what it could have done better; how to achieve the full-aim of minor jurisprudence. From this perspective there is still merit in reapplying this lens to Critical Legal Studies, however, minor jurisprudence is so far an underutilised term and as such lacks the cachet and development that "subculture" has benefitted from. With the exception of Elena Loizidou's 1999 article 'Sex @ the End of the Twentieth Century: Some Re-Marks on a Minor Jurisprudence'[50] and Olivia Barr's PhD thesis 'A Minor Jurisprudence of Movement',[51] there has been little development of the term. In 2016 the idea of minor jurisprudence was revisited through a symposium, with the papers collated by Christopher Tomlins and published in *Law Text Culture* as 'Law As… Minor Jurisprudence in Historical Key'.[52] While some of these papers present new ways to think of and on minor jurisprudence,[53] they do not offer the structure needed to demystify Critical Legal Studies, a structure which can be found in the application of a legal-subculture.

A. *Language, Comics, and the Roots of CLS*

The Crits viewed law as a culture,[54] however, they didn't see themselves as a legal-subculture, instead presenting themselves as a network or political location.[55] It is plausible, however, that

[50] Elena Loizidou, 'Sex @ the End of the Twentieth Century: Some Re-Marks on a Minor Jurisprudence' (1999) 10 *Law and Critique* 71.
[51] Olivia M Barr, *A Minor Jurisprudence of Movement* (PhD Thesis, Melbourne University Law School, 2012).
[52] (2017) 17 *Law Text Culture* 1-298.
[53] See generally Peter Goodrich, 'How Strange The Change From Major To Minor' (2017) 17 *Law Text Culture* 30; Mark Antaki, 'Making Sense of Minor Jurisprudence' (2017) 17 *Law Text Culture* 54.
[54] See, eg, Dalton, above n 7, 999. The cls view takes a subcultural perspective of the dominant legal culture however others have also viewed law as a culture, but with different focuses and implications. See generally Lawrence Rosen, *Law as Culture: An Invitation* (Princeton University Press, 2006); Oscar G Chase and Jerome S Bruner, *Law, Culture, and Ritual* (New York University Press, 2005).
[55] Krever, Lisberger and Utzschneider, above n 1, 23; Tushnet, 'A Political History', above n 11, 1517.

the Crits saw themselves as an extension of the counterculture they drew inspiration from.[56] This thesis claims that the Crits' physical location and methods of critique effectively eschews the title of counterculture. However, the influence of the counterculture forms an important part of their legal-subcultural status. The effect of the counterculture was not limited to just Critical Legal Studies as '[l]iterally, no academic discipline was untouched by the countercultural revolution'.[57] However, the cls connection went further than being 'touched by the countercultural revolution'[58] and was reflective of its aims more broadly:

> As a movement, the counterculture was admittedly disjointed, with its followers embracing everything from yoga to shamanism to McLuhanism. Yet if there was one common thread, it was a rejection of the existing society, which many labelled "The Establishment," their main critique being that everyday life in the Western world had come to resemble the workings of a massive industrial corporation.[59]

The countercultural similarities to Critical Legal Studies are immediately clear, but microcosmically, with a focus on law and the law school, rather than 'existing society' more broadly.[60] Drawing from this explanation of counterculture, other parts of cls start to make sense contextually. For example, in the first published edition of Kennedy's *The Rise and Fall of Classical Legal Thought* in 2006, Kennedy provides a preface to the edition which states '[f]or this edition I've added this preface, a bibliography and a rudimentary index'.[61] What is a seemingly innocuous statement highlights that the original self-published history of American legal thought, refused to conform to even the most common and useful structures. Similarly, Roberto Unger's *The Critical Legal Studies Movement*, which presents as a "standard" book, draws on a body of existing theory, but has no citations, which can be read as defying a similar

[56] Kennedy, *Hierarchy*, above n 1, 205; Laura Kalman, *Yale Law School and the Sixties: Revolt and Reverberations* (The University of North Carolina Press, 2005) 7.
[57] Larkin, above n 36, 77.
[58] Ibid.
[59] Meghan Warner Mettler, '"If I Could Drive You Out Of Your Mind" Anti-Rationalism And The Celebration Of Madness In 1960s Counterculture' (2015) 9(2) *Journal of Literary & Cultural Disability Studies* 171, 173.
[60] Ibid.
[61] Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (BeardBooks, 2006) vii.

convention. The obvious downside to these actions is the way they add to the mystification of cls, especially when approaching the work years after it was presented in context. However, effect of the counterculture is perhaps most evident in the specific language used by the Crits.

A common thread in assessments of cls, was the Crits' use of language: '[t]his body of writing has been correctly described as "dense and difficult and often inaccessible" and as having produced some of the most provocative and perplexing legal scholarship of the past several years'.[62] The inaccessibility of cls language was not only due to the style of the work,[63] but also the specific terminology used. The use of this specific language demonstrates the interconnectivity between the influence of the counterculture movement and the position of Critical Legal Studies as a legal-subculture. To demonstrate the connection between language and the cls roots in counterculture, the term "trashing", one of the commonly associated cls terms,[64] will be discussed. This discussion will identify the issues with trying to define trashing, before offering a source for its namesake.

Starting with the eponymously named 'Trashing',[65] Mark Kelman offers a somewhat opaque definition of the term:

> Here's one account of the technique that we in Critical Legal Studies often use in analysing texts, a technique I call "Trashing": Take specific arguments very *seriously* in their own terms; discover they are actually foolish ([tragi]-*comic*); and then look for some (external observer's) *order* (*not* the germ of truth) in the internally contradictory, incoherent chaos we've exposed.[66]

Kelman expands on the term, drawing on Michel Foucault's discussions of 'power',[67] stating:

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[62] J Stuart Russell, 'The Critical Legal Studies Challenge To Contemporary Mainstream Legal Philosophy' (1986) 18(1) *Ottawa Law Review* 1, 3.
[63] See, eg, Peter Gabel and Duncan Kennedy, 'Roll Over Beethoven' (1984) 36(1/2) *Stanford Law Review* 1.
[64] See above Introduction.
[65] Kelman, above n 17.
[66] Ibid 293.
[67] Michel Foucault, *Power/Knowledge* (ed Colin Gordon) (Colin Gordon trans (eds), Leo Marshall, John Mepham, Kate Soper, The Harvester Press, 1980). Kelman specifically draws on pages 72-77 and 78-108 at page 321 of 'Trashing'.

> Many of us (arguably influenced by Foucault) have been interested in understanding power in its most local manifestations … for me, trashing is above all a technique of seeing (and undermining) illegitimate power in the most comprehensible and immediate institutions I see – the law schools where I've studied and worked.[68]

In the second quote, Kelman's expansion on trashing highlights the use of foolishness in the original definition and the need to both see and undermine illegitimate power. Despite their non-doctrinal aim, Kelman's approach does follow an earlier explanation of trashing by Alan Freeman:

> That trashing may reveal truth seems significant if one's mission as a scholar is to tell the truth. If telling the truth requires one to engage in delegitimation, then that is what one ought to be doing. Trashing is also liberating … [t]he goal of trashing, however, is not liberation into nihilist resignation … [t]he point of delegitimation is to expose possibilities more truly expressing reality, possibilities of fashioning a future that might at least partially realize a substantive notion of justice instead of the abstract, rightsy, traditional, bourgeois notions of justice that generate so much of the contradictory scholarship.[69]

Freeman's account of trashing, which also addresses issues of power,[70] elucidates the themes taken by Kelman. At the heart of Freeman's trashing, is a type of liberation that cannot be achieved by side-stepping dominant approaches to legal issues. At the same time, he highlights that works addressing rights or other notions of justice within this existing framework only bolster the dominant culture, rather than challenging it. Although the reading of both papers together provides a basic understanding of trashing, the more logically titled 'Trashing' relies on existing knowledge or supplementary texts (both Foucault and Freeman in this case) to fully appreciate or apply trashing to a subject. Even Freeman's much clearer account, which also

[68] Kelman, above n 17, 321.
[69] Freeman, above n 4, 1230-1231.
[70] Ibid 1231.

relies on Karl Marx and Foucault,[71] is a short, 10-page article, that challenges fellow Crits, rather than offering a "how to" trash. However, the difficulty in clarifying what is, or how to trash, is not only related to the lack of descriptions given, but to the title itself.

The verb "trashing" arose in the in the early-1970s in relation to specific vandalism by university students in the US.[72] The era, locations, and reasons for the vandalism, position these students accused and associated with the acts of trashing, within the same broad counterculture that birthed the Crits.[73] For Critical Legal Studies more specifically, this thesis makes the argument that the idea of trashing incorporated this term's roots in vandalism and desecration, but also drew from its application in counterculture literature, specifically the titular comic character Trashman from the comic *Trashman*. The character, created and drawn by Spain Rodriquez, originally featured alongside other countercultural cartoonists such as Robert Crumb, in *The East Village Other* or *EVO*. The *EVO* was considered 'a New York Newspaper so countercultural that it made *The Village Voice* look like a church circular'.[74] The cartoon which features, sex, drugs, and violence reflects a number of other countercultural themes and styles of the time.[75]

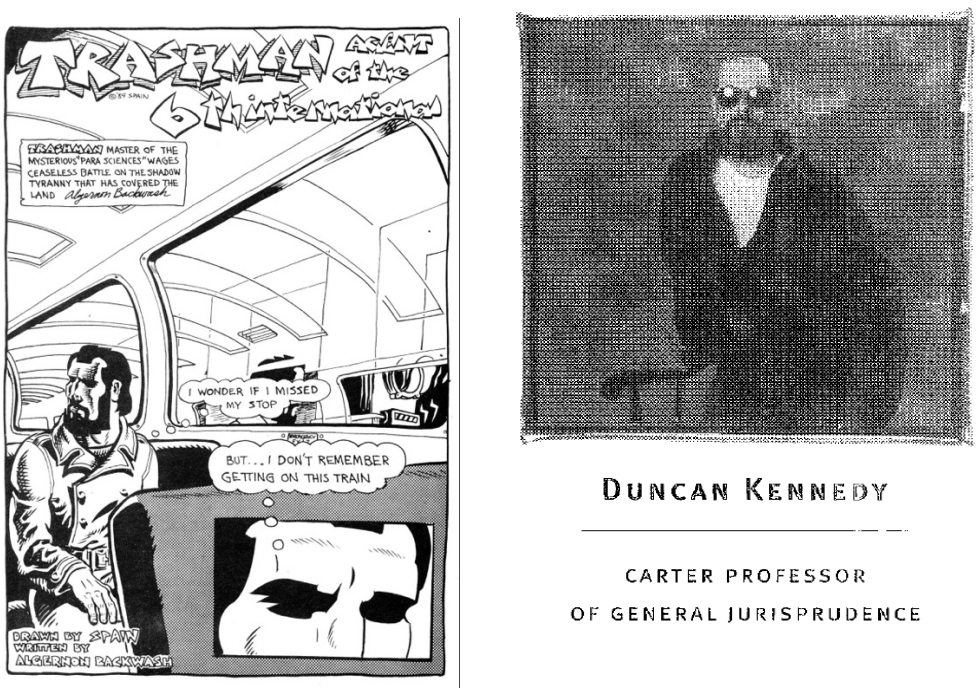
Alleged to have been reflective of the author's own social and political beliefs, *Trashman* is set in an American dystopia, 'with a totalitarian form of government, mass poverty, repressive social control systems, a large military-like police force, a lack of individual freedoms, and continual warfare or violence'.[76] Trashman is an agent of the 'sixth international' (see image below), a nod to the Third International and a denotation of Trashman's Communist allegiance.[77] Although Trashman does not actively "trash" those he fights against, those

[71] Ibid 1237.
[72] *Oxford English Dictionary*, 'trash' verb.
[73] See, eg, Helen Lefkowitz Horowitz, 'The 1960s and the Transformation Of Campus Cultures' (1986) 26(1) *History of Education Quarterly* 1, 10-38.
[74] Margalit Fox, 'Walter Bowart, Alternative Journalist, Dies at 68', *The New York Time*s (online), 14 January 2008 < https://www.nytimes.com/2008/01/14/arts/14bowart.html>.
[75] See generally The Furry Freak Brothers; Fat Freddy's Cat.
[76] *The Collected Trashman* (2013) Underground Comix Joint < https://comixjoint.com/collectedtrashman.html>.
[77] See generally Leon Trotsky, *Third International After Lenin* (Pioneer Publishers, New York, 1936).

inspired by his disdain for oppressive or fascistic structures to challenge similar structures of their choosing, may be understood as "trashing".

It should be noted that while comics also played a large part in the way cls was presented, in both their *Critical Legal Studies Newsletters*,[78] and the work of their students,[79] there is little assessment given to the importance of this graphic culture.[80] Building on the visual, as well as the linguistic connection, the link to *Trashman* is strengthened with an image of Duncan Kennedy from the 1996 *Harvard Law Bulletin*; an image focused on by Goodrich in his review of Kennedy's *Critique of Adjudication (fin de siècle)*:[81]

Figure 1. Trashman and Duncan Kennedy



[78] See, eg, *Newsletter of the Conference on Critical Legal Studies* (Buffalo New York, December 1986).
[79] Duncan Kennedy, 'Remembering Keith Aoki's 'Casual Legal Studies: Art During Law School'. (Super Aoki a Tribute to Keith Aoki)' (2012) 45(5) *University of California Davis Law Review* 1817.
[80] See some development of current rather than historical works in Thomas Giddens (ed), *Graphic Justice: Intersections of Comics and Law* (Routledge, 2015); Thomas Giddens, *On Comics and Legal Aesthetics: Multimodality and the Haunted Mask of Knowing* (Routledge, 2018). *Contra*, Cassandra Sharp and Marett Leiboff (eds), *Cultural Legal Studies: Law's Popular Cultures and the Metamorphosis of Law* (Routledge, 2015) 3-23, Leiboff and Sharp identify 4 broad areas which they feel conditioned and developed this broad field in Australia. The authors mention British cls and refer to the US critical legal movement, however, this is focused on Law and Literature and Law and Society, citing the influential authors as James Boyd White, Austin Sarat, and Robert Cover, rather than any US based cls scholars.
[81] Peter Goodrich, 'Duncan Kennedy As I Imagine Him: The Man, The Work, His Scholarship, and The Polity' (2001) 22 *Cardozo Law Review* 971, 973.

In his assessment of the image, Goodrich states that Kennedy 'is dressed for urban combat, he is everyday cool, sympatico but with attitude, and in the accompanying text he talks of adopting "a kind of intellectual guerilla warfare" against the institution'.[82] Side-by-side, the description could fit either image. However, while Goodrich's assessment circles around similar visual connections, the link to the obscure counterculture comic book hero is not addressed and nor should he be. It is unlikely that despite the seemingly obvious influence of *Trashman* on cls, that the Crits would have noted this or thought it worthy of noting. Much like Kennedy's lack of bibliography or index,[83] or Unger's lack of citations,[84] the Crits not only avoided existing conventions but importantly like most subcultures, they were organic and responsive, rather than strategic. Something which Kennedy was seemingly aware of:

> I've been asked a million times why CLS "failed," but it seems a more interesting question how such an overtly leftist, anti-mainstream academic movement, with no outside funding of any kind, could take off, expand so quickly, and last for about fifteen years as a highly visible factor in legal academia (of all places).[85]

Kennedy's position is similar to the point made earlier by Unger that cls was 'never intended to generate a permanent genre of legal writing',[86] instead it was reactionary, a method that intended to engage with an immediate issue, not an ongoing solution to a problem. The lack of explanations, the reactionary nature, specific language, and for Kennedy specifically a certain dress-sense, demonstrate the features of a subculture.[87]

The term "trashing" as a legitimate way to critique law, is recognition of the counterculture creating a legal-subculture. Hebdige outlines the reactions to subcultural

[82] Ibid 974.
[83] Kennedy, *Rise and Fall*, above n 61.
[84] Unger, above n 24.
[85] Kennedy, *Hierarchy*, above n 1, 204.
[86] Ibid 4.
[87] See generally Hebdige, above n 37, 90-99.

language, stating '[n]otions concerning the sanctity of language are intimately bound up with ideas of social order'.[88] For the Crits the use of the term "trashing" begins to undermine the existing order, removing the politeness that a term like "critique" employs. In turn, for the universities and the non-crits, the use of "trashing" challenges the sanctity of the law school and the profession of law. As Hebdige continues, 'violations of the authorized codes through which the social world is organized and experienced have considerable power to provoke and disturb'.[89] These reactions work simultaneously, so that while the Crits were delegitimating an existing legal argument, they were provoking and disturbing the existing social order. The position of cls as a legal-subculture provides an existing framework to understand the reactions of those in the dominant culture who had been disturbed by the actions of the Crits and explains their seemingly disproportionate reactions through the lens of a moral panic.

B. *Critical Legal Studies: a Moral Panic*

To view Critical Legal Studies as a moral panic, positions the Crits as legal deviants. The proposal of this deviancy is not new, even if the lens presented is. The deviant nature of Critical Legal Studies has been noted, perhaps most imaginatively by Patricia Williams in her 1986 article 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights'.[90] Within the article Williams describes the Crits leaving an allegorical walled-city of law, the 'Celestial City',[91] which through this action, demonstrates the literal deviation of the Crits from law's form and structure.[92] A moral panic is a sociological or criminological method applied to deviants and subcultures;[93] its application here is due to the classification of cls as a legal-

[88] Ibid 91.
[89] Ibid.
[90] Patricia J Williams, 'Alchemical Notes: Reconstructing Ideals From Deconstructed Rights' [1987] 22 *Harvard Civil Rights – Civil Liberties Law Review* 401.
[91] Ibid 401-402.
[92] Ibid.
[93] See Jock Young, 'Moral Panic: Its Origins in Resistance, Ressentiment and the Translation of Fantasy into Reality' (2009) 49(1) *British Journal of Criminology* 4.

subculture and the Crits' as deviants. Its application to the deviancy of the subcultural Crits, helps to contextualise the reactions received from those in the dominant liberal legal culture, the "moral majority'". As Jock Young, argues the identification of the moral panic advocates, appreciates, and defends the subculture;[94] viewing Critical Legal Studies as a moral panic highlights and explains the disproportionate responses by liberals and conservatives in the dominant legal culture.

The concept of a moral panic was developing several years before the first Conference on Critical Legal Studies. A sociological construct to make sense out of disproportionate reactions to deviants, the term has been used widely since its inception.[95] However, in its original context there are counterculture crossovers between Critical Legal Studies and the sub-cultural groups who were both the subjects and instigators of the term moral panic. For example, Jock Young, credited with creating the phrase, applied it initially in his 1971 book, *The Drugtakers: The Social Meaning of Drug Use*,[96] an assessment of the 1960s hippies and counterculture in Notting Hill, London. Similarly, in 1972 Stanley Cohen refined the idea of the moral panic in his book *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*,[97] addressing the media and political portrayals of these two youth subcultures in Brighton, UK.

In a similar approach to Critical Legal Studies, Young and Cohen focused on phenomena that related to the cultural change they were witnessing. Though not directly connected, there were shared cultural values in the work of the Crits and specifically those of Young. Reflecting on the importance of when this took place, Young states

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[94] Ibid 9.

[95] See eg Eugene McLaughlin, 'See Also Young, 1971: Marshall McLuhan, Moral Panics and Moral Indignation' (2014) 18(4) *Theoretical Criminology* 422.

[96] Jock Young, *The Drugtakers: The Social Meaning of Drug Use* (MacGibbon and Kee, 1971).

[97] Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (Paladin, 1973).

> [i]t is important to stress how a younger generation of sociologists identified with the process of cultural change that pivoted around 1968. We were all moved by the times: the possibility of social change, the worlds of diversity that the new bohemia promised, the youthful colonization of leisure and the rejection of austerity and discipline in a world seemingly in fast-forward, all of which made the choice of being on the side of progress well nigh inevitable.[98]

Similarly, Duncan Kennedy reflects on the effect this time had on him; leading him from a left-liberal undergraduate to a radical law student:

> In the first year of law school, this was 1967-68, I had the classic generational experience of radicalisation. I started law school as a disillusioned Cold War leftliberal, anti-Communist, and then there was this realisation: the Soviet Union was a paper tiger; with the Prague Spring in 1968, it was obvious that the Soviet Union under Brezhnev had had it; I was happy not sad or alarmed by the successes of the North Vietnamese Tet offensive. The whole anti-Communist construct was now nothing but an aspect of conservatism in America, and the liberal commitment to anti-Communism was a major source of America's inability to deal with the real problems, the war and the ghetto. In the course of a year I switched back to a position much more like that of my teenage self and have been there more or less ever since.[99]

On the framing of this time period, Phil Rose addresses that despite how the 1960s are often remembered, those in this progressive space were far from the majority, '[u]sually portrayed as having rejected traditional values, or at least as having redefined them, only a small minority of young boomers were actually involved in radical politics or the hippie movement'.[100] Rose continues that 'a small percentage of a huge number is still a lot; and this fraction of the baby boomer generation clearly very much made its mark on how the 1960s are perceived'.[101] This perception was then magnified as it resonated beyond national boundaries: '[t]he counterculture … bonded internationally through shared values and sensibilities'.[102] In similar

[98] Young, 'Moral Panic', above n 93, 8.
[99] Krever, Lisberger and Utzschneider, above n 1, 6.
[100] Phil Rose, '"Love Is All You Need": Why There Will Never Be Another Beatles' in Brian Cogan and Thom Gencarelli (eds), *Baby Boomers and Popular Culture: An Inquiry Into America's Most Powerful Generation* (Praeger, 2015) 225, 234.
[101] Ibid.
[102] Ibid.

but different fields Young, Cohen, and the Crits were not only tackling similar societal problems with a similar counterculture influence, but the formers' development of moral panics can be used as a lens to position and understand Critical Legal Studies.

In its original usage, a moral panic was seen between a subculture and society more broadly, i.e. hippies and drugs, or the violence between mods and rockers and their contrast to "decent society". This juxtaposition lies at the heart of a moral panic, with Young highlighting the influence of Albert Cohen who had 'conceived of moral indignation … what would now be described as a form of "othering" — a process both of threat to identity and of confirmation'.[103] An approach which lay some of the groundwork for Young's moral panic:

> One may also join with others in righteous puritanical wrath to mete out punishment to the deviants, not so much to stamp out their deviant behavior, as to reaffirm the central importance of conformity as the basis for judging men and to reassure himself and others of his attachment to goodness.[104]

In developing the moral panic, Young also drew from Marshall McLuhan,[105] highlighting the effect of the media, and how indignation could transform to panic. Recently this framework has been refined by Erich Goode and Nachman Ben-Yehuda, who focus on the work of Stanley Cohen, arguing that he 'launched the term moral panic as a means of characterizing the reactions of the media, the public, and agents of social control to the youthful disturbances'.[106] In their approach, Nachman and Ben-Yehuda build on Cohen's position and list the factors he used to identify a moral panic, as a way to categorise moral panics more generally.

Nachman and Ben-Yehuda's list identifies seven actors or events in a moral panic: the press, the public, law enforcement, politicians and legislators, action groups, folk devils, and

[103] Young, 'Moral Panic', above n 93, 10.
[104] Ibid.
[105] McLaughlin, above n 95, 424.
[106] Erich Goode and Nachman Ben-Yehuda, *Moral Panics: The Social Construction Of Deviance* (Wiley, 2nd ed, 2009) 22.

an analogy to disaster.[107] While the identification of law enforcement or politicians and legislators is difficult in the application to Critical Legal Studies, it does not mean that their equivalents were not present. Traditionally in Cohen or Young's moral panics, the reaction was seen broadly in society and focused on national reactions. In contrast, the Critical Legal Studies moral panic was much more institutionally based, for a smaller, interested audience. For Critical Legal Studies, this interest was most prominent at its home,[108] Harvard Law School. In this context, Cohen's original term 'agents of social control' can be seen to mirror the deans, boards, and alumni of the university.[109]

With this minor clarification it can be posited that the reaction to Critical Legal Studies followed the formula of a moral panic. Goode and Ben-Yehuda's first actor in a moral panic is the press. The press covered Critical Legal Studies, with a number of articles in the *The New York Times*,[110] but also *The New Yorker*,[111] and *The New Republic*.[112] Goode and Ben-Yehuda identify that not only does the topic need to be covered, but that it is given far more attention than is deserved and the seriousness is overstated. From inside Critical Legal Studies, Kennedy highlights this event: 'the national media decided that Harvard Law School was a "story," the story of sixties radicals reemerging with tenure to disrupt everything good and true'.[113] Objectively, it is a strange occurrence for a group of legal academics and their pedagogical methods to be reported on, let alone repeatedly in a paper of record.[114] However, the seriousness

[107] Ibid 23-27.
[108] See generally Kalman, above n 56.
[109] Goode and Ben-Yehuda, above n 106, 22.
[110] See, eg, Jennifer A Kingson, 'Harvard Tenure Battle Puts "Critical Legal Studies" on Trial', *The New York Times* (online), August 30 1987 < https://www.nytimes.com/1987/08/30/weekinreview/harvard-tenure-battle-puts-critical-legal-studies-on-trial.html>; Allan Gold, 'Traditionalist Is Named As Harvard Law Dean', *The New York Times* (online) February 18 1989 < https://www.nytimes.com/1989/02/18/us/traditionalist-is-named-as-harvard-law-dean.html>.
[111] Calvin Trillin, 'Harvard Law', *A Reporter at Large*, *The New Yorker* (online), 26 March 1984 < https://www.newyorker.com/magazine/1984/03/26/harvard-law>.
[112] Louis Menand, 'What is "Critical Legal Studies": Radicalism for Yuppies' *The New Republic* (Washington D.C.) March 17 1986, 20; Marc Granetz, 'Duncan the Doughnut' *The New Republic* (Washington D.C.) March 17 1986, 22.
[113] Kennedy, *Hierarchy*, above n 1, 216.
[114] Kingson, above n 110; Gold, above n 110.

of the claims against Critical Legal Studies can be seen in Louis Menand's 1986 article which, when noting the recent reporting on Critical Legal Studies, states

> it [Critical Legal Studies] operates with no expectation of developing a theory of politics or the state. No target is out of bounds, since whatever exists helps maintain the ideological hegemony of the powers that be, and is thus deserving of disrespect.[115]

Within the article, the terms 'nihilist' and 'elite' are levelled at the Crits, as well as records of staff wanting to leave Harvard Law School due to the presence of Critical Legal Studies and the Crits.[116] The threats, if one was to take Menand's words at face value, was the anti-ideological promulgation of disrespect in all facets of "normal" or "decent" society, with the added threat that if it can happen at Harvard it can happen anywhere.

The related aspect of "the public", those who read the press and react to it, needs to be curtailed for the application to Critical Legal Studies. Although the publications that wrote on Critical Legal Studies were public papers and magazines, the panic was likely to only effect those within the broader legal community. In Cohen's original positioning of the public, their response was due to the relatability to the act of deviancy, i.e. the drugs in question rather than the specific users,[117] and the acts of 'disdain, rebellion and indecency' from youth, rather than the groups specifically in Brighton;[118] '[t]he events themselves were not as important as what they seemed to represent'.[119] For the public concerned with Critical Legal Studies, the broader US legal community, the reactions were numerous.[120] However, Paul Carrington, Dean of Law at Duke University, summed up the fears of this community with his 1984 journal article 'Of Law and the River' offering a damning statement on Critical Legal Studies and the Crits:

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[115] Menand, above n 112, 21.
[116] Ibid.
[117] Young, 'Moral Panic', above n 93, 5.
[118] Goode and Ben-Yehuda, above n 106, 25.
[119] Ibid.
[120] See Chapter 5.

> The nihilist teacher threatens to rob his or her students of the courage to act on such professional judgment as they may have acquired. Teaching cynicism may, and perhaps probably does, result in the learning of the skills of corruption: bribery and intimidation. In an honest effort to proclaim a need for revolution, nihilist teachers are more likely to train crooks than radicals. If this risk is correctly appraised, the nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy.[121]

The effect of the "public's" reaction was felt most harshly at Harvard Law School, with influential alumni, such as George Gillespie III,[122] stating Duncan Kennedy and the Crits 'represented a kind of professional barbarism' to Harvard's civilised place within the legal profession.[123] Similarly, the agents of social control affected a change, notably with other academic staff actively not hiring Crits:

> Critical Legal Studies' faculty members would find a place here [Harvard Law School] if the only concern of the faculty was scholarship. But, what has happened now is many people will vote "for" or "against" thinking how that person will turn out to vote in the future.[124]

This open secret received wide attention with the denial of tenure to Crits Clare Dalton and David Trubek.[125] Although their denial was not expressly due to an anti-Critical Legal Studies stance, the earlier statements by faculty members help to frame it as such. The effect of this

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[121] Paul D Carrington, 'Of Law and The River' (1984) 34 *Journal of Legal Education* 222, 227.
[122] See, eg, 'George Gillespie, lawyer who helped The Washington Post Co. go public, dies at 87', *Obituaries*, *The Washington Post* (online), 17 September 2017 < https://www.washingtonpost.com/local/obituaries/george-gillespie-lawyer-who-helped-the-washington-post-co-go-public-dies-at-87/2017/09/17/6740be4a-9b52-11e7-87fc-c3f7ee4035c9_story.html?noredirect=on&utm_term=.ae2ec5148e3d>.
[123] Steven M Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton University Press, 2008) 193.
[124] Miguel Rodriguez, '"Politicized" Faculty Affects Tenure, Teaching, Research' *Harvard Law Record* (Cambridge), 9 March 1984. Attributed to "a faculty member on the right".
[125] Kingson, above n 111.

practice quelled the growth of Critical Legal Studies at Harvard Law School, [126] despite a growth in faculty more generally.[127]

Moved by pieces witnessed in the press,[128] action groups, such as the Olin Foundation, were so panicked by Critical Legal Studies, that they contacted sympathetic Harvard faculty to see what could be done to stop them.[129] The result of this action group was the funding of a rival movement, Law and Economics, for which the Olin Foundation created a centre at Harvard law School, the future recipient of over $18 million from the Foundation.[130] Goode and Ben Yehuda describe these actors as 'moral entrepreneurs'[131] who offer solutions to panics they believe are not being dealt with by existing remedies.[132] The moral entrepreneurs behind the action groups are often moved by the image of the "folk devil", 'the agent responsible for the threatening or damaging behaviour or condition'.[133]

In general terms the folk devil relates to stereotypes, for example, whether rightly or wrongly the post-2001 terrorist, or child-molester, will conjure certain definite images of a perpetrator. Even where there is no such clear image, the folk devil will incite similar panics if it is given a title. For example, Goode and Ben-Yehuda address the collective terms 'leftist' and 'radical' as being a folk devil to conservatives: '[t]o conservatives, leftists and radicals are great as folk devils; even today, they do terrible things like desecrate the flag, the symbol of our country'.[134] For Critical Legal Studies this was the "Crit" often exemplified by Duncan Kennedy. For example, under the title of 'Invasion of the Punk Professors' the front page of

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[126] See Chapter One.
[127] See generally, News and Announcements, 'Robert Clark to conclude service as HLS dean', *The Harvard Gazette* (online), 5 December 2002 < https://news.harvard.edu/gazette/story/2002/12/robert-clark-to-conclude-service-as-hls-dean/>. Article states core tenured staff was 64 in 1989 and 81 2002.
[128] Teles, above n 123, 193.
[129] Ibid 193-194.
[130] John J Miller, Karl Zinsmeister and Ashley May, *Agenda Setting: A Wise Giver's Guide to Influencing Public Policy* (The Philanthropy Roundtable, 2015) 40.
[131] Goode and Ben-Yehuda, above n 106, 26 quoting Howard S Becker, *Outsiders: Studies in the Sociology of Deviance* (Free Press, first published 1963, 1997 ed) 147.
[132] Goode and Ben-Yehuda, above n 106, 26.
[133] Ibid 27.
[134] Ibid.

the March 17th 1986 edition of *The New Republic* features a caricature of Kennedy in sneakers and a turtleneck, in front of a lectern, gesturing vigorously to an audience of bashful and confused law students.[135] While this image is less radical than this thesis' proposal that Kennedy channelled Trashman in his presentation,[136] the image of the folk devil, however mild, is still there.

The final element in a moral panic is the analogy to disaster, where preparations are made similarly to those before, during, and after a natural disaster. But unlike a natural disaster, people gravitate towards them, rather than flee.[137] The strength of this analogy can be seen with the rhetoric used by those "responsible" for the disaster, with Kennedy using this terminology to describe cls:

> It is often said that we destroyed Harvard—that Yale's ascendency was caused by what we did beginning in the late 1970s. The common view is that Yale Law School triumphed because it was not disrupted internally by the radicals, who they purged. I think this is largely correct. That is, I think the Yale Law School's current intellectual prestige is directly based on the reaction of the law professoriate to the disruption of Harvard Law School through the 1980s.[138]

Kennedy's account plays into Critical Legal Studies as a moral panic, with hyperbolic terms accepted and used genuinely when remembering what took place. As a response to a moral panic, the reactions to Critical Legal Studies were reasonable in this context. Ostensibly, cls does not cause such a reaction now, however, it does occasionally return when the influence of Critical Legal Studies can be used to explain a legal or political position. For example, although more prominently levelled at his connections to Critical Race Theory and Derrick Bell

[135] Menand, above n 112.
[136] See above Language, Comics, and the Roots of CLS.
[137] Goode and Ben-Yehuda, above n 106, 28.
[138] Krever, Lisberger and Utzschneider, above n 1, 34.

specifically,[139] Barrack Obama's time at Harvard from 1988-1991 resulted in criticisms of him and the influence of Critical Legal Studies. From 2016, in the *Chicago Tribune*:

> it is probably no coincidence that President Barack Obama's executive orders stretched the law and Constitution to new lengths, often beyond the breaking points. He went to Harvard Law School in an era when critical legal studies, which challenge and overturn accepted legal norms and standards and practices, were at their zenith.[140]

The application of this sociological and criminological framework to Critical Legal Studies positions and contextualises the reactions it received and offers a compelling understanding of their vehement nature.[141] More broadly, the position of Critical Legal Studies as a legal-subculture provides this clarity and positions cls as influenced by the 1960s and 70s counterculture, but within the institution of the law school. The final relevant element of a legal-subculture is its normalisation, the transition from something "other" to something reduced and accepted. In the context of more famous subcultures this process relates to its commodification, i.e. the sale and acceptance of the once subcultural ripped tee-shirts and leather jackets of the punks.[142] In this context, Hebdige explains the process: 'as soon as the original innovations which signify "subculture" are translated into commodities and made generally available, they become "frozen"'.[143]

Although not commodified in the strict sense of the word, the more Critical Legal Studies' approaches and methods were separated from the subculture and accepted within law schools, cls became "frozen". The general availability of a concept such as the indeterminacy

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[139] See generally Fred A Bernstein, 'Derrick Bell, Law Professor and Rights Advocate, Dies at 80', *The New York Times* (online) 6 October 2011 < https://www.nytimes.com/2011/10/06/us/derrick-bell-pioneering-harvard-law-professor-dies-at-80.html>.
[140] Stephen B Presser, 'What American law professors forgot and what Trump knew', *Opinion*, *Chicago Tribune* (online) 17 November 2016 < https://www.chicagotribune.com/news/opinion/commentary/ct-law-professors-trump-scalia-supreme-court-conservative-perspec-1118-md-20161117-story.html>.
[141] See Chapter Five.
[142] Hebdige, above n 37, 96.
[143] Ibid.

thesis, without the pragmatic and activist base of the legal-subculture, leads to a weaker accepted version. For example, in a 2017 article in *The Atlantic*, the indeterminacy thesis is presented as common and accepted knowledge. A throw-away line not expanded on in the article states: 'No one lives on Mount Olympus. Government lawyers, judges, journalists are all fallible. They are all vulnerable to bias and self-interest'.[144]

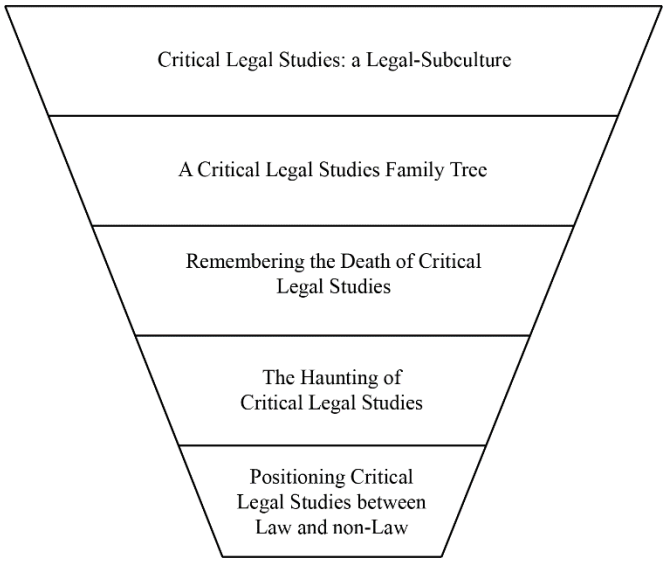
The effect of these specific subcultural elements: the language, style, influences, and organic approach, as well as the reaction to subcultures through the lens of a moral panic, and finally its crystallised or frozen historical nature, helps to position Critical Legal Studies. Taking this act of demystification as a starting point, this thesis will make a series of further demystifications, highlighting and addressing a series of different issues which have rendered cls as currently mystified. The result of these demystifications is access to Critical Legal Studies and the (re)use of its tools and insights. The remaining acts of demystification are presented in the overview below.

IV. Argument Overview

Positioning Critical Legal Studies as a legal-subculture, provided the first act of demystification. This categorisation presents an understanding of the cls language, position predominantly within law schools, and reactions from the dominant legal culture. This demystification is also the broadest and most general to take place, with the following chapters narrowing their focus as they progress:

[144] Peter Beinart, 'Why Trump is accusing Obama of Wiretapping' *Politics*, *The Atlantic* (online) 7 March 2017 <https://www.theatlantic.com/politics/archive/2017/03/why-trump-is-accusing-obama-of-wiretapping/518793/>.

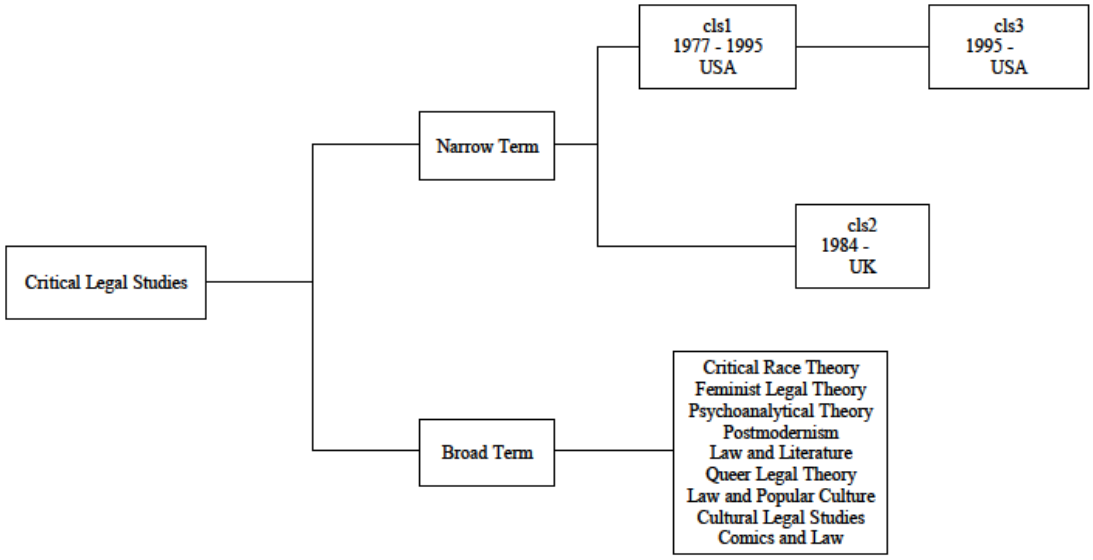
Figure 2. Demystification Overview



Chapter One, presents a way of untangling the wide-variety of "Critical Legal Studies". Aside from the original US-based Critical Legal Studies, there are a number of other related legal movements which fall under the umbrella term Critical Legal Studies; for example, British CLS, Critical Race Theory, and Feminist Legal Theory. Drawing from Margaret Davies, Costas Douzinas and Adam Gearey's assessment of Critical Legal Studies,[145] this chapter develops the *Critical Legal Studies Family Tree*:

[145] Margaret Davies, *Asking the Law Question* (Thomson Reuters, 3rd ed, 2008) 183; Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart, 2005) 229.

Figure 3. The Critical Legal Studies Family Tree



This framework groups and positions the various Critical Legal Studies, to clarify their relationships before proposing the idea of two US-based Critical Legal Studies. The *Critical Legal Studies Family Tree* acknowledges Douzinas and Gearey's geographic designations of cls and positions these with Davies' use of a broad and narrow divide between the Critical Legal Studies. The *Family Tree* positions Critical Race Theory as broad and the Critical Legal Studies Movement as narrow. On the narrow branch of Critical Legal Studies, three variations are presented: cls1 representing the original US-based Critical legal Studies, cls2 representing the British Critical Legal Studies, and cls3 representing the Critical Legal Studies that continued in the US after the death of cls1. With this identification the chapter then focuses on the factors leading to the death of cls1 and the creation of cls3: the cls1 founders, their location,

and the rivalry from Law and Economics. This assessment demystifies the multifaceted term "Critical Legal Studies" with the refinement of two US-based Critical Legal Studies.

Having presented the importance of the cls1 death and the creation of cls3 in Chapter One, the second chapter investigates the existing importance placed on this event. Using a content analysis methodology and critically reading six texts, this chapter concludes that the death of cls1 does not form part of the Critical Legal Studies history. Recognising the subcultural barriers to cls1, the analysis focuses on reference texts, made up from three legal dictionary entries and the top three Google search results for "Critical Legal Studies". The content of these texts demonstrates a number of unified elements in the cls1, creating a common history; notably there is no mention of its death. The impact of this common history, especially in the online sources, is identified and assessed in a contemporary work opposing Critical Legal Studies. This chapter argues that the common history which makes no mention of cls1's death contributes significantly to the mystification.

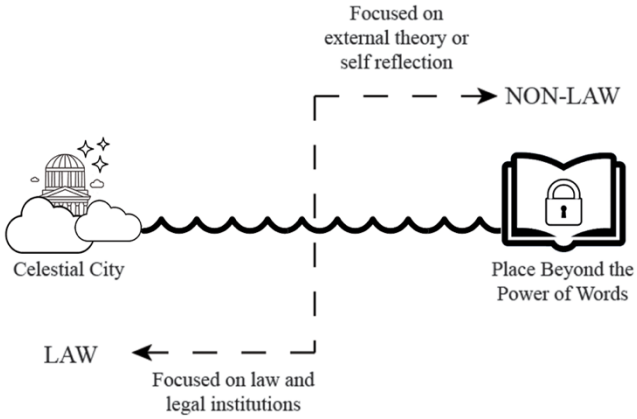
To unpack and demystify the cls1 death, Chapters Three and Four present a framework and reading respectively, to demonstrate the differences between the two US-based Critical Legal Studies: cls1 and cls3. Focusing on Duncan Kennedy's description of the cls1 death as "dead as a doornail", Chapter Three proposes that cls1 "haunts" cls3. Drawing a literary analogy to the discussion and outcome of what it means to be "dead as a doornail" in Charles Dickens' *A Christmas Carol*, this thesis proposes that cls3 is "passively-haunted". This concept is presented as oppositional to a traditional "active-haunting", with a passive-haunting demonstrating the effects of being constricted and regressive but relying on the non-appearance of a ghost.

To differentiate this thesis' creation of a passive-haunting a brief discussion of Jacques Derrida's 'hauntology'[146] as a response to Francis Fukuyama's 'end of history'[147] is given. This discussion acknowledges the indirect effect Fukuyama had on the death of cls1 and why Derrida's hauntology does not offer the same level of demystification as a passive-haunting. Having established this framework, Chapter Five presents a comparative reading of Peter Gabel and Duncan Kennedy's cls1 text 'Roll Over Beethoven'[148] and Jerry Anderson's cls3 text 'Law School Enters the Matrix: Teaching Critical Legal Studies'.[149] This chapter demonstrates the effect of the passive-haunting through the constricted and regressive nature of Anderson's cls3 text when compared to the depth in 'Roll Over Beethoven'.

Having identified and unpacked how contemporary Critical Legal Studies (cls3) mystifies Critical Legal Studies, this thesis' final chapter tackles the difficulties and mystification associated with cls1. By analysing the various critiques cls1 received from liberals, broad, and narrow Critical Legal Studies, this chapter proposes the usefulness of these critiques when trying to address issues in cls1. While the critiques vary, this chapter proposes that the pre-Critical Race Theory scholars Mari Matsuda and Patricia Williams offer the most useful critiques. Specifically, by repurposing the geography used in Williams' article 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights',[150] this chapter presents a scale to plot cls1 works, presented here as the *Geography of cls1*:

[146] Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International* (Peggy Kamuf trans, Routledge, 1994) [trans of: *Spectres de Marx* (first published 1993)].
[147] Francis Fukuyama, 'The End Of History?' (1989) 16 *The National Interest* 3; Francis Fukuyama, *The End of History and the Last Man* (The Free Press, 1992).
[148] Gabel and Kennedy, above n 63.
[149] Anderson, above n 7.
[150] Williams, above n 90.

Figure 4. Geography of cls1



To begin the article, Williams' presents an allegorical story 'The Brass Ring and the Deep Blue Sea', as a response to a friend who asked her 'what Critical Legal Studies was *really* all about'.[151] Williams' brief story imagines law as a walled Celestial City atop the Deep Blue Sea, law as "word magic", lawyers as priests, and the Crits as a group wilfully leaving the city's confines. As the Crits leave they discover "undoing words" which counter the word magic and offers hope to a disenfranchised people under the Deep Blue Sea. However, as the Crits sail further from the Celestial City, they get closer to a place beyond the power of words, which renders their magic impotent. Williams' critique is that the Crits had the power to help those forgotten by law but move too far to the obscure to help. By creating this world, Williams provides a geography to position cls1 works in relation both law and non-law. The creation of the *Geography of cls1* is proposed to aid the (re)use of cls1 works by understanding how they

[151] Ibid 402 (emphasis in original).

may or may not relate to each other, rather than placing value judgments on the authors, the journals, or publishing houses which have issued them.

The *Geography of cls1* is the last demystification offered by this thesis. Having started broadly, framing Critical Legal Studies as a legal-subculture, before categorising the various "Critical Legal Studies" as related limbs on a *Family Tree*, and identifying the death of cls1. From here the thesis investigates the lack of remembrance and importance placed on this event, before presenting the concept of a passive-haunting to understand how the death of cls1 continues to affect cls3, demonstrating its constricted and regressive nature through a comparative reading of texts from these two iterations of Critical Legal Studies.

V. CONCLUSION

The demystifications presented in this thesis offer a map and not a tracing of Critical Legal Studies.[152] They strike a balance between meta-analysis and the implications of specific texts. It would be impossible to cover all works which influenced or fall under the banner of Critical Legal Studies, and no attempt has been made to do this. Instead, this thesis follows the narrow US-based Critical Legal Studies, with a focus on the works and insights of Duncan Kennedy. It is the aim of this thesis to engage thoughtfully but critically with an often misunderstood and marginalised body-of-work, often seen as too amorphous and disparate to provide useful tools for legal analysis. The approach taken by this thesis should not be considered definitive or doctrinal, but a series of rational arguments offering a perspective on the demystification of Critical Legal Studies.

In its current mystified state, Critical Legal Studies is entombed in an idiosyncratic bricolage of language, theories, and theorists. The current state of cls presents barriers which

[152] Deleuze and Guattari, *A Thousand Plateaus*, above n 16, 12.

restrict meaningful engagement with its tools or insights. By demystifying Critical Legal Studies, these barriers are acknowledged and removed. The purpose of this thesis is a return to the meaningful use and application of Critical Legal Studies to contemporary and continuing issues in law. While some of the specific targets that Critical Legal Studies engaged with have changed and evolved, the hierarchies and indeterminacy in law's application have not. There is a continued need for critical methods to tackle these structural and ideological issues and the demystification of Critical Legal Studies provides a way for this to transpire.

Chapter One

Introducing the Critical Legal Studies Family Tree

'Sometimes we can choose the path we follow. Sometimes our choices are made for us. And sometimes we have no choice at all.'

Neil Gaiman – The Sandman

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I. INTRODUCTION

More than 40 years after the first Conference on Critical Legal Studies in 1977,[1] the movement itself has ground to a halt, with "Critical Legal Studies" or "cls" remembered as an historical movement of leftist intelligentsia against legal liberalism.[2] At the same time, Critical Legal Studies, concerning fields of legal inquiry that are posed to critique law from a critical position, or through a critical lens, are flourishing.[3] Such is the multifaceted nature of the term "Critical Legal Studies" that differentiations often rest with necessary further identification of specific themes, theorists, or scholars. However, this adds complication to an already difficult area to navigate. Recognising this difficulty, Costas Douzinas and Adam Gearey categorise Critical Legal Studies through national identities.[4] The authors identify similarities between the national varieties but address their individuality based on geographic lines, specifically looking at different Critical Legal Studies in the USA,[5] Great Britain,[6] Australia,[7] and South Africa.[8] Taking a different approach to same problem, Margaret Davies designates a broad and narrow categorisation to Critical Legal Studies; i.e. designating the US Critical Legal Studies Movement as narrow and Critical Race Theory as broad.[9] However, while both Douzinas, Gearey and Davies' approaches provide some clarity, they have limitations, solutions to which can be developed further.

Notably, Douzinas and Gearey's categorisation becomes muddied with the (re)location of the Critical Legal scholars they assign to specific locations, a point which the authors identify

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[1] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (New York University Press, 2004) 204.
[2] Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (Routledge, 1996) 185; See, eg, E Dana Neacsu, 'CLS Stands for Critical Legal Studies, If Anyone Remembers' (2000) 8(2) *Journal of Law and Policy* 415.
[3] See especially Cassandra Sharp and Marett Leiboff (eds), *Cultural Legal Studies: Law's Popular Cultures and the Metamorphosis of Law* (Routledge, 2015); see also Matthew Stone, Illan rua Wall and Costas Douzinas (eds), *New Critical Thinking: Law and the Political* (Routledge, 2012).
[4] Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart, 2005) 229–258.
[5] Ibid 229.
[6] Ibid 239.
[7] Ibid 247.
[8] Ibid 253.
[9] Margaret Davies, *Asking the Law Question* (Thomson Reuters, 3rd ed, 2008) 183.

themselves.[10] The authors' acknowledgement of this issue highlights the placeholder nature of these categories, rather than creating a definitive structure. Similarly, it can be inferred from Davies' approach that a dichotomy is imposed and a designated Critical Legal Studies is either broad or narrow. Whilst imperfect, both approaches are useful as a starting point to think about the categorisation of different Critical Legal Studies. Building on these ways of thinking about Critical Legal Studies, this chapter presents a *Critical Legal Studies Family Tree* aimed at reducing complication and assisting the exploration of its complexity.

To demonstrate the effectiveness of the *Critical Legal Studies Family Tree*, this chapter presents, first, an overall understanding of the structure and its interrelated limbs. Having established the outline of the Family Tree, the focus shifts to a specific branch, undertaking a detailed assessment of the US-based Critical Legal Studies. This assessment will demonstrate the clarity that the *Critical Legal Studies Family Tree* offers by focusing on the proposed death of Critical Legal Studies in the mid-1990s. This chapter argues that this death mystifies Critical Legal Studies and its illumination though the *Family Tree* aids its demystification. This thesis posits that the death of Critical Legal Studies is related to three interconnected areas: the scholars who founded Critical Legal Studies, their location at Harvard University Law School, and the rivalry between Critical Legal Studies and Law and Economics. The interaction between these three areas will demonstrate a cause of death and a way to understand the position of the Critical Legal Studies that continued posthumously.

II. THE CRITICAL LEGAL STUDIES FAMILY TREE

A discussion on Critical Legal Studies, requires the term to be unpacked, providing an understanding of its origins, impact, and legacy. However, when asking the seemingly simple question "what is critical legal studies?" the answer given depends on a number of factors,

[10] Douzinas and Gearey, *Critical Jurisprudence*, above n 4, 239 nn 26.

including the time, location, and associated theorists, with each combination providing a host of different answers. These different answers demonstrate the breadth of Critical Legal Studies. Appreciating this breadth contextualises the existing work undertaken on differentiating the various "Critical Legal Studies". Margaret Davies addresses this issue by offering a broad and narrow reading of "Critical Legal Studies".[11] Davies' framework outlines a way to separate the narrow category of Critical Legal Studies as a title, and the broad category of Critical Legal Studies as a description. For example, the narrow categorisation focuses on the Critical Legal Studies Movement,[12] which Davies restricts to an existence within the United States in the 1970s and 80s.[13] Contrastingly, Davies applies the broad categorisation to areas of legal theory which take a critical approach to law, including, Critical Race Theory and Feminist Legal Theory.[14]

The division of Critical Legal Studies into broad or narrow categories, should be understood as a clarification of the term, rather than a separation of two distinct areas. Davies demonstrates that these two readings of Critical Legal Studies can be identified, however, the influence of the narrow Critical Legal Studies on the broad, [15] and to some extent vice versa,[16] is accepted within the literature. This interwoven relationship between both broad and narrow Critical Legal Studies, means that the distinction Davies draws is not always immediately clear. This lack of clarity demonstrates the nuanced relationship between a number of broad and narrow Critical Legal Studies, although it should be noted that this link is not present in all

[11] Davies, above n 9, 183.
[12] Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Harvard University Press, 1983).
[13] Davies, above n 9, 184.
[14] Ibid.
[15] See Patricia J Williams, 'Alchemical Notes: Reconstructing Ideals From Deconstructed Rights' [1987] 22 *Harvard Civil Rights – Civil Liberties Law Review* 401; David M Trubek, 'Foundational Events, Foundational Myths, and the Creation of Critical Race Theory, or How To Get Along with a Little Help from Your Friends (2011) 43(5) *Connecticut Law Review* 1503; Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back To Move Forward' (2011) 43(5) *Connecticut Law Review* 1253.
[16] See, eg, Duncan Kennedy, *Sexy Dressing etc.* (Harvard University Press, 1993).

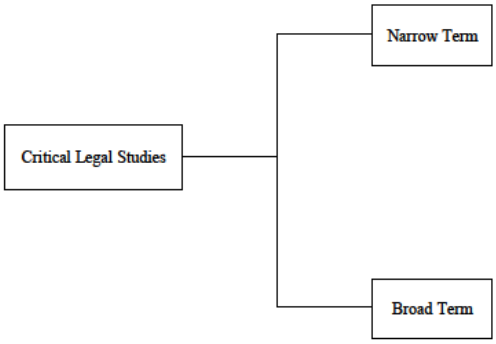
Critical Legal Studies works.[17] The use of a broad/narrow distinction, does, however, provide a blunt distinction, based on parameters of time, location, and author.[18]

Similarly, Costas Douzinas and Adam Gearey categorise Critical Legal Studies through a series of geographic locations.[19] This categorisation alleviates the dichotomous nature of Davies' broad/narrow approach, but still presents some foundational issues. The primary issue is acknowledged by the authors in their discussion of Critical Legal Studies in Great Britain and the "Brit Crits", '[t]here is a problem with the "Brit" Crit. Many of the scholars associated with this position are not British. Although some may have become British through long association with British bad habits, others a resolutely non-British, or even anti-British.'[20] Douzinas and Gearey recognise their framework's limitations and don't impose it as a mode of firm categorisation. Instead, it is used to differentiate the historical locations of Critical Legal Studies in the authors' larger project of '[c]ritical legal thought', itself a conscious progression from Critical Legal Studies.[21]

The work that Davies, Douzinas and Gearey have done grounds this thesis' presentation of the *Critical Legal Studies Family Tree*. Using Davies' broad/narrow approach as the starting point, the broad/narrow divide shapes the first two limbs on the *Family Tree*.

[17] Crenshaw, above n 15; Trubek, above n 15.
[18] Davies, above n 9, 184.
[19] Douzinas and Gearey, *Critical Jurisprudence*, above n 4, 229.
[20] Ibid 239.
[21] Ibid 258.

Figure 1. Family Tree: Broad Narrow

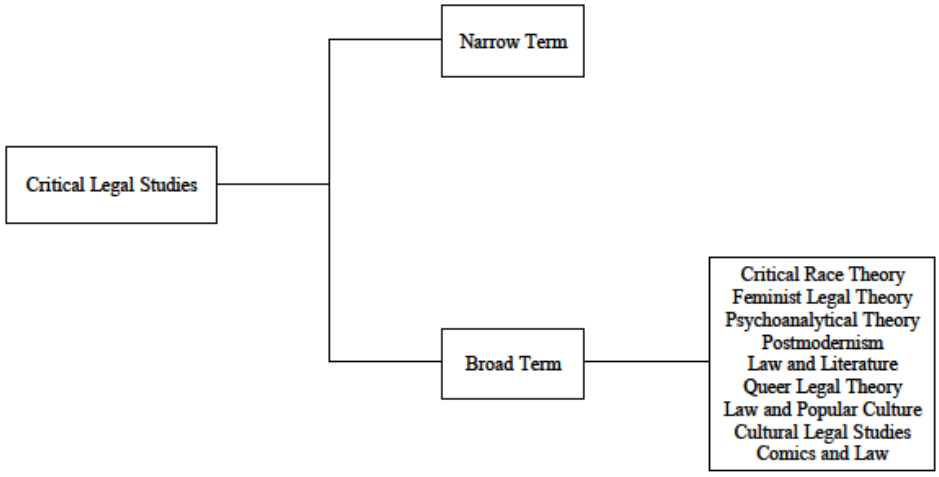


This thesis is focused on the US-based Critical Legal Studies, which falls under Davies' narrow categorisation; as such the discussion and refinements made under the *Family Tree* will reflect this. However, this does not mean that there is not a similar, plausible argument for refining the works under the broad category. Instead, it should be understood that substantial discussion of the broad category falls outside the scope of this thesis and its demonstration of the *Critical Legal Studies Family Tree*. The broad category houses a non-exhaustive list of Critical Legal Studies, including the aforementioned Critical Race Theory and Feminist Legal Theory,[22] but also critical historical scholarship, psychoanalytical theory, postmodernism, law and literature, and queer legal theory, all of which Davies identifies under this heading.[23] In addition to

[22] Davies, above n 9, 183.
[23] Ibid.

Davies' selection, there are emerging critical fields that should also be included, such as Law and Popular Culture,[24] Cultural Legal Studies,[25] and Comics and Law.[26]

Figure 2. Family Tree: Broad complete



Having established and identified broad Critical Legal Studies, the next step is to define what distinct areas can be identified under Davies' narrow categorisation. There are specific limitations in Davies' broad/narrow approach and its application to the narrow US-based Critical Legal Studies. Davies draws some distinctions between variants of the narrow Critical Legal Studies, however, these are general and with less importance than the broad/narrow

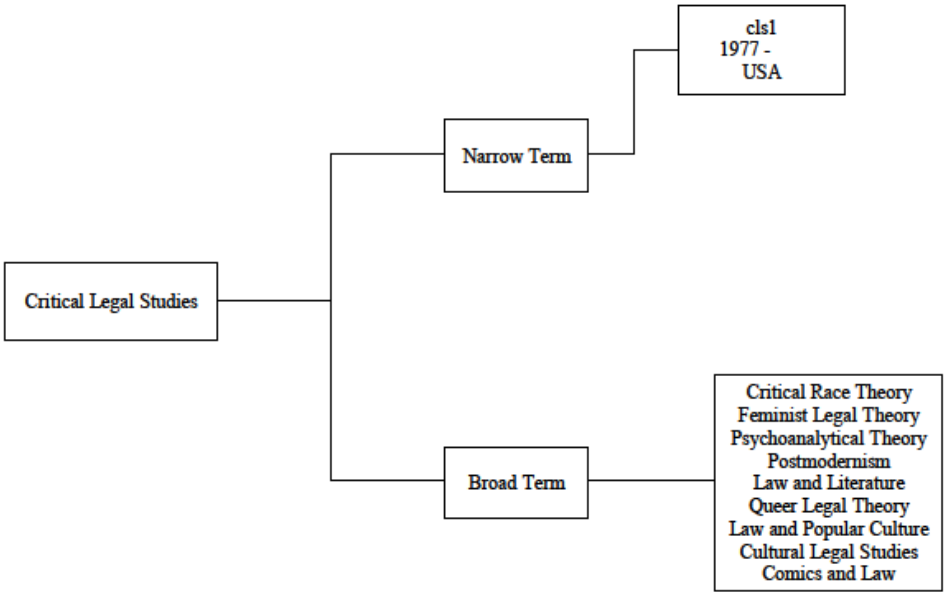
[24] See, eg, William P MacNeil, *Lex Populi* (Stanford University Press, 2007).
[25] Sharp and Leiboff, above, n 3.
[26] Thomas Giddens (ed), *Graphic Justice: Intersections of Comics and Law* (Routledge, 2015); Thomas Giddens, *On Comics and Legal Aesthetics: Multimodality and the Haunted Mask of Knowing* (Routledge, 2018).

divide itself. For example, Davies provides a location and timeline for the US-based Critical Legal Studies,[27] but her introduction to the very different British Critical Legal Studies is mentioned in a footnote only.[28] This thesis contends that, following Douzinas and Gearey, this difference within the narrow category needs to be clearer. The two dominant narrow Critical Legal Studies are the British and the American approaches.[29] Unlike the broad category, narrow Critical Legal Studies are defined primarily by time and geographic location. Despite featuring a crossover of influences, topics, and authors, the Critical Legal Studies of the United States and Great Britain need to be recognised as different Critical Legal Studies. Instead of conflating similarities and presenting a unified narrow branch, these shared factors create two narrow limbs for the US and British Critical Legal Studies.

In the foundational years of Critical Legal Studies, this divide may not have been clear.[30] However, its origins are unquestioned, as Douzinas outlined in 2005, '[c]ritical legal thought … started in America in the Seventies and was first introduced in Britain in the early Eighties'.[31] For the *Family Tree* this positions the US-based Critical Legal Studies as the first limb. In an attempt to tackle the geographic issues presented by Douzinas and Gearey,[32] this thesis presents the limbs numerically, rather than with associated nationalities. As such the initial limb under the narrow heading is "cls1" representing the US-based Critical Legal Studies.

[27] Davies, above n 9, 183.
[28] Ibid nn 2.
[29] Although other countries had and continue to have critical legal scholarship, it is either less dominant than the US and UK branches or more generally housed within the broad category and falls outside the scope of this thesis.
[30] See eg, Costas Douzinas, 'A Short History of the British Critical Legal Conference or, the Responsibility of the Critic' (2014) 25 *Law and Critique* 187, 189.
[31] Costas Douzinas, 'Oubliez Critique' (2005) 16(1) *Law and Critique* 47, 58.
[32] Douzinas and Gearey, *Critical Jurisprudence*, above n 4, 229-258.

Figure 3. Family Tree: Narrow CLS1 1977



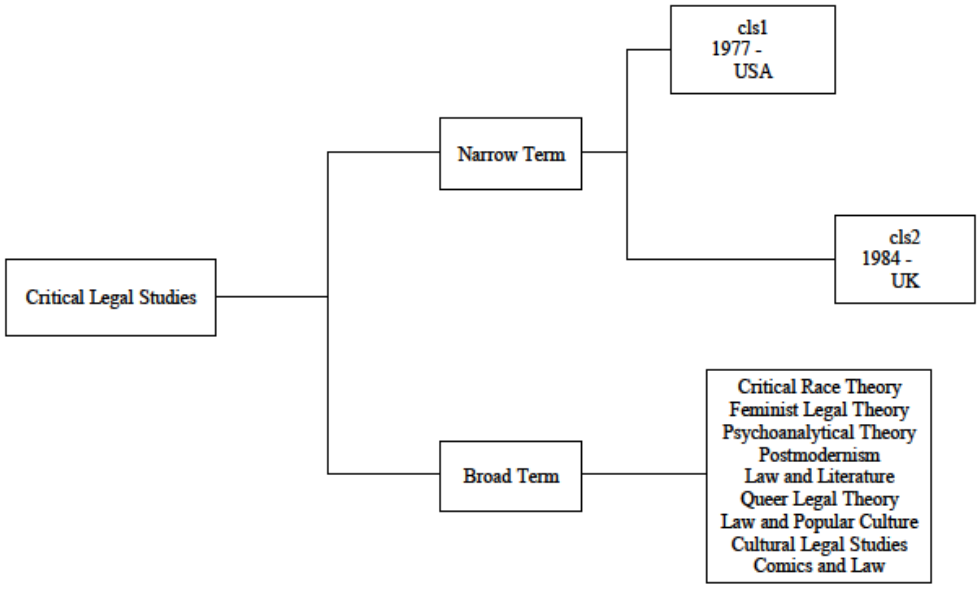
Cls1 is the Critical Legal Studies referred to as the Critical Legal Studies Movement,[33] pertaining to the scholarship and meetings of this organisation primarily in the United States. This Critical Legal Studies grew out of the inaugural Conference on Critical Legal Studies (CCLS) held in 1977 in Madison, Wisconsin.[34] Cls1 was founded on the writing of notable legal scholars Duncan Kennedy, Morton Horwitz, and Roberto Unger, and is identifiable with specific terms and concepts, such as "trashing" and the "indeterminacy of law".[35] This thesis is primarily concerned with cls1. It is, however, not the only narrow Critical Legal Studies.

[33] Unger, *The Critical Legal Studies Movement*, above n 12.
[34] Kennedy, *Hierarchy*, above n 1.
[35] See Introduction, Part I.

Cls1 originated before being introduced, rather than transplanted, into Britain several years after its inception. Initially a distinction between British and US Critical Legal Studies may not have been clear, with Brit Crit authors Peter Fitzpatrick and Alan Hunt stating in 1987 that '[c]ritical legal scholarship has not formed clearly delineated "national" varieties'.[36] However, by 1993 fellow Brit Crit Peter Goodrich presented a paper on the distinctly US-based Critical Legal Studies.[37] Goodrich's paper enforces the geographic distinction, tellingly titled 'Sleeping with the enemy: On the politics of critical legal studies in America'[38] questioning the issues faced specifically by US-based Critical Legal Studies compared to legal critique in Great Britain.[39] By 2005 Douzinas was more confident still, stating that aside from the name, 'not much links the two sides'.[40] In terms of categorisation, this chapter follows the clear division between the two Critical Legal Studies,[41] and presents British Critical Legal Studies as "cls2", under the narrow categorisation of the *Critical Legal Studies Family Tree*.

[36] Peter Fitzpatrick and Alan Hunt (eds), *Critical Legal Studies* (Basil Blackwell, 1987) 1.
[37] Peter Goodrich, 'Sleeping with the Enemy: An Essay on the Politics of Critical Legal Studies in America' (1993) 68(2) *New York University Law Review* 389.
[38] Ibid.
[39] Ibid 186-187 nn 11.
[40] Douzinas, 'Oubliez Critique' above n 31, 59.
[41] A number of US based sources on Critical Legal Studies do not address any variety of Critical Legal Studies outside of the US, see, eg, James Boyle (ed), *Critical Legal Studies* (Dartmouth, 1992); Brian H Bix (ed), *Philosophy of Law: Critical Concepts in Philosophy* (Routledge, 2016) vol 6. This is seen to a lesser extent with later works from the Brit Crits, see, eg, Costas Douzinas and Colin Perrin (eds), *Critical Legal Theory* (Routledge, 2012) has no foundational cls1 papers in the four-volume collection. Instead, Douzinas and Perrin include Pierre Schlag, 'US CLS' (1999) 10 *Law and Critique* 199 to historically address cls1.

Figure 4. Family Tree: Narrow CLS2 1984



The creation of the *Family Tree*, which offers the neat categorisation of cls1 and cls2, comes with its own set of issues; relevant here is the issue of a clear starting point. For example, cls2 can potentially be traced back further than 1984 and before the introduction of cls1, with the seminal book *Images of Law* by Zenon Bankowski and Geoff Mungham, in 1976.[42] A similar issue arises for cls1 with *Law Against the People*, an edited collection on critically demystifying law, published in 1971.[43] Theoretically both books offer earlier starting points for cls1 and cls2, however, whilst influential they should not be considered part of the Critical Legal Studies cannon. The purpose of this *Family Tree* is not to encompass all critical works, but those who identified and worked under the banner of Critical Legal Studies. Therefore,

[42] Zenon Bankowski and Geoff Mungham, *Images of Law* (Routledge, 1976).
[43] Robert Lefcourt, *Law Against the People* (Random House, 1971).

whilst *Images of Law* was influential on cls2 specifically, [44] it should be viewed as a separate critical work, rather than Critical Legal Studies.

Instead, the date given to the start of the cls2 limb relies on Fitzpatrick and Hunt's *Critical Legal Studies*,[45] which states that '[i]n Britain the Critical Legal Conference was formed in 1984'.[46] With reference to flyers and calls for papers, Fitzpatrick and Hunt's claim can be verified, however the idea of the first conference appears to have been somewhat informal and does not conform to what might be understood as a "standard" structured legal conference today. However, in 1985 a one-day-conference was discussed at Middlesex Polytechnic in June,[47] and was held at Birkbeck College that September.[48] In 1986 the Critical Legal Conference (CLC) was considered a 'full conference' and was held in September at the University of Kent.[49] In keeping with Davies' initial distinction, the identification and categorisation of cls2 is used to outline what cls1 was not. Whilst certain cls2 works will be relevant to the critique and contextualisation of cls1, further analysis of this category falls outside the scope of this thesis.

At this stage, the narrow side of the *Critical Legal Studies Family Tree* has two limbs, cls1 and cls2. Despite the existing similarities and differences in both theory and practice cls1 and cls2 both have, there is a major distinction vital to the unpacking of the narrow Critical Legal Studies and the development of the *Family Tree*: the death of cls1.

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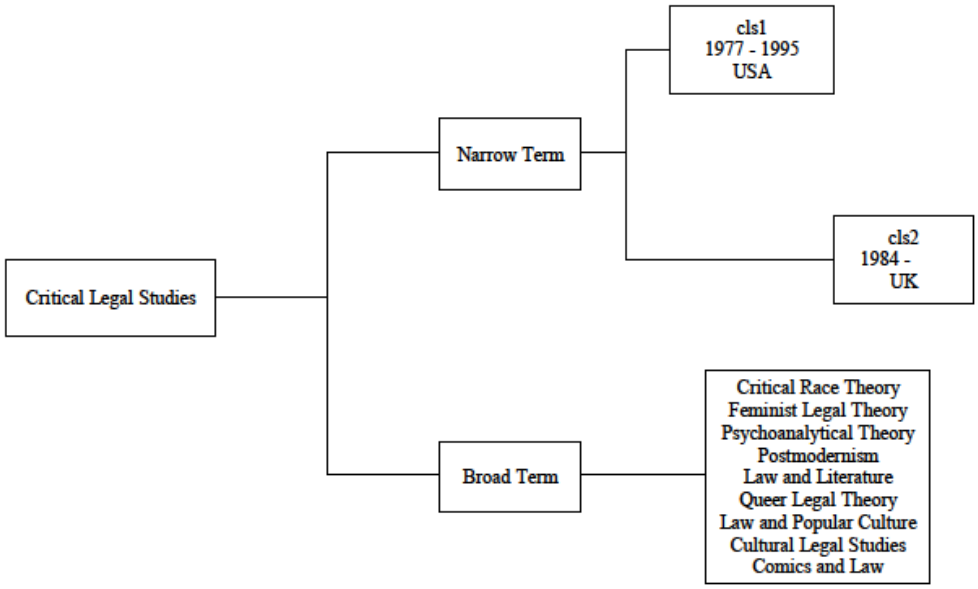
[44] For cls2, see especially Costas Douzinas and Lynda Nead (eds), *Law and the Image: The Authority of Art and the Aesthetics of Law* (University of Chicago Press, 1999); Peter Goodrich, 'Screening Law' (2009) 21(1) *Law and Literature* 1.
[45] Fitzpatrick and Hunt, above n 36; Douzinas, 'Oubliez Critique', above n 31, 61.
[46] Fitzpatrick and Hunt, above n 36.
[47] CLC Organizing Group, 'Critical Legal Conference' (Meeting Minutes, 1985) < https://www.kent.ac.uk/law/research/clc-2016/archive.html>.
[48] CLC Middlesex University, 'One-Day Conference: What is Critical Legal Studies' (Call for Papers, 1985) < https://www.kent.ac.uk/law/research/clc-2016/archive.html>.
[49] University of Kent, 'Critical Legal Conference, First Annual Conference: Law, Critique and Social Transformation' (Call For Papers, 1986) < https://www.kent.ac.uk/law/research/clc-2016/archive.html>.

Figure 5. Family Tree: Narrow CLS1 1977-1995

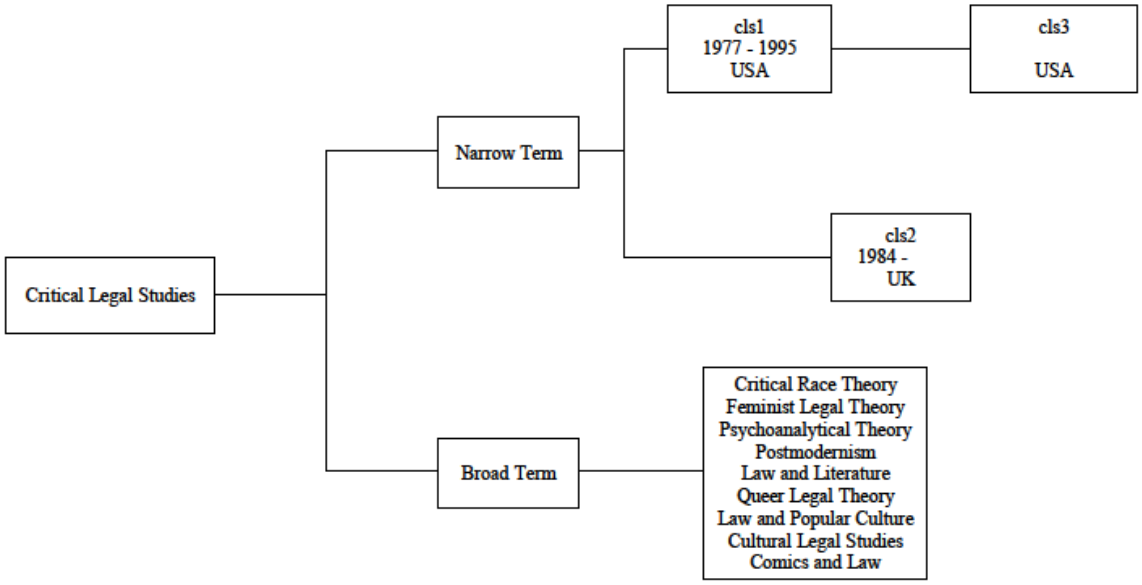


Within the structure of this *Family Tree*, the death of cls1 provides two important outcomes. First it further differentiates itself from cls2, which has not suffered a death. Second, the death of cls1 provides a categorisation for US-based Critical Legal Studies post-1995. For cls2, the CLC is still running and early cls2 works, like Hunt and Fitzpatrick's *Critical Legal Studies*,[50] or Douzinas, Goodrich, and Yifat Hachamovitch's *Politics, Postmodernity, and Critical Legal Studies*,[51] demonstrate modes of thinking that can still be seen in contemporary cls2 works, sometimes from the same authors.[52] Cls1 has not followed this path, and instead transitioned

[50] Fitzpatrick and Hunt, above n 36.
[51] Costas Douzinas, Peter Goodrich and Yifat Hachamovitch (eds), *Politics, Postmodernity, and Critical Legal Studies: The Legality of the Contingent (And Sport)* (Routledge, 1994).
[52] See, eg, Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge-Cavendish, 2009).

to what has been called a death.[53]. The result of this death is a schism in US-based Critical Legal Studies, resulting in the creation of a new limb: cls3.

Figure 6. Family Tree: Narrow CLS3



Until this point, the divisions presented via the *Family Tree* should cause little to no debate.[54] However, the cls3 limb is not something already articulated within Critical Legal Studies,[55] instead it is a creation of this thesis. Cls3 should be understood as a contemporary Critical Legal Studies; it follows the categorisation of the narrow US-based Critical Legal Studies, appearing after the death of cls1. Unlike cls1 or cls2, cls3 is resultant only on the death of cls1,

[53] See below The cls1 Eulogy.
[54] See Davies, above n 9, 183-212; See Douzinas and Gearey, *Critical Jurisprudence*, above n 4, 229-258.
[55] But see Adam Gearey, '"Change is Gonna Come": Critical Legal Studies and the Legacies of the New Left' (2013) 24 *Law and Critique* 211, 224.

rather than a conference or a grouping of scholars. For clarity, cls3 should also be understood as the US-based Critical Legal Studies that still continues to this day. By investigating how the cls1 death occurred this thesis will demonstrate a key factor in the mystification of Critical Legal Studies.

III. THE CLS1 EULOGY

In the December 1st edition of 1995's *Harvard Law Record*, the student run Harvard Law School paper, a student, Hope Yen, penned an article on cls1. Under the title 'As HLS Mulls its Mission, CLS Scholars Remain Quiet', the article is a response to the lack of engagement by the once vocal Crits on development plans for Harvard Law School by the new Dean, Robert Clark.[56] The article begins on page two of the *Harvard Law Record*, and continues on page four, with a secondary title 'Crits at HLS a Dying Breed?'[57] Although Harvard-centric, Yen's article is an important piece of more general cls1 history. The article's focus on the silence of the Crits allows Yen to question Crits still on the Law School faculty, interviewing Duncan Kennedy and Morton Horwitz. Within the quotes that Yen uses, both Professors of Law refer to cls1 as dead.[58]

Yen's article offers a unique insight into the death of cls1. First by identifying from prominent Crits that a death has occurred, second from the location in which this information was gathered and published, and third with its relation to Dean Clark and his association with Law and Economics.[59] These three factors are linked throughout the history of cls1, with its key actors, their location, and competing theories of jurisprudence shaping cls1 and inevitably its end. When Yen captures both Kennedy and Horwitz saying that cls1 is dead, and Dean Clark

[56] Hope Yen, 'As HLS Mulls Its Mission, CLS Scholars Remain Quiet', *Harvard Law Record* (Cambridge), December 1 1995, 2.
[57] Hope Yen, 'Crits at HLS a Dying Breed?', *Harvard Law Record* (Cambridge), December 1 1995, 4.
[58] Yen, 'HLS Mulls Its Mission', above n 56.
[59] See below The Rivals: cls1, Liberalism, and Law and Economics.

stating that he did not kill it,[60] the article can be read as a posthumous discussion on cls1 itself, rather than Dean Clark's plans for the Law School. To best appreciate this reading, the history of cls1, focusing on prominent crits, Harvard Law School, and Law and Economics will be discussed in the lead-up to Yen's article and the declared death of cls1.

The death of cls1 will be discussed with reference to three categories: the cls1 founders, their location, and the cls1 rivals. Given the organic and loosely affiliated nature of cls1, the many universities it had clusters at, as well as the early relationship between cls1 and Law and Economics,[61] these titles are imperfect. However, given what each title denotes, it is possible to understand them as place holders, representative of key issues, rather than unequivocal and definitive terms. The location in question is Harvard Law School, the founders are Duncan Kennedy, Morton Horwitz, and Roberto Unger, and the rival is Law and Economics. Categorised in this way the specific rise and fall of cls1 at Harvard Law School can be seen as endemic to cls1 as a whole.

A. *The cls1 Founders*

Harvard University Law School acted as a microcosm for cls1. Harvard Law School was home to some of the most prominent names in cls1, which given its prestige, went a long way in vetting the movement more broadly. The relationship between Harvard Law School and cls1 can be traced back to the hiring of three legal theorists in 1971: Duncan Kennedy, Morton Horowitz, and Roberto Unger.[62] In accordance with the *Critical Legal Studies Family Tree*, this act by the Law School predates the beginning of cls1. However, the hiring of these theorists serves as a prelude to the movement proper, as Kennedy recounted in a 2012 interview:

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[60] Yen, 'HLS Mulls Its Mission', above n 56.
[61] See, James R Hackney Jr, *Legal Intellectuals in Conversation: Reflections on the Construction of Contemporary American Legal Theory* (New York University Press, 2012) 22.
[62] Ibid 28.

> When I got to Harvard Law School, I fell in with Morton Horwitz and Roberto Unger. We were all hired at the same time, and as it very often happens in law faculties, people that are hired in the same year form a kind of cohort. There's a kind of intimacy that comes from arriving at the same time, but it developed quickly way beyond that into a very deep intellectual alliance.[63]

The alliance Kennedy speaks of was manifested through the creation of cls1. Kennedy, Horwitz, and Unger all contributed key texts to the "Critical Legal Studies Movement", with their work during the prelude to cls1 establishing a grounding in areas further developed after the inaugural Conference on Critical Legal Studies in 1977.

To demonstrate their contributions, this chapter will assess the themes and structure of these theorists' works during this time. Through this demonstration, unity within the scholarship will be presented without the need for a detailed and extensive literature review of the content. For example, during this pre-cls1 phase, Kennedy published *How the Law School Fails: A Polemic*,[64] and *Form and Substance in Private Law Adjudication*.[65] Despite the length of these papers, especially *Form and Substance*,[66] these works can considered fairly minor by Kennedy, with his more notable published cls1 work coming after the first CCLS.[67] Both papers hint, however, at the proceeding cls1 with Kennedy's first *Polemic* bearing traceable roots to his more famous *Polemic*,[68] as well as themes of formal and ad hoc implications of law, seen in *Form and Substance*.[69] These papers cover issues on structures of rhetoric and hierarchies within institutions, which feed into the dominant themes throughout Kennedy's later cls1 work.[70] The foundational pre-cls1 work for Kennedy was the 1975 unpublished

[63] Ibid.
[64] Duncan Kennedy, 'How the Law School Fails: A Polemic' (1971) 1(1) *Yale Review of Law and Social Action* 77.
[65] Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1989) 89 *Harvard Law Review* 1685.
[66] The paper is 95 pages long.
[67] See Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 *Buffalo Law Review* 209.
[68] Kennedy, *Hierarchy*, above n 1.
[69] Kennedy, 'Form and Substance', above n 65, 1685.
[70] Ibid.

manuscript *The Rise and Fall of Classical Legal Thought*, which remained in this form until being formally published in 2006.[71]

Rise and Fall set the tone for a dominant branch of cls1 with the use of structuralism and critical theory to assess what Kennedy calls classical legal thought (from 1850-1940).[72] In the 2006 published version of *Rise and Fall*, Kennedy included a preface to the 1975 work, outlining that by discussing structuralism and critical theory with regard to law and legal history, he aimed to provide more techniques to a legal repertoire.[73] Candidly, Kennedy also admits that his hope was for this work to be included in the fields of critical theory and structuralism. Whilst the latter was not clearly achieved, the work's thematic resonance with cls1 can be seen through the issues Kennedy outlines. For example, *Rise and Fall* traces five issues through the period of classical legal thought which Kennedy identifies as: 'Legal Consciousness',[74] 'The Phenomenological Approach to Legal Reasoning, By Analogy and By Deduction, to Produce a Conception of the "Mode of Integration of a Subsystem"',[75] 'The Notion of Nesting',[76] 'The Ontology of Rights and Powers',[77] and 'Reason Dies While Giving Birth to Liberalism'.[78] For Kennedy, *Rise and Fall's* structure and subject matter is identifiably a form of Critical Legal Studies, before the term was openly coined.

Choosing to publish through Harvard University Press, rather than following Kennedy's self-publication method, Horwitz also released a book on legal history. Published in 1977 *The Transformation of American Law, 1780 – 1860* won the Bancroft Prize the following year.[79] *The Transformation of American Law* evidenced a different way that legal history could be undertaken through a broad cls1 approach. Although they are both historical

[71] Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (BeardBooks 2006).
[72] Ibid vii.
[73] Ibid xiv.
[74] Ibid xiv.
[75] Ibid xvii.
[76] Ibid xx.
[77] Ibid xxi.
[78] Ibid xxii.
[79] Morton J Horwitz, *The Transformation of American Law 1780-1860* (Harvard University Press, 1977).

works, Horwitz and Kennedy differ in both form and methodology. Horwitz also revisits history through a contemporary critical lens, but does not impose a framework in the way Kennedy approached *Rise and Fall*.[80] Instead, moving away from the dominant jurisprudential focus of constitutional law, Horwitz focused on the underrepresented analysis of private law.[81] *The Transformation of American Law* identifies a tendency for previous historical work to look at public law as in the public interest,[82] and for private law to be "private", despite its influence on the distribution of power and wealth in American society.[83] Horwitz challenged this dominant approach, demonstrating a move from the historical ideals of Legal Realism's critique of public law,[84] to the foundational cls1 stance which viewed all law as politics.[85]

The difference in approach, demonstrated by Kennedy and Horwitz, shows a wide berth in the foundations of cls1. It is important to note that these differences were also clear at the time, with Kennedy identifying that 'in 1975, Morty Horwitz and I were arguing about a series of different methodological issues that had a lot of influence on the first stages of Critical Legal Studies at the intellectual level'.[86] These discussions were in regard to the different approaches they took to their historical work, with Kennedy reiterating his structural and critical position, and stating Horwitz took an approach relative to his Marxist allegiances.[87] Rather than fragment or dissolve cls1 before it began, these differences paved the way for the diverse approaches taken to law under the banner of cls1. This diversity is further exemplified by Unger's work, which moved away from the direct legal-historical approach taken by both Kennedy and Horwitz, instead presenting a philosophical approach to law in the pre-cls1 period.

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[80] Kennedy, *Rise and Fall*, above n 71, x.
[81] Horwitz, above n 79, xii.
[82] Ibid xiv.
[83] Ibid xv.
[84] See, Oliver Wendell Holmes Jr, *The Common Law* (Dover Publications, first published 1881, 1991 ed).
[85] Hackney, above n 61, 27.
[86] Tor Krever, Carl Lisberger and Max Utzschneider, 'Law on the Left: A Conversation with Duncan Kennedy' (2015) 10(1) *Unbound* 1, 24.
[87] Ibid.

Beginning with *Knowledge and Politics* in 1975,[88] and continuing with *Law in Modern Society* in 1976,[89] Unger set the tone for the philosophical side of cls1. Whilst not strictly a series, Unger notes that *Law in Modern Society* builds upon *Knowledge and Politics*, and both books follow a similar style.[90] In comparison to both Kennedy and Horwitz, Unger's works begin more broadly. *Knowledge and Politics* opens with a statement from the author, that the book's purpose is to 'help one understand the context of ideas and sentiments within which philosophy and politics must now be practiced'.[91] The book is not so much a call to arms as a map one might use to understand the current (1975) climate of philosophy and politics. As such *Knowledge and Politics* covers a wide-range of topics, but with liberalism at the heart of Unger's critique. This theme can be seen directly in the establishing chapters on Liberal Psychology,[92] Liberal Political Theory,[93] and The Unity of Liberal Thought.[94]

In his follow-up text, *Law in Modern Society*, Unger further follows the thread of liberalism, this time addressing it with regard to social theory; the underlying aim of the book is to lead towards a critique of social theory.[95] Again Unger addresses the topic at hand broadly, demonstrating and positioning law within the realm of modernity, primarily by addressing different cultures,[96] and then assessing how liberalism has effected change internationally.[97] Whilst there is undoubtedly a marked difference between the three authors and their works, their central theme of critiquing and questioning liberalism; their own voices and styles evident and distinct in this pre-cls1 time. In a post-cls1 world there is a potential argument that the works themselves were at best tenuously connected, either broadly critical, or merely

[88] Roberto Mangabeira Unger, *Knowledge and Politics* (The Free Press, 1975).
[89] Roberto Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (The Free Press, 1976).
[90] Ibid v.
[91] Unger, *Knowledge and Politics*, above n 88, v.
[92] Ibid 29.
[93] Ibid 63.
[94] Ibid 104.
[95] Unger, *Law in Modern Society*, above n 89.
[96] See, eg, Unger, *Law in Modern Society*, above n 89, 47-133.
[97] See, eg, ibid, 134-191.

progressive. However, collectively their unified approach to demystifying liberal notions of law lay the groundwork for cls1.

B. *The cls1 Location*

The groundwork for cls1, completed by Kennedy, Horwitz, and Unger, was undertaken during their time at Harvard Law School. This location, as proposed above, acted as a microcosm for cls1: what happened to cls1 at Harvard Law School directly impacted cls1 as a whole. The relationship between Harvard Law School and cls1 therefore becomes a fundamental part of the cls1 story. Importantly the relationship between cls1 and Harvard Law School was new.[98] The instigation of this relationship hinged on a changing socio-political climate,[99] and changes in jurisprudence which led to universities hiring legal theorists like Kennedy, Horwitz, and Unger. Inadvertently these factors helped to create and directly affect cls1, specifically with its relationship to Harvard Law School. By addressing how this relationship began, it is possible to identify the pressures which led to the death of cls1.

As was argued earlier in this chapter, the relationship between cls1 and Harvard Law School can be traced back to the 1971 hiring of Kennedy, Horwitz, and Unger. However, the importance of this action is compounded when historically the broad type of critical work undertaken by these impending-cls1 scholars was not traditionally welcomed at Harvard Law School.[100] Instead, from the early part of the 20th Century this type of scholarship had been deliberately nurtured at Yale Law School.[101] However, as Laura Kalman identifies, the hiring of the early Crits by Harvard and not Yale, demonstrated a deliberate transition in both institutions:

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[98] Hackney, above n 61, 28.
[99] See below The Rivals: liberalism, cls1, and Law and Economics.
[100] Laura Kalman, *Yale Law School and the Sixties: Revolt and Reverberations* (The University of North Carolina Press, 2005) 7; See Hackney, above n 61, 28.
[101] Kalman, above n 100, 7.

> Yale, which had embraced forward-looking legal realism in the 1930s, rejected realism's descendant, Critical Legal Studies [cls1], at the same time that Harvard Law School, which had once turned its back on realism, made a home for realism's child and for scholarship that represented one logical extension of sixties activism.[102]

In her assessment, Kalman's identification leads to a series of issues which underpin the relationship between cls1 and Harvard Law School. Kalman's insight contextualises cls1 historically as a descendant of Legal Realism, and then contemporaneously as an extension of 1960s activism;[103] by unpacking this statement it will be possible to address the significance of Harvard Law School as the location for cls1. The connection Kalman draws between Legal Realism and cls1 further illuminates the relationship between cls1 and Harvard Law School. The implication in Kalman's quote is that cls1 would follow a similar path to Legal Realism and be rejected by Harvard Law School.[104] The hiring of Kennedy, Horwitz, and Unger demonstrated that Harvard was open to 'increasing [its] intellectual dynamism',[105] however its history with Legal Realism placed the emergence of cls1 in a precarious position. To appreciate the importance of this position for cls1, it is necessary to briefly look at the relationship between Legal Realism, cls1, and Harvard Law School.

Kalman is not alone in her connection of cls1 and Legal Realism, with Legal Realism often heralded as a predecessor of cls1,[106] along with claims that cls1 is a continuation of Legal

[102] Ibid.
[103] See Introduction, Part III Counterculture, Minor Jurisprudence, and Legal-Subculture.
[104] Kalman, above n 100, 7.
[105] Steven M Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton University Press, 2008)193.
[106] Hackney, above n 61, 27; Goodrich, above n 2, 209.

Realism.[107] Legal Realism does differ from some cls1 approaches,[108] but its focus on judicial subjectivity under the guise of scientific formalism draws a strong correlation. Relative to the idea of a cls1 location, was Legal Realism's own relationship with Harvard Law School; notably through former student, Oliver Wendell Holmes Jr.[109] The Legal Realists are often exemplified by Wendell Holmes Jr and his work in both *The Common Law*,[110] and *The Path of the Law*.[111] Within these works Wendell Holmes Jr embodied the critical stance of the Legal Realists, demonstrating an application of broader philosophical theory and critique of law.[112] This critical stance also included challenging the dominant formalist pedagogy, which was embodied by Harvard Law School's Socratic Method. Although Legal Realism ultimately failed in directly overthrowing formalism at Harvard Law School, its influence was felt throughout the 20th century culminating in new jurisprudential approaches, including cls1.

The Legal Realists' choice to focus their challenge on Harvard Law School related to the creation of the Socratic case book method by a former of Dean of the Law School, Christopher Columbus Langdell.[113] Langdell's formalist pedagogical approach, which he instigated at Harvard Law School, transformed and dominated legal education from the early part of the 20th century.[114] Sometimes referred to as 'Langdellianism', the method was embraced heavily by a large number of law schools across the US at this time.[115] Critically, this method encouraged students to 'believe law was separate from morality and preference' in

[107] Hackney, above n 61, 27; Goodrich, above n 2, 209; Debra A Livingston, ''Round and 'Round the Bramble Bush from Legal Realism to Critical Legal Scholarship' (1982) 95(7) *Harvard Law Review* 1669, 1682; Neil Duxbury, 'The reinvention of American legal realism' (1992) 12(2) *Legal Studies* 137, 138; William W Fisher III, Morton J Horwitz and Thomas A Reed (eds), *American Legal Realism* (Oxford University Press, 1993) xi-xv; Andrew Altman, 'Legal Realism, Critical Legal Studies And Dworkin' (1986) 15(3) *Philosophy & Public Affairs* 205; John Hasnas, 'Back To The Future: From Critical Legal Studies Forward To Legal Realism, Or How Not To Miss The Point Of The Indeterminacy Argument' (1995) 45(1) *Duke Law Journal* 84; David Fraser, 'What a Long, Strange Trip it's Been: Deconstructing Law from Legal Realism to Critical Legal Studies' (1988-89) 5 *Australian Journal of Law and Society* 35, 38; Davies, above n 9, 191.
[108] See Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton University Press, 1990) 77-79.
[109] See Louis Menand, *The Metaphysical Club* (Farrar Straus and Giroux, 2001).
[110] Holmes, *The Common Law*, above n 84.
[111] Oliver Wendell Holmes Jr. 'The Path of the Law' (1897) 10(8) *Harvard Law Review* 61.
[112] See, eg, Holmes, *The Common Law*, above n 84, 188.
[113] Anthony Chase, 'The Birth of the Modern Law School' (1979) 23 *The American Journal of Legal History* 329; Kalman, above n 100, 17.
[114] Kalman, above n 100, 17.
[115] Ibid.

turn draining law of its 'ideological political content'.[116] Despite its success,[117] its vacuous nature made it a target for more inclusive modes of legal reasoning. However, this was not exclusive to the Legal Realists, with an early charge against Langdellianism being led unsuccessfully by Roscoe Pound, who called for the implementation of a sociological jurisprudence.[118] Although he was also unsuccessful, the movement spurred by Wendell Holmes Jr was described as 'the most concerted attempt to challenge Harvard's control over legal education'.[119] As a result of this effort by the Legal Realists, their approach was seen as a valid alternative, and was desirable to other schools, most notably when it was taken up at Yale.[120]

Historically, with Harvard's rejection and Yale's acceptance of Legal Realism, it was not expected that Harvard Law School would hire young critical scholars like Kennedy, Horwitz, and Unger. Their unexpected appointment, paired with the lack of critical roots within the Law School, presented an uncertain foundation for cls1 at Harvard. More importantly to this current analysis, the level of uncertainty allows a challenge to be levelled at the terminology used by Kalman in the second part of her quote. Kalman begins by stating that Harvard Law School made 'a home for realism's child' and qualifies this child as a 'logical extension of sixties activism'.[121] This chapter proposes that the concept of a home for cls1, as an extension of 1960s activism, from an institution such as Harvard Law School is problematic. The denotation of the term "home" implies certain values that were not evident in the existence of cls1,[122] and it is why the use of "location" has been employed in this chapter instead. The distinction between location and home, moves beyond mere semantics, and removes the inferred emotion with the designation of a home, which can include ownership, belonging, and

[116] Ibid.
[117] Neil Duxbury, *Patterns of American Jurisprudence* (Clarendon Press, 1995) 9-18.
[118] Ibid 54; Kalman, above n 100, 18.
[119] Kalman, above n 100, 18.
[120] Ibid 19.
[121] Ibid 7.
[122] See below The slow death of cls1.

safety. The idea of a location instead is one where cls1 could be practiced, but where it would also be in competition with other modes of jurisprudence, specifically Law and Economics.

C. *The Rivals: cls1, Liberalism, and Law and Economics*

Following a similar path to the Legal Realists and their fight against formalism, cls1 and the Crits also challenged the dominant structure of law. However, transitions made in American society during the 20th century shifted the dominant form of law from formalism to liberalism.[123] Given the breadth of the term, the "liberalism" in question can be understood as 'the set of political ideas that had descended from the New Deal and that had shaped the steady postwar expansion of federal social and economic responsibilities'.[124] The shaping of these responsibilities were such that liberalism infiltrated all walks of American life including law and the academy.[125] As historian Alan Brinkley continues, '[f]aith in both the value and durability of liberalism shaped not only the politics, but also much of the scholarship of the postwar era'.[126] The Crits' focus, especially via Kennedy, was inside the law school,[127] and as he later affirmed, '[t]he mainstream of the law school world was not conservatism; the mainstream was liberalism'.[128] Collectively, the critique and criticism of liberalism was the primary target of the Crits.[129]

In countering liberalism, the Crits and cls1 were not alone. Notably, and notably much earlier than cls1,[130] Law and Economics had developed similar anti-liberal sentiments. Law and Economics formed from within the Chicago School of Economics, primarily offering

[123] Duxbury, above n 117, 32-64.
[124] Alan Brinkley, *Liberalism and its Discontents* (Harvard University Press, 1998) ix.
[125] Ibid.
[126] Ibid.
[127] Kennedy, 'How the Law School Fails', above n 64; Kennedy, *Hierarchy*, above n 1.
[128] Hackney, above n 61, 24.
[129] See above The cls1 Founders.
[130] Hackney, above n 61, 22.

alternatives to Keynesianism, the economic driving force behind liberalism,[131] and applying these alternatives to law.[132] At Chicago University the area was spearheaded by Edward Levi and Aaron Director,[133] spawning a journal of the same name in 1958. In the third volume of the journal, Ronald Coase published an article, 'The Problem of Social Cost'.[134] Presenting a mixture of real case law and theoretical economics, Coase's seminal piece attacked existing economic arguments, specifically the imposition of taxes, fines, and restrictions on businesses that harm others. This paper challenged the dominant concept of the Pigouvian Tax,[135] and instead looked at market-based alternatives and degrees of harm that would be less economically damaging to the businesses which caused harm.

'The Problem of Social Cost' transformed what would come to be known as "Law and Economics", notably when Coase took over as editor of the journal and openly pushed the approach he had taken in this paper.[136] Coase's influence and the change in direction brought in interest from young scholars including Richard Posner who, as a prolific author, would further refine Law and Economics.[137] On its own, the journal, and even the academics at Chicago, were not enough to bring about an end to liberalism, however, the direction implemented by Coase helped to build a foundation against it. Within jurisprudence and the academy, these efforts, paired with the unlikely allies of the civil rights movement and the revolutionary 1960s,[138] helped to destabilise liberalism until '[b]y the end of the 1960s [the] secure liberal universe was beginning to crumble'.[139]

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[131] Michael Stewart, *Keynes and After* (Pelican Books, 2nd ed, 1968) 240.
[132] Rob Van Horn and Philip Mirowski, 'The Rise of the Chicago School of Economics and the Birth of Neoliberalism' in Philip Mirowski and Dieter Plehwe (eds), *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Harvard University Press, 2009) 140.
[133] Ronald Coase, 'Law and Economics at Chicago' (1993) 36(1) *The Journal of Law and Economics* 239, 247, 251.
[134] Ronald Coase, 'The Problem of Social Cost' (1960) 3 *The Journal of Law and Economics* 1.
[135] Ibid 28.
[136] Coase, 'Law and Economics at Chicago', above n 133, 253.
[137] Ibid 251; See, eg, Richard A Posner, *Economic Analysis of Law* (Little Brown and Company, 1973); See also, Richard A Posner, *The Economics of Justice* (Harvard University Press, 1981).
[138] Brinkley, above n 124, x.
[139] Ibid.

Despite their shared target of liberalism, cls1 and Law and Economics occupied different political positions from which they led their attacks. Whilst the categorisation of cls1 as politically left and Law and Economics as politically right, is an oversimplification, it is one which aids the narrative. Ideologically these directions broadly designate the politics aligned with both movements, however, there is an implicit binary opposition with this stance that was not always evident, as cls1 and Law and Economics did interact.[140] However, as cls1 developed it remained opposed to liberalism and distanced itself further from Law and Economics.[141] This distance, however, merely clarified the nature of the relationship between both movements as liberalism continued to wane, moving to a relationship of direct competition. As Neil Duxbury identified, '[f]ew American academic lawyers seem to dissent from the proposition that … law and economics and critical legal studies [cls1] have been the "best-organized most ambitious voices in the law schools"'.[142]

Given the status and locations of cls1 and Law and Economics, the competition occasionally left the law school and made for public consumption. Notably, this was seen when Mark Kelman's *A Guide to Critical Legal Studies* singled out Posner's approach to Law and Economics in a chapter titled 'Legal Economists and Normative Social Theory'.[143] In the form of a book review for the *Wall Street Journal*, Posner, at this stage an appeals court judge, penned a response to Kelman's claims.[144] Although he compliments Kelman as a critic of mainstream law,[145] Posner calls Kelman out as 'too quick to find contradiction, too dismissive of efforts to reconcile apparent conflicts, too contemptuous of practical reason'.[146] This bickering in the public eye, can be seen as somewhat sporting and even healthy between two

[140] Krever, Lisberger and Utzschneider, above n 86, 11; See also, Richard Rorty, 'The Banality of Pragmatism and the Poetry of Justice' *Southern California Law Review* 63 (1990) 1811, 1812; Richard A Posner, *The Problematics of Moral and Legal Theory* (The Belknap Press, 1999) 266: Posner unpacks the difference between postmodernism and pragmatism in law, and asks himself am I 'a right-wing "Crit"?'
[141] Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1987) 114-185.
[142] Duxbury, above n 117, 304; *Contra* Schalg, 'US CLS', above n 41, 206.
[143] Kelman, above n 141, 114.
[144] Richard A Posner, 'Bookshelf: A Manifesto for Legal Renegades', *The Wall Street Journal* (online), 27 January 1987.
[145] Ibid.
[146] Ibid.

competing legal movements. However, the elephant in the room, the dying form of post-war American liberalism,[147] highlights the very real competition of a winner-takes-all situation.

IV. THE SLOW DEATH OF CLS1

With a contextual framework made up from the founders, their location, and their rivals the climate and pressures surrounding cls1 have been presented. This chapter proposes that this climate and context provide an understanding of events that occurred over time and eventually led to the death of cls1. The likelihood of the cls1-death became more apparent as the flaws in liberalism began to show more broadly and interest in both cls1 and Law and Economics as potential replacements to legal liberalism grew. However, as this interest grew, so did critiques and criticisms of both legal movements.[148] Aside from the aforementioned factors, the lack of a coherent cls1 alternative to liberal law failed to instill confidence in those who might have been more politically supportive of other cls1 aims.[149] In contrast, the election of Ronald Reagan in 1980 and the push towards supply-side economic policy, thematically resonated with Law and Economics; culturally there was a push towards what would become coined as neo-liberalism, which affected politics and institutions alike.[150]

Whilst the wider political climate was ebbing towards a conservativism that aligned with Law and Economics, the 'extension of sixties activism',[151] cls1, was faltering at Harvard Law School. As the notoriety of cls1 had grown, so had tensions within the law faculty at Harvard. Broadly this tension was between three identifiable groups, the Crits, traditional

[147] Brinkley, above n 124, x.
[148] See, eg, Richard Bauman, *Ideology and Community in the First Wave of Critical Legal Studies* (University of Toronto Press, 2000); Ronald Dworkin, 'Is Wealth a Value?' (1980) 9 (2) *The Journal of Legal Studies* 191.
[149] Bauman, above n 148; Richard Michael Fischl, 'The Question That Killed Critical Legal Studies' (1992) 17(4*) Law and Social Inquiry* 779.
[150] David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) 13; Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (ZoneBooks, 2015) 10, 122-131.
[151] Kalman, above n 100.

liberals, and those affiliated with Law and Economics. [152] Such was the environment that at least one Professor left Harvard, after 20 years' service, for Chicago Law School.[153] However, these tensions truly came to a peak in 1987, when Harvard Law School denied tenure to two cls1 scholars. When David Trubek, a visiting professor, and Clare Dalton, an assistant professor, applied for tenure at Harvard Law school and were denied, the Crits and their sympathisers took this as a direct attack.[154] There was no clear evidence this was an attack, and no expectation that every application for tenure would receive it, as Trubek had found previously when he was denied tenure at Yale Law School.[155] However, the timing of the denial moved beyond the issue at hand and became representative of cls1 at Harvard Law School. Whilst tensions had been running high between the different legal factions,[156] the tenure denial was something institutionally instigated, rather than from an individual. In itself this top-down rejection of cls1 scholars represented an institutional decline in cls1 approval or acceptance at Harvard Law School. Trubek did not request a review and returned to the University of Wisconsin Law School;[157] Dalton received a review and her tenure denial was upheld.[158]

The decision at Harvard Law School rippled through the legal academy and the broader community with the help of newspapers like the *New York Times*, which had covered the story.[159] Reading between the lines, those with an interest in the saga of cls1 at Harvard, would have seen that the movement was not going to wield the power it once had, however at this stage its actual death would not have been so easy to predict. In hindsight the *New York Times* article did contain a quote from fellow Crit Robert Gordon of Stanford Law School, which was

[152] 'Vorenberg, Former Law School Dean, Dies at 72', *The Harvard Crimson* (online), April 14 2000 < https://www.thecrimson.com/article/2000/4/14/vorenberg-former-law-school-dean-dies/>.
[153] Jennifer A Kingson, 'Harvard Tenure Battle Puts "Critical Legal Studies" on Trial', *The New York Times* (online), August 30 1987 < https://www.nytimes.com/1987/08/30/weekinreview/harvard-tenure-battle-puts-critical-legal-studies-on-trial.html>.
[154] Ibid.
[155] Hackney, above n 61, 28.
[156] Kingson, above n 153.
[157] Ibid.
[158] Ibid.
[159] Ibid.

quite telling. Gordon gets to the heart of the seriousness of the competition between cls1 and Law and Economics, stating that '[t]here's a peculiar kind of vanity or megalomania at Harvard, that the place is the soul of the American ruling class … [w]hoever wins in local institutional battles there thinks they will control America's cultural and institutional destiny'.[160] A critical reading of Gordon's observation gives a preemptive understanding that only one challenger of legal liberalism was likely to survive.

In 1989, two years after the denial of tenure to Trubek and Dalton, the dean of law at Harvard Law School, Dean Vorenburg who had overseen the prominent cls1 years stepped down. [161] Dean Vorenburg was succeeded by Robert C. Clark, a traditionalist with a background in corporate law,[162] whose appointment was met with dissatisfaction from the Crits.[163] Gerald Frug, a Crit and part of the six-person faculty search committee that helped shortlist the potential deans, believed the appointment of Clark was a mistake.[164] The Harvard University President, Derek Bok, however, gave his full support to Clark overriding Frug and any similar criticisms.[165] The appointment of Dean Clark allowed a reshuffling of the faculty, separating the factions, and removing more of the power the Crits held in the law school;[166] a move that set the tone for the start of a new decade.

In 1991 Law and Economics' Ronald Coase won the Nobel Prize for Economic Science.[167] With this award, Coase joined earlier recipients and Law and Economic influencers, Friedrich von Hayek in 1974 and Milton Friedman in 1976.[168] The prestige of this accord and the lineage behind it, further legitimised the Law and Economics approach. Now facing a Nobel

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[160] Ibid.
[161] Allan Gold, 'Traditionalist Is Named As Harvard Law Dean', *The New York Times* (online) February 18 1989 < https://www.nytimes.com/1989/02/18/us/traditionalist-is-named-as-harvard-law-dean.html>.
[162] See, eg, Robert Clark, *Corporate Law* (Little Brown Company, 1986).
[163] Ibid.
[164] Ibid.
[165] Ibid.
[166] Yen, 'HLS Mulls Its Mission', above n 56.
[167] The Nobel Prize, *All Prizes in Economic Sciences* < https://www.nobelprize.org/prizes/uncategorized/all-prizes-in-economic-sciences/>.
[168] Ibid.

Prize winning opponent, reflective of governments throughout the world,[169] cls1 as the 'extension of sixties activism' was being crystalised as legal whimsy.[170] Given the reflective nature of Law and Economics to a certain political and business class, the final blow to cls1 came in the form of corporate endowments; notably the endowments provided by John M Olin and the Olin Foundation.[171] After giving money to the Law and Economics movement in the 1970s,[172] the Olin Foundation pushed for a Law and Economics program at Harvard Law School, which was accepted by the University President, Derek Bok.[173] Similar to Gordon's earlier observation, Steven Teles identifies Harvard Law School as a target for the Olin Foundation: 'Because of its size and prestige, Harvard Law School has an outsized impact on American legal culture and the character of the legal professoriate'.[174] The multiyear grant created 'The John M. Olin Center for Law, Economics, and Business', and would go on to receive funding of more than $18 million from the Olin Foundation.[175]

V. CONCLUSION: ENDING CLS1, BEGINNING CLS3

The ongoing competition between cls1 and Law and Economics throughout the 1980s, provides some context to the question asked in Hope Yen's 1995 article for the *Harvard Law Record*. Broadly, in the face of a changing law school, where are the Crits? Historically it can be argued that as the unsuccessful side in a jurisprudential overhaul, the Crits had stepped out of the limelight, no longer gracing the pages of mainstream newspapers and magazines.[176] However,

[169] See, eg, Harvey, above n 150, 5-38.
[170] Kalman, above n 100.
[171] John J Miller, Karl Zinsmeister and Ashley May, *Agenda Setting: A Wise Giver's Guide to Influencing Public Policy* (The Philanthropy Roundtable, 2015) 38.
[172] Ibid 39.
[173] Ibid 40.
[174] Teles, above n 150, 192.
[175] Ibid.
[176] See, eg, Kingson, above n 153; Gold, above n 161; Louis Menand, 'What is "Critical Legal Studies": Radicalism for Yuppies' *The New Republic* (Washington D.C.) March 17 1986, 20; Marc Granetz, 'Duncan the Doughnut' *The New Republic* (Washington D.C.) March 17 1986, 22.

in Yen's specific context, within Harvard Law School, the Crits also 'Remain Quiet'.[177] Turning to both Kennedy and Horwitz, as well as Dean Clark, Yen receives unanimous confirmation that cls1 is not as it once was. Whilst there is a heavy motif of death around cls1 in the article, there is no unified understanding of what has actually died. Each interviewee, and Yen herself, draw different conclusions, reflecting the complexity of the situation.

Chronologically the article presents a short quote from Dean Clark, who bluntly states 'I didn't kill them'.[178] Given the animosity from the Crits to Clark's appointment,[179] this short statement is telling, first as to the assumption that it could be his fault by proxy, and that even outside of the immediate cls1 community, people are aware that cls1 is dead. Yen moves from Clark's protest-like statement to her own experience of cls1 at Harvard Law School. Yen, herself citing Kennedy in the same article, states that cls1 is as 'dead as a doornail'.[180] Once Yen has made her observation she provides a longer quote from Clark, in which he refers to cls1 as entering another phase in its lifecycle, having changed, or retired.[181] The choice words from Clark, that this time do not mention death, seem to be applicable only after something is no longer a threat, i.e. a respectful memoriam to cls1.

While thematically similar, Yen and Clark do present different ideas of what death means to cls1. In questioning Kennedy, however, Yen achieves a more detailed understanding from one of the cls1 founders:

> You have to distinguish Critical Legal Studies the movement, from Critical Legal Studies the academic school … [t]here isn't at Harvard Law School or nationally any CLS[1] movement left. The movement completely collapsed several years ago. The school of thought, which is academic, is alive and well, but the school of thought doesn't have any activist component, period.[182]

[177] Yen, 'HLS Mulls Its Mission', above n 46.
[178] Ibid.
[179] Gold, above n 161; Yen, 'HLS Mulls Its Mission', above n 56.
[180] Yen, 'HLS Mulls Its Mission', above n 56.
[181] Ibid.
[182] Ibid.

Kennedy's response provides an assessment of cls1 as living a half-life, one that is no longer able to do what it used to. Kennedy's concession is that despite not wanting to create 'just another set of bibliographical headings' when cls1 began, the current state of cls1 is just that.[183] Horwitz follows a similar line about the state of the then contemporary cls1, but optimistically argues for a resurgence once it's safe to come out again.[184] Although not referencing them directly, the implication Horwitz makes is that the situation that befell Trubek and Dalton in 1986 was still a very real concern for the younger Crits; something which Kennedy agreed with, and had addressed a year earlier.[185]

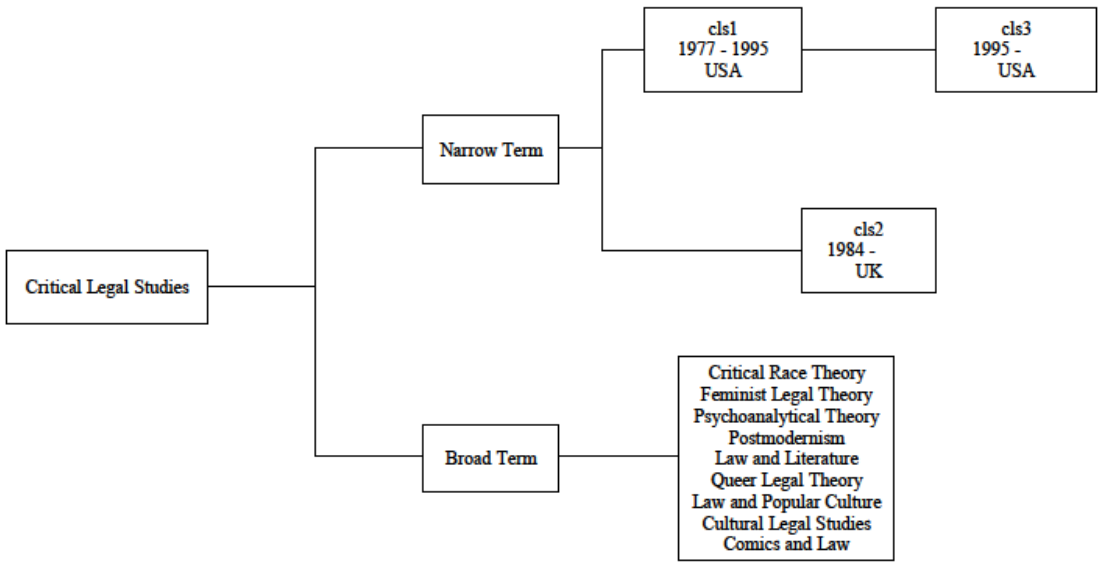
Both Kennedy and Horwitz as representatives of the Crits at Harvard Law School, present a dire view of contemporary (1995) cls1, but with an overarching assumption that it will live on in one form or another. However, the justifications they present are reminiscent of Kennedy's assessment of law schools more broadly, that there is 'endless attention to trees at the expense of forests'.[186] The hope for cls1 to reemerge in a decade, as per Horwitz,[187] or to continue as an area of academic interest, as per Kennedy,[188] seems to deny, or not fully-appreciate, that in the same article there is a consensus that cls1 is dead. Given that cls1 never reemerged and that its academic influence also waned, the optimism that Kennedy and Horwitz showed was ill-placed. Instead, what can be taken from Yen's article, is that the death of cls1 was not hyperbole and that in 1995 cls1 was as dead as a doornail.

Recognising cls1 as dead, rather than on hiatus, clarifies two important areas. Firstly, in immediate relation to Yen's article, it frames the responses to the state of cls1 as individual acts of mourning. For example, this can be seen with Clark's uncomfortable and jocular tone presenting a preemptive "not guilty", backed up with pleasantries about a once real foe that is

[183] Yen, 'CLS a Dying Breed?', above n 57.
[184] Ibid.
[185] Gerard J Clark, 'A Conversation With Duncan Kennedy' *The Suffolk University Law School Journal* (1994) 24(2) 56, 58.
[186] Duncan Kennedy, 'Legal Education as Training for Hierarchy' in David Kairys (ed), *The Politics of Law* A *Progressive Critique* (Pantheon Books, revised ed, 1990) 38, 38.
[187] Yen, 'HLS Mulls Its Mission', above n 56.
[188] Ibid.

no longer a threat.[189] This act of mourning is also evident in Horwitz and Kennedy's demonstration of optimism that cls1 will continue or be reborn. Even Yen's premise for the article, her line of questioning about "what happened to the Crits", becomes an act of discovery; that the once vibrant cls1 at Harvard Law School is dead. The second clarification is more important to Critical Legal Studies as a whole as it creates a way to understand and interpret the narrow US-based cls work that continued post-1995. As was proposed earlier in this chapter, in accordance with the structure of the *Family Tree*, this Critical Legal Studies will be categorised as cls3.

Figure 7. Family Tree: Complete



[189] Ibid.

Cls3, beginning with the declaration of cls1's death in 1995 and continuing,[190] completes this demonstration of the *Critical Legal Studies Family Tree*. The creation of this genealogy, a refinement on both Davies, Douzinas and Gearey's original divisions, provides a framework that aids in the overall demystification of Critical Legal Studies. The idea of the *Critical Legal Studies Family Tree*, provides a system to address the questions "what is critical legal studies?" or "which critical legal studies?" By using the *Family Tree* as a flowchart or map, these questions can be answered, albeit after further measures are accounted for. These measures include the need to identify a broad or narrow reading, whether it relates to US-based or another (most notably British) cls2, and if it was before or after cls1 was considered 'dead as a doornail'.[191] Depending on the qualifiers chosen, the answer becomes evident by following the correlating limbs and demystifying these questions. The ability to answer, "which Critical Legal Studies?" is a step towards its demystification, but the clarity created by dividing Critical Legal Studies into branches and limbs, comes with its own set of related questions. Primarily, as this thesis is concerned with cls1, it is now by proxy, also concerned with cls3. The identification of these two closely related, but distinctly different areas of Critical Legal Studies, provides insight into how a description of the US-based Critical Legal Studies could differ so strongly between the late-1980s and the late-1990s. Within the larger thesis question of demystifying Critical Legal Studies, it is necessary to address the complex relationship between cls1 and cls3.

[190] Ibid.
[191] Ibid.

Chapter Two

Who Remembers the Death of cls1?

'O sancta simplicitas! What strange simplification and falsification mankind lives in! One can never cease to marvel when one has acquired eyes for this marvel! How we have made everything around us bright and free and easy and simple! How we have known how to bestow on our senses a passport to everything superficial, on our thoughts a divine desire for wanton gambolling and false conclusions!'

Friedrich Nietzsche – Beyond Good and Evil

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I. INTRODUCTION

Chapter One proposed a way of unpacking the term "Critical Legal Studies". Given its breadth, a structure to clarify which Critical Legal Studies was being referred to was presented in the form of a *Family Tree*. This literal genealogy,[1] achieves a level of clarity; the contextualisation of Critical Legal Studies provides a framework for grouping and discussing its variants. In turn, the variants' categorisation as limbs on the *Family Tree*, allows a way of mapping the different Critical Legal Studies and their positions in relation to one another. Notably within this unpacking process, a schism was identified in the US-based Critical Legal Studies, resulting in a new limb, cls3. In the context of the overarching thesis process of demystification, the relationship between cls1 and cls3 offers a new way of viewing the US-based Critical Legal Studies. This division highlights an element of its mystified status: that the US-based Critical Legal Studies is made up from two related but different Critical Legal Studies.

To address the relationship between cls1 and cls3, it is necessary to identify whether or not the death and division forms part of the Critical Legal Studies narrative and history. For example, if this division does form part of the dominant historical view, then its discussion here would limit the implied level of demystification offered, i.e. the division is known and has therefore been addressed previously. However, if the death and posthumous continuation of the US-based Critical Legal Studies is not part of the dominant history, then the idea of cls1 and cls3 offers an expansive demystification. This chapter proposes that the death of cls1 and the resulting division is not part of the common Critical Legal Studies history.

There is a motif of death around cls1 from the 1990s onwards, however there is very little written about what this means for Critical Legal Studies itself. Duncan Kennedy represents somewhat of an exception to this rule, as shown by his 2003 paper 'Two

[1] A necessary distinction between this and the alternative use of genealogy, see generally Friedrich Nietzsche, *On the Genealogy of Morals* (Penguin Classics, 2013); Michel Foucault, 'Nietzsche, Genealogy, History' in Donald F Bouchard, *Language, counter-memory, practice: selected essays and interviews* (Cornell University Press, 1977) 139-164.

Globalizations of Law & Legal Thought: 1850-1968'.[2] In the opening paragraph, Kennedy opines that while 'critical legal studies as a political movement has been dead for a number of years, critical legal studies as a legal academic school of thought is very much alive'.[3] Kennedy's view retains his earlier sentiments in the *Harvard Law Record*,[4] which acknowledges but minimises the impact of the cls1-death. The idea of death with relation to cls1, is therefore in a unique position: it is talked about generally but is rarely expanded upon.

This chapter engages with this conundrum to identify how the motif of death surrounds cls1 but is not recognised as an integral part of its history. This chapter argues that even when the death is assessed, there is no discussion on the Critical Legal Studies that continues posthumously. Through a method of content analysis, this chapter investigates how cls1 is remembered in reference materials and online sources. The barrier to entry that exists for cls1 as part of its legal-subcultural status,[5] means that these generalist sources offer an accessible and more widely available account of the cls1 history. This assessment will demonstrate that there is some mention of the cls1 death in specific books and articles, however it does not feature in general reference material and online sources, contributing to its mystification. Given this thesis' focus on mystification and demystification, these terms will also be addressed when they appear in the texts to demonstrate how other aspects of Critical Legal Studies are also glossed over.

[2] Duncan Kennedy, 'Two Globalizations Of Law & Legal Thought: 1850-1968' (2003) 36(3) *Suffolk University Law Review* 631.
[3] Ibid.
[4] Hope Yen, 'As HLS Mulls Its Mission, CLS Scholars Remain Quiet', *Harvard Law Record* (Cambridge), December 1 1995, 2; Hope Yen, 'Crits at HLS a Dying Breed?', *Harvard Law Record* (Cambridge), December 1 1995, 4.
[5] See Introduction, Part III Counterculture, Minor Jurisprudence, and Legal-Subculture.

II. WHERE DEATH IS REMEMBERED

Texts on general legal history and jurisprudence, which take a critical stance or focus on critical approaches to law, make mention of the cls1 death. These mentions are not in-depth, but they will inform their broader discussions and understandings of Critical Legal Studies. Conversely, non-critical approaches to jurisprudence are much more likely to not mention the death of cls1. For example, in *Asking The Law Question* Margaret Davies, who takes a critical rather than abstract view of jurisprudence,[6] mentions the death of cls1. Davies heads part of a subsection in her chapter on Critical Legal Studies as: 'Is It [cls1] Dead?'.[7] The identification of the cls1-death here is drawn from Kennedy's discussion in 'Two Globalizations of Law & Legal Thought: 1850-1968',[8] to which Davies poses some questions about the death and potential assimilation of cls1 into the mainstream of law. However, the author offers no definitive outcome for cls1 instead seeing its end coinciding with the expansion of "broad" Critical Legal Studies: Feminist Legal Theory and Critical Race Theory.[9]

Similarly, in their work *Critical Jurisprudence: The Political Philosophy of Justice*,[10] Costas Douzinas and Adam Gearey dedicate a chapter to Critical Legal Studies.[11] They, like Davies, discuss broad and narrow Critical Legal Studies (but not with these signifiers) and begin with cls1. Unlike Davies, Douzinas and Gearey introduce the death of cls1 on their first page. The mention of death comes after the authors present a series of questions about the way in which cls1 can be categorised, asking in regard to a 'history' of cls1: 'Is it correct to impose a tradition on a body of thought that has set its face against tradition?'[12] Douzinas and Gearey argue that these types of difficult questions leave cls1 with an uneasiness about itself, 'an

[6] Margaret Davies, *Asking the Law Question* (Thomson Reuters, 3rd ed, 2008) 11-12.
[7] Ibid 210.
[8] Kennedy, 'Two Globalizations', above n 2.
[9] Davies, above n 6, 212.
[10] Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart, 2005) 229.
[11] Ibid.
[12] Ibid.

anxiety towards its own constitution'.[13] The death, the authors argue, is at once a symptom and influence of this anxiety, stating that '[i]n American CLS [cls1], the repeated announcements of its own death have marked this unique anxiety'.[14]

Neither Davies nor Douzinas and Gearey engage with death in great detail, or in a similar way to this thesis, however, it is nonetheless integral to their interaction with cls1 and Critical Legal Studies more broadly. In contrast, non-critical approaches to jurisprudence, such as Denise Meyerson's *Essential Jurisprudence*, addresses Critical Legal Studies,[15] but makes no mention of the cls1 death. Instead, the author focuses primarily on general ideas and thinkers behind cls1, taking a meta-view of the movement. Meyerson's Critical Legal Studies section is brief but thorough;[16] interestingly the cls1 section ends in present tense, using a quote from Alan Hunt and Peter Fitzpatrick's *Critical Legal Studies*.[17] The implication from this reading is that not only did cls1 not die, but according to the author, there is still a 'significant core of unity' within Critical Legal Studies.[18]

Taking a similar generalist approach to jurisprudence, Ian McLeod's *Legal Theory* makes mention of cls1, but not of its death. [19] Instead, McLeod ends his short section on cls1 with a quote from Neil Duxbury's *Patterns of American Jurisprudence* which positions cls1 as continually 'losing momentum' after its mid-1980s peak.[20] Interestingly in Duxbury's *Patterns of American Jurisprudence*, the paragraph directly preceding the quote taken, grapples with the decline of cls1 and states: 'if not entirely dead, [cls1] certainly has little life left in it'.[21]

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[13] Ibid.
[14] Ibid.
[15] Denise Meyerson, *Essential Jurisprudence* (Routledge Cavendish, 2008) 104.
[16] Ibid 104–116.
[17] Peter Fitzpatrick and Alan Hunt (eds), *Critical Legal Studies* (Basil Blackwell, 1987).
[18] Meyerson, above n 15, 105 quoting Fitzpatrick and Hunt, above n 17, 2.
[19] Ian McLeod, *Legal Theory* (Palgrave Macmillan, 5th Edition, 2010).
[20] See Neil Duxbury, *Patterns of American Jurisprudence* (Clarendon Press, 1995) 426; McLeod cites this passage from Duxbury at page 115.
[21] Duxbury, above n 20, 426.

Duxbury's own statement relies on personal correspondence, rather than academic sources, which could account for McLeod's omittance of this necessary information.

The lack of recognition of the cls1 death in the dominant generalist and non-critical approach to jurisprudence, can be understood through the way in which Critical Legal Studies fits into the non-critical authors' broader jurisprudential narrative. Within Meyerson and McLeod's books, for example, Critical Legal Studies is positioned in a linear and progressive fashion, i.e. Legal Realism begat Critical Legal Studies, Critical Legal Studies begat Critical Race Theory, and so on. Following this linear approach, the end of the preceding movements are positioned as logical transitions rather than deaths. Similarly, in critical approaches to jurisprudence, the works engage with the cls1 death, but only in a cursory manner. Davies, Douzinas and Gearey, and Duxbury all acknowledge the cls1 death but do not interrogate the event in an in-depth way.[22] The combination of both approaches positions the death of cls1 as something reserved for critical or minor approaches to jurisprudence and the transformation of cls1 to broad Critical Legal Studies as the dominant understanding.

Moving from general jurisprudence and historical accounts of cls1, there are two notable references that appear to engage more substantially with the idea of the cls1 death. The first is a review of Mark Kelman's *A Guide to Critical Legal Studies*, by Richard Michael Fischl.[23] Fischl's article, which appears in *Law and Social Inquiry* in 1993, five years after the release of Kelman's book, proposes that the question that killed cls1 was 'what would you put in its place?', referencing a common question from critics of cls1 to the Crits who advocated removing the rule of law.[24] Chronologically this is the first open mention of cls1 being dead, coming two-years before Hope Yen's article in the *Harvard Law Record*.[25] However, whilst Fischl is engaged with the motif of death around cls1, he states that despite the difficulty of

[22] Douzinas and Gearey offer a better assessment than Duxbury and Davies on this subject.
[23] Richard Michael Fischl, 'The Question That Killed Critical Legal Studies' (1992) 17(4) *Law & Social Inquiry* 779.
[24] Ibid 780.
[25] Yen, 'HLS Mulls Its Mission', above n 4; Yen, 'Crits at HLS a Dying Breed?', above n 4.

this question,[26] his title is ironic and the piece is not a eulogy.[27] More broadly, Fischl's use of "death" can be read in a similar way to Kennedy and Horwitz in 1995;[28] Fischl acknowledges the move of cls1 from the public eye, but demonstrates an optimism about the continuation of Critical Legal Studies. So, whilst death is central to Fischl's piece, his stance and the context of his article as a response to what he perceives as a common misconception, separates it from the death discussed in this thesis.[29] In contrast, the second mention of the cls1-death is more closely aligned to this thesis, drawing from similar sources, including Hope Yen's article in the *Harvard Law Record*.

In 1998 Arthur Austin published a critique of various critics of law called *The Empire Strikes Back: Outsiders and the Struggle over Legal Education*.[30] Austin's 'outsiders',[31] those who target and attack the Empire, were those involved in Critical Legal Studies (both in the broad and narrow sense) but primarily cls1, Critical Race Theory, and Feminist Legal Theory.[32] Austin is explicit in his use of the death of cls1, titling the chapter focused specifically on the Crits as 'Cls[1] Is Dead As A Doornail'.[33] Austin takes this phrase directly from Yen's piece and then from his vantage point in 1998, writes about cls1 in a posthumous fashion. Austin, however, does not see an emergence of cls3, merely that cls1 died and was no more than 'an episode, not a movement – a mild hangover from … the 1970s';[34] distancing himself further from the understanding demonstrated by Fischl, Horwitz, and Kennedy. Austin's cause of death

[26] See especially Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton University Press, 1990); Richard Bauman, *Ideology and Community in the First Wave of Critical Legal Studies* (University of Toronto Press, 2000); See also Jack M Balkin, 'Critical Legal Theory Today' in Francis J Mootz III (ed), *On Philosophy in American Law* (Cambridge University Press, 2009) 64.
[27] Fischl, above n 23, 780.
[28] Yen, 'HLS Mulls Its Mission', above n 4; Yen, 'Crits at HLS a Dying Breed?', above n 4.
[29] See, John Henry Schlegel, 'CLS Wasn't Killed by a Question' [2007] 58(5) *Alabama Law Review* 967, 968. Schlegel's response to Fischl identifies the 'fading away' of cls1, rather than a death. This aligns both pieces as acknowledging the decline in cls1, but not the "death" that Duncan Kennedy or Arthur Austin focus on.
[30] Arthur D Austin, *The Empire Strikes Back: Outsiders and the Struggle over Legal Education* (New York University Press, 1998).
[31] Ibid.
[32] Ibid ix.
[33] Ibid 83.
[34] Ibid 109.

is also substantially different to the one presented within this thesis. Aside from the denial of any continuing Critical Legal Studies, Austin's smoking gun in the death of cls1 is somewhat tenuous, focusing on the posthumous discovery of Paul de Man's anti-Semitic *Le Soir* writings.[35]

Austin presents a theory on the death of cls1 that relies on de Man's fall from grace causing irreparable damage to literary criticism, and in turn being responsible for, or at least a key contributor to, the death of cls1. Austin connects de Man to cls1 through his relationship with fellow literary critic Jacques Derrida.[36] Although Derrida's influence on cls1 is evident, specifically around the idea of deconstruction,[37] Austin's argument about the connection to cls1 is underdeveloped. However, what should be taken from Austin's discussion is not the cause, but the acknowledgement and interaction with the death of cls1.[38]

Both Fischl and Austin, whilst not addressing the cls1 death in the same way as this thesis, strengthen the argument that cls1 did in fact die. Even in their vastly different stances, thematically both authors acknowledge the figure of death surrounding Critical Legal Studies, with both pieces building from this position. In terms of the cls1-death that was confirmed in Yen's article,[39] there is nothing as blatant within the cls1 era writings from other Crits or their commentators. Even Kennedy's optimistic stance sees the death as a move from the political to the academic, rather than the finalisation of cls1.[40] Following the *Family Tree* structure, however, there are articles classified as cls3 (post-1995) which discuss the disappearance of

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[35] See James Atlas, 'The Case of Paul de Man', *The New York Times* (online) 28 August 1988 < https://www.nytimes.com/1988/08/28/magazine/the-case-of-paul-de-man.html>; Louis Menand, 'The de Man Case', *A Critic at Large*, *The New Yorker* (online) 24 March 2014 <https://www.newyorker.com/magazine/2014/03/24/the-de-man-case>; Evelyn Barish, *The Double Life of Paul de Man* (Liveright, 2014).

[36] Austin, *The Empire Strikes Back*, above n 30, 83.

[37] See David L Gregory, 'A Guide To Critical Legal Studies' (1987) 1987(6) *Duke Law Journal* 1138, 1141-1142 nn 12: 'Deconstruction, always controversial, is now deeply embarrassed as well as perennially embattled'. Gregory goes into great detail to discuss the issues facing deconstruction after the de Man revelations. While it can be broadly related to cls1 through their use of the term, there is no great connection relating to the cls1 death more specifically.

[38] See generally Arthur Austin, 'The Top Ten Politically Correct Law Review Articles' [1999] 27 *Florida State University Law Review*, 233; Austin book above pp83

[39] Yen, 'HLS Mulls Its Mission', above n 4; Yen, 'Crits at HLS a Dying Breed?', above n 4.

[40] Kennedy, 'Two Globalizations', above n 2.

cls1;[41] notably these works do not discuss a death per se. This questioning by cls3 scholars and dismissal by critics of cls1, such as Austin, can also be read politically i.e. neither side wanting to contend that there is middle-ground; cls1 is either dead and gone, or transformed and waiting to emerge from the shadows. Having addressed specific accounts of the cls1 death and broad jurisprudential works, this chapter will now undertake a review of more general and accessible sources. By assessing the literature, and critically engaging with its content, this chapter will identify that the cls1 death is rarely considered, contributing to the mystification Critical Legal Studies.

III. METHOD OF ANALYSIS

The subcultural nature of cls1 ensures certain barriers to entry for those outside of the legal-subculture.[42] A result of these barriers is a reliance on non-cls1 texts to inform those outside of the legal-subculture about cls1. Having outlined the trend in dominant non-critical jurisprudence books to ignore the cls1 death, this section will review how cls1 is remembered in more general and accessible sources. Specifically, this section will review three legal dictionary entries and the top three Google search results for "Critical Legal Studies". The chosen number of dictionary entries is due to the need for brevity within the confines of a thesis, and the incredible similarities between the entries to be discussed. The selection of the top three Google results for "Critical Legal Studies" is also for brevity, but mostly it is in relation to 'PageRank'.[43] Users seeing the results of a searched term, such as "Critical Legal Studies" are likely to trust and associate authority with the order of the results.[44] As such, links beyond the top three on the first page are unlikely to be clicked on, especially in the context of

[41] See generally, E Dana Neacsu, 'CLS Stands For Critical Legal Studies, If Anyone Remembers' (1999-2000) 8(2) *Journal of Law and Policy* 415.
[42] See Introduction, Part III Counterculture, Minor Jurisprudence, and Legal-Subculture.
[43] Siva Vaidhyanathan, *The Googlization of Everything: (And Why We Should Worry)* (University of California Press, 2012) 51.
[44] Ibid.

a general search such as this. So, while this sample size is small, it demonstrates how cls1 is remembered outside of the legal-subculture.

The choice of texts relates to a "first port-of-call" for information, i.e. if you had never heard of Critical Legal Studies, how would you find out about it? While a text like Mark Kelman's *A Guide to Critical Legal Studies*,[45] is logically titled as a place to start reading about cls1, its position in the cls1 subculture means it is stylistically a difficult place to start.[46] *A Guide to Critical Legal Studies* is also unlikely to be close to hand when compared to other accessible resources. Instead, within the law school, a legal dictionary is a logical port-of-call to define or understand a term. And more broadly, an internet search, predominantly by Google,[47] is likely to be undertaken first.[48] There is also implication that these accessible materials will lack the emotional character of specific pro and anti-cls1 works. For example, Austin's assessment of cls1 as 'a failed movement, a confession that when all the Critbabble is carved away, CLS[1] is basically antipragmatic, little more than a blend of elitism and narcissism',[49] is unlikely to be mirrored in a legal dictionary. However, the method employed to analyse these texts will still assess the content and its implications.

The method for this analysis is undertaken through the adaptation of two existing methodologies: content analysis and critical reading. Both methodologies offer insight into how the death of cls1 is remembered, however neither fully achieves the necessary mix of empirical and qualitative analysis individually. Content analysis, originally a social science methodology, has been adapted for law by Mark Hall and Ronald Wright.[50] The authors begin their paper on the legal interpretation of content analysis, by calling '[l]egal scholars, the

[45] Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1987).
[46] See generally Richard A Posner, 'Bookshelf: A Manifesto for Legal Renegades', *The Wall Street Journal* (online), 27 January 1987.
[47] Vaidhyanathan, above n 43.
[48] See generally Newton Lee, 'To Google or Not to Google' in Newton Lee (ed), *Google It* (Springer, 2016) 3.
[49] Austin, *The Empire Strikes Back*, above n 30, 86.
[50] Mark A Hall and Ronald F Wright, 'Systematic Content Analysis Of Judicial Opinions' (2008) 96 *California Law Review* 63, 63.

mockingbirds of the academy … great borrowers of scholarly methods. We experiment with the tools of historians, economists, sociologists, literary theorists, moral philosophers, and others, often to great effect'.[51] The authors then propose adapting content analysis as a form of 'legal empiricism' and demonstrate its application to a selection of judicial opinions.[52]

Content analysis takes a series of papers 'on a particular subject, and systematically reads them, recording consistent features of each and drawing inferences about their use and meaning'.[53] In the current context this approach is a useful method for assessment. However, traditionally and to a lesser extent in Hall and Wright's adaptation, content analysis requires the coding of the materials to assess them statistically, [54] and in most instances a larger sample size to draw from.[55] In both cases the specificity of the cls1 death hinders the use of a larger sample size and thus does not benefit from coding and statistics. If the question was broader, i.e. "how is Critical Legal Studies remembered online?" then a greater number of search results would be required and the full use of this method would be applicable.

Instead, fulfilling Hall and Wright's mockingbird metaphor, this chapter will systemically read and assess the inferences in the texts with the content analysis method.[56] However, in addition this reading will be critical, not only addressing the way in which the cls1 death has or has not been presented, but also the format, layout, and context of the source. Within a legal context, this type of critical reading methodologically aligns itself with a cls1 approach, specifically Alan Freeman's reading of 'trashing'.[57] However, the application of a cls1 method to non-legal texts such as websites and dictionaries, is not directly transferable. In other disciplines the critical approach to more generalist texts has been developed. For

[51] Ibid.
[52] Ibid 63-64.
[53] Ibid 64.
[54] See generally Martin Abbott and Jennifer McKinney, *Understanding And Applying Research Design* (John Wiley & Sons, 2013) 318.
[55] Ibid.
[56] Hall and Wright, above n 50, 63.
[57] Alan D Freeman, 'Truth And Mystification In Legal Scholarship' (1981) 90(5) *The Yale Law Journal* 1229, 1230-1231.

example, the philosopher Roberto Esposito identifies this type of inquiry as 'philosophical reflection',[58] a way 'to critically dismantle opinion, [and] to radically interrogate what is presented as immediately clear to all'.[59] Similarly, in her proposed method of critical ethnography, D. Soyini Madison states it is necessary 'to deconstruct and reinvent those epistemological certainties that foreclose alternative possibilities for ordering and reordering authoritative regimes of truth'.[60]

Thematically, these different disciplines converge on the purpose of critical readings to question what is immediately clear, what is an epistemological certainty, and what this means for the subject more broadly. In the current context, these theorists' signpost what needs to be critically assessed in a critical reading. For cls1, the focus is on a lack of acknowledgment or interaction with its death, which in turn adds to its mystification, but also, that the chosen texts demonstrate unified histories and understandings of cls1, which need to be engaged with. The similarities between the dictionary entries and the cross-linking of the websites creates 'epistemological certainties' around cls1,[61] which become difficult to challenge, add to its mystification, and the mystification of Critical Legal Studies more broadly.

IV. CRITICALLY ENGAGING GENERALIST TEXTS

A. *Legal Dictionaries*

The dictionaries chosen for this review are *Black's Law Dictionary*, the LexisNexis *Concise Australian Law Dictionary* and the Oxford *Australian Law Dictionary*.[62] These dictionaries

[58] Roberto Esposito, 'The *Dispositif* of the Person' (2012) 8(1) *Law, Culture and the Humanities* 17.
[59] Ibid.
[60] D Soyini Madison, *Critical Ethnography: Method, Ethics, and Performance* (Sage, 2nd ed, 2012) 6.
[61] Ibid.
[62] Bryan A Garner (ed), *Black's Law Dictionary* (Thomas West, 9th ed, 2014); Trischa Mann (ed), *Australian Law Dictionary* (Oxford, 2010); Peter Butt (ed), *Concise Australian Dictionary* (LexisNexis Butterworths, 4th ed, 2011).

were chosen due to their prevalence in the law school, often bundled with first-year textbooks. While the dictionaries list contributing authors, they do not specify which author wrote or contributed to which entry.[63] This makes the identification and analysis of "whose" version of Critical Legal Studies is being read difficult, while adding to the anonymous authority derived from a dictionary entry.

It is worth noting that the jurisdiction of the latter two dictionaries could be perceived as problematic, with Australian Critical Legal Studies not featuring on the *Family Tree*.[64] An Australian limb was not included due to the comparatively small contribution made to the narrow field of Critical Legal Studies.[65] Excluding the "Oz Crits", the term given by Douzinas and Gearey,[66] is due mostly to their more applicable position under the broad categorisation of Critical Legal Studies.[67] There is a potential argument that the Oz Crits could be a related sub-limb of cls2, with the transplantation of early Brit Crits Shaun McVeigh and Peter Rush to Melbourne,[68] and Kim Economides to Adelaide.[69] However, in either instance the Oz Crits fall outside the scope of this thesis. Despite their non-inclusion in this thesis, Critical Legal Studies objectively has a position in Australia and therefore an Australian dictionary is not problematic. Cls1 and its related forms were created by this thesis, so the term to be looked-up is "Critical Legal Studies". The first dictionary to be assessed is the American *Black's Law Dictionary*, which states:

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[63] These dictionaries list a general editor, before a sizable list of contributors to the edition.
[64] See Chapter One, Part II The Critical Legal Studies Family Tree.
[65] See generally Nickolas John James, 'Australian Legal Education And The Instability Of Critique' (2004) 28 *Melbourne University Law Review* 375.
[66] See Douzinas and Gearey, *Critical Jurisprudence*, above n 10, 247-252.
[67] For example, see Australian critical publications: *Law, Text, Culture* and *Australian Feminist Law Journal*.
[68] See, eg, Shaun McVeigh, 'Traversals: Engagements with Critical Movements in Law' (2005) 14(2) *Griffith Law Review* 143; Peter D Rush, 'Surviving Common Law: Silence and the Violence Internal to the Legal Sign' (2005-2006) 27(2) *Cardozo Law Review* 753. McVeigh and Rush are currently at Melbourne Law School.
[69] CLC Organizing Group, 'Critical Legal Conference' (Meeting Minutes, 1985) < https://www.kent.ac.uk/law/research/clc-2016/archive.html>; University of Kent, 'Critical Legal Conference, First Annual Conference: Law, Critique and Social Transformation' (Call For Papers, 1986) < https://www.kent.ac.uk/law/research/clc-2016/archive.html>. Economides is currently at Flinders University, South Australia.

> **Critical Legal Studies.** (1978) **1.** A school of thought advancing the idea that the legal system perpetuates the status quo in terms of economics, race and gender by using manipulable concepts and creating an imaginary world of social harmony regulated by law. The Marxist wing of this school focuses on socioeconomic issues. Fem-crits emphasize gender hierarchy, whereas critical race theorists focus on racial subordination. See *fem-crit* under CRIT; CRITICAL RACE THEORY. **2.** The body of work produced by adherents to this school of thought. – Abbr. CLS.

The entry in *Black's* is short, to the point and offers no divisions, or associated texts or theorists. The entry begins with the year 1978, positioning this Critical Legal Studies as cls1,[70] albeit a year after the first Conference on Critical Legal Studies (CCLS).[71] It is important to note that despite the start date, there is no end date presented and no mention of a death or similar in the definition. The lack of a stated end-point is compounded by the tense used, that Critical Legal Studies is still talked about in the present-tense. The entry isn't restricted by the divisions used within this thesis and includes broad Critical Legal Studies' Fem-Crits and Critical Race theorists as part of Critical Legal Studies. Interestingly, both of these broad Critical Legal Studies also have their own entries, so their inclusion here can be understood as connected, but not definitive. It can be inferred that from this position the entry approaches Critical Legal Studies as an umbrella term. The entry does not use the term demystification, however, the concept of an "imaginary world" which cls1 rallies against, implies a form of demystification.

In the *Oxford Australian Law Dictionary*,[72] Critical Legal Studies is listed as:

> **critical legal studies (CLS)** A left-leaning movement, critical of *legal liberalism*, which was especially strong in the USA in the 1980s. It draws variously on Marxism, feminism, *postmodernism* and even American *legal realism* to criticise and deconstruct ("trash") *legal positivism*, *legal formalism*, rights and modernist epistemologies. Leading "Crits" include Duncan Kennedy and Roberto Unger.[73]

[70] See Chapter One, Part II The Critical Legal Studies Family Tree.
[71] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (New York University Press, 2004) 204.
[72] Mann, above n 62.
[73] Italics added to replace the changed font in the original text for other terms covered within the dictionary.

This entry is brief and focuses only on what this thesis has titled cls1; there is no mention of the other Critical Legal Studies variants. Whilst not addressing a broad/narrow divide, other geographic locations are implied with the phrasing that Critical Legal Studies was 'especially strong in the USA'.[74] Unlike *Black's* the italicised terms linked to Critical Legal Studies are not from the broad category, but instead situate cls1 in its broader jurisprudential setting. The entry identifies the politically left stance of cls1, its primary target of liberalism, and its timeframe. The phrasing surrounding the timeframe is relevant in the current context as it states cls1 'was especially strong … in the 1980s'.[75] This statement, whilst arguably true,[76] allows the entry to ignore the CCLS and other 1970s milestones,[77] as well as any question of why it became less-strong, or weak, from 1980s onwards. By focusing only on the 1980s, this entry stays neutral on whether cls1 did or did not die. This stance also means there is no engagement with what happened to cls1 after this time, aside from the inference that it got weaker. The entry does not use the term demystification, but does use the synonymous Crit term trash,[78] which it equates to deconstruction.[79]

In the *LexisNexis Concise Australian Legal Dictionary*,[80] the Critical Legal Studies entry provides article citations, making it longer than the previous entries:

> **critical legal studies** *Abbr* – **CLS** A movement which began in the United States in the 1970s, according to which there is no universal foundation for law amenable to rational deduction. Critical legal studies is opposed to positivist jurisprudence, and rights-based theories (such as those proposed by Ronald Dworkin and John Rawls). It is most strongly opposed to liberal legal theory, claiming that it conceals the power structures underlying legal systems. In this sense CLS shares a common position with Marxist critiques of legal systems in liberal-democratic societies. Leading proponents of the school are Roberto Unger, author of *The Critical Legal Studies Movement* (1986), and Duncan Kennedy, author of "The

[74] Mann, above n 62.
[75] Ibid 156-157.
[76] See Chapter Four, Part I – cls1 timeline diagram.
[77] See Chapter One, Parts II and III.
[78] See Introduction, Part III Counterculture, Minor Jurisprudence, and Legal-Subculture. See especially *Trashman*.
[79] See Introduction, Part I.
[80] Butt, above n 62, 147.

Stages of Decline of the Public-private Distinction" (1982) 6 *U Pennsylvania LR* 1349. See also **Dworkin, Ronald**; **Marx Karl**, **positivism**; **Rawls, John**.

Compared to *Black's* and the *Oxford Dictionary*, the *LexisNexis* entry is roughly double the size. In spite of this length increase, it still covers similar ground. Again, there is no broad/narrow approach, nor is there mention of any Critical Legal Studies variants. The geography is the same, with this entry also focusing purely on the US and cls1. Similarly to *Black's* entry, *LexisNexis* provides a starting date, however this is less precise, referencing the whole of the 1970s. Despite this being the only direct reference to a date, there is still a correlation with the *Oxford* entry: the prominence of cls1 in the 1980s implied through the publication dates of the works referenced. Once again opposition to liberalism and cls1 similarities with Marxism appear. Unlike the *Oxford*, the *LexisNexis* entry does not include any Crit jargon, instead it goes further, taking a quasi-cls1 tone to open the entry. The latter part of the opening sentence states that 'there is no universal foundation for law amenable to rational deduction'.[81] The statement, which doesn't appear to be a quote from a Crit, takes a simple message about cls1 critiquing the rule of law, and conveys it in an overly complicated way. For those familiar with cls1 works,[82] this approach can be fitting or even amusing, however, for the purpose of accessibility, this entry struggles.

The *LexisNexis* entry had the length and potential to discuss the intricacies of "Critical Legal Studies", however, whilst expanding slightly when compared to *Black's* and *Oxford*, it covered similar ground. As per the other entries, there is no explicit mention of demystification, but there is allusion to it, with *LexisNexis* discussing the cls1 focus on the "concealment" of

[81] Ibid.

[82] See, eg, Peter Gabel and Duncan Kennedy, 'Roll Over Beethoven' (1984) 36(1/2) *Stanford Law Review* 1, 4: 'Okay, the unalienated relatedness which is immanent in our current alienated situation. What I'm saying is, that that does not sound to me like an evocation which can fulfill the legitimate functions of communication, of language and knowledge, because it's abstract bullshit, whereas what we need is small-scale, microphenomenological evocation of real experiences in complex contextualized ways in which one makes it into doing it'. This article exemplifies the heavy-worded nature associated with cls1, see Chapter Five for an in-depth analysis.

power structures.[83] However, in all three entries these important points have to be critically read into the text, rather than being presented in a clear or definitive way.

The *LexisNexis* entry also follows *Black's* and *Oxford* by not discussing the end of cls1. All three entries position Critical Legal Studies in a present tense, which neither confirms nor denies its death. However, where *Black's* included broad Critical Legal Studies variants and the *Oxford* discussed a cls1 strong point, the *LexisNexis* entry avoids making mention of cls1 either continuing in different forms, or its influence waning. With this singular focus and present tense, the *LexisNexis* entry implies cls1 continued, uninterrupted from the 1970s to present. Despite this implication, it can be concluded that the death of cls1 does not feature within any of the legal dictionary entries. It can also be concluded that the entries share very similar information. There are differences, but these are subtle and nuanced, whereas the similarities are blatant, leaving a reader of all three entries with a specific view of Critical Legal Studies creating an authoritative regime of truth.[84]

B. *Online*

The second area to be assessed is online, specifically through the search engine Google. Google has established its place as an oft first port-of-call for those seeking information online, superseding other available search engines.[85] Using the same logic applied to the dictionary, the full-name "Critical Legal Studies" was searched. It is important to note that despite many results from a term searched (usually within the millions), the first few listings on the first page of results are the most clicked on, and subsequently accepted (rightly or wrongly) as the most important.[86] For both this reason, and for brevity, only the top three search results will be

[83] Butt, above n 62.
[84] Madison, above n 60.
[85] Vaidhyanathan, above n 43.
[86] Ibid.

assessed. When "Critical Legal Studies" is searched via Google, the first three results are listed in order as: Wikipedia's entry on Critical Legal Studies, Cornell University's "Wex", which provides free legal information, and Harvard University's the Bridge, which is similar to Wex. Interestingly each of these sites follows an encyclopedic approach to the subject, which like the dictionary entries, makes identifying an author difficult. However, the association to known entities Wikipedia, Cornell, and Harvard implies some level of authority and gravitas to the websites.

1. *Wikipedia*

The first result for the search criteria entered is a link to the Wikipedia article on Critical Legal Studies. Wikipedia is a free and collaboratively written encyclopedia, which 'allows basically anybody to produce and edit content'.[87] This must be noted when comparing the other potential sources available, as there is an expectation of experts or peer-reviewed work forming the entries of more traditional encyclopedias. However, as Wikipedia itself states, it is 'written largely by amateurs'.[88] In spite of these factors, or perhaps because of them, it is not surprising that the first search result is Wikipedia. As Thomas Leitch describes in his book *Wikipedia U* 'Wikipedia is the source everyone uses but no one is supposed to use or admits using',[89] and at least some part of this usage is because '[s]earch engines rank their pages near the top'.[90] As such, it is likely that a more obscure term such as "Critical Legal Studies", should return the Wikipedia entry in the top results. Given this status, the information is likely to be reflective of the dictionaries but may also display interest in a pro or anti-cls1 stance.

[87] René König, 'WIKIPEDIA: Between lay participation and elite knowledge representation' (2013) 16(2) *Information, Communication and Society* 160, 161.
[88] *Wikipedia contributors* Wikipedia <https://en.wikipedia.org/wiki/Wikipedia:About#Wikipedia_contributors>.
[89] Thomas Leitch, *Wikipedia U: Knowledge, Authority, and Liberal Education in the Digital Age* (Johns Hopkins University Press, 2014) 4.
[90] Ibid 57.

The format of the Wikipedia entry is segmented and is divided into a series of subsections. These subsections begin with a brief overview of Critical Legal Studies, before addressing its influence, its history, the relationship between Critical Legal Studies and American Legal Realism, Critical Legal Studies as a literature and a network, the intellectual and political context of Critical Legal Studies, its themes, and its continued influence, with the remainder of headings offering external links and references cited. The brief overview section begins by providing a short statement, similar to the *Oxford Dictionary* entry, focusing on legal power structures. As per the dictionary entries, the overview section only addresses cls1, with no mention of either the narrow or broad Critical Legal Studies.

As the overview continues it makes a claim that there is a general consensus on the 'key goals' of cls1. This claim is footnoted, and the hyperlinked footnote offers both the second and third search results as authority, citing Cornell's Wex and Harvard's Bridge entries on Critical Legal Studies. The issue of cross-referencing from another website as a cited authority will be addressed when comparing all three entries, however, what is currently pertinent are the stated 'key goals' of cls1. This type of list was avoided in cls1, given its non-doctrinal approach and the wide-berth of cls1 topics.[91] Any goals, let alone 'key goals", which implies a separation from other types of goals, is problematic. The overview lists the goals as bullet points, which gives a sense of authority in descending order:

> to demonstrate the ambiguity and possible preferential outcomes of supposedly impartial and rigid legal doctrines.
>
> [T]o publicize historical, social, economic and psychological results of legal decisions
>
> [T]o demystify legal analysis and legal culture in order to impose transparency on legal processes so that they earn the general support of socially responsible citizens.[92]

[91] See Introduction.
[92] *Critical legal studies* Wikipedia < https://en.wikipedia.org/wiki/Critical_legal_studies>.

So far this is the first reference to demystification, and from its position as the last goal of cls1 it can be read as falling behind legal impartiality and publicising the influence of other academic fields on legal decisions. However, as they are presented, both points one and two fall under the broad understanding of legal demystification. This is strengthened further when the last point on demystification seems to confuse the matter further by stating that this demystification is 'so that they earn the general support of socially responsible citizens'.[93] This, presumably is meant to lead back to the preceding sentence which states '[d]espite wide variation in the opinions of critical legal scholars around the world there is general consensus regarding the key goals of Critical Legal Studies'.[94] In this reading, the aim of Critical Legal scholars worldwide is to 'earn the general support' of citizens who are socially responsible.[95] In short, the key goals stated on the Wikipedia entry are nonsensical. The phrases and wording used is reminiscent of cls1 and general areas of Critical Legal thought can be picked out of them, such as demystification, however, as a grouping they offer no clarity or further understanding.

As the entry continues, the issues that arose in the overview section also continue. Given the propensity for online research and the likelihood for people to use Wikipedia to base their assumptions and understandings,[96] this entry is problematic. Further issues are caused by the stylistic nature of the site, it reads in a disinterested, encyclopedic way, and cites a number of primary sources. For example, the Wikipedia page draws upon big name sources like Roberto Unger's reissued *The Critical Legal Studies Movement*,[97] but also more obscure papers like a 1984 *Texas Law Review* paper on Unger and Rights.[98] This mixture of sources, allows those with some knowledge of cls1, including the contributors to the page, to justify the

[93] Ibid.
[94] Ibid.
[95] Ibid.
[96] Leitch, above n 89, 57.
[97] Roberto Mangabeira Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso, 2015).
[98] Allan C Hutchinson and Patrick J Monahan, 'The "Rights" Stuff: Roberto Unger and Beyond' (1984) 62(8) *Texas Law Review* 1477.

content, i.e. it provides more than a surface-level understanding. However, taken on face value by someone unfamiliar with cls1, the entry is misleading and presents with less clarity than the dictionary entries.

Under the other headings, the Wikipedia entry makes allusions to geographic divisions in Critical Legal Studies, referencing Costas Douzinas and Colin Perrin's 2011 *Critical Legal Theory* series,[99] to illuminate the development of what this thesis has titled under broad Critical Legal Studies. This lack of subcategorisation under the banner of Critical Legal Studies is consistent throughout with reference to *The Australian Feminist Law Journal* and Birkbeck College as continuing Critical Legal Studies. There are some rather obscure mentions to Karl Popper and Immanuel Kant, without a great deal of context that read as though the author or authors of the page have made connections to existing philosophical work on critique and feel it warrants inclusion. Overall this typifies the entry, which for an initial understanding of Critical Legal Studies, misses the mark.

2. *Wex*

The second result is from Cornell University Law School's Legal Information Institute (LII). The non-for-profit institute provides free legal information online, however unlike Wikipedia its contributors are selected for their knowledge in the field.[100] Wex is the LII's 'legal dictionary and legal encyclopedia', which is contributed to by 'legal experts'.[101] It should be noted that despite the search parameters, the page title is "Critical Legal Theory"; a subtle and often interchangeable title for the narrow understanding of Critical Legal Studies, with 'critical legal

[99] Costas Douzinas and Colin Perrin (eds), *Critical Legal Theory* (Routledge, 2012).
[100] Legal Information Institute, *Who We Are* Wex < https://www.law.cornell.edu/lii/about/who_we_are>.
[101] Ibid.

studies: an overview' as the subheading.[102] This structure implies an implicit understanding of Critical Legal Studies in a similar way to the broad and narrow description, except here the broad term is Critical Legal Theory, and the narrow is Critical Legal Studies. Interestingly the final paragraph of the entry does discuss subgroups which would fit within the broad categorisation, which it frames as having 'fundamentally different, even contradictory, views'; specifically highlighting Critical Race Theory, Feminist Legal Theory, and postmodernism.

The layout of the entry follows a more traditional encyclopedia style, with four paragraphs and no sub-headings. Despite the lack of subheadings, each paragraph comfortably stands alone, addressing different aspects of Critical Legal Studies. The first paragraph deals with the intent and nature of Critical Legal Studies, discussing social hierarchies and the idea of law as politics. The second discusses its history and key thinkers. As well as Duncan Kennedy, Morton Horwitz, and Roberto Unger, the list also includes Robert Gordon and Catharine MacKinnon. Given the relatively short length of the paragraphs, there is no qualifying information as to why Gordon and MacKinnon have been included here. Both authors are important to cls1, but they occupy different spaces to the three Harvard-based founders, especially in MacKinnon's case.[103] The third paragraph looks at the academic influences on Critical Legal Studies, citing the Frankfurt School, Karl Marx, Antonio Gramsci, as well as Michel Foucault and Jacques Derrida. The final paragraph, as addressed above, covers the Critical Legal Studies subgroups.

Within the Wex's structure, it is the second paragraph that should thematically address the issues pertinent to the cls1-death. However, there is no explicit discussion about this or subsequent posthumous Critical Legal Studies work. What the second paragraph does make explicit is the associated geographic location of what is presented as Critical Legal Studies. For

[102] Legal Information Institute, *Critical Legal Theory* Wex <https://www.law.cornell.edu/wex/critical_legal_theory>; but see Ofer Raban, *Modern Legal Theory and Judicial Impartiality* (Glasshouse Press, 2003) 59, on Ronald Dworkin's different application of the term "critical legal theory".
[103] See Chapter Five, Part II, B.

the Wex, Critical Legal Studies is only concerned with cls1, referring to its starting point at the 1977 CCLS in Wisconsin. This is continued with the opening line to the third paragraph stating that 'CLS has been largely a U.S. movement'. Interestingly the entry dates the roots of cls1 as beginning with social activism around Civil Rights and the Vietnam War, also highlighting the breadth of fields that Critical Legal Studies borrowed from. Whilst there is no mention of the cls1 death or any posthumous work, there is an implication of demystification, with the third paragraph's reference to Legal Realism and their attention to the social context of law.

After all the Critical Legal Studies specific content is addressed, the Wex entry gives a list of 'Key Internet Sources', the first of which is the Harvard Bridge Project on Critical Legal Theory. This follows Wikipedia's reference to this site as well, which seemingly puts the third online entry in a position of authority, however there is no indication if this is due to the Critical Legal Studies connection to Harvard Law School, or if the entry is just more detailed and better referenced. Overall the Wex entry on Critical Legal Studies offers a concise and seemingly more focused analysis than Wikipedia, with its layout more akin to the dictionary entries. Although Wex makes no mention of the cls1 death, work that came after 1995 (cls3) specifically, or demystification, it offers a more comprehensive reading of Critical Legal Studies than the other online entries, or dictionaries so far.

3. *The Bridge*

The third and final result comes from Harvard Law School's the Bridge. The page's purpose is not too dissimilar from Cornell's Wex, stating that it is a database for law school students, providing information on American Legal theory and legal reasoning.[104] The page layout, however, is more closely aligned with Wikipedia, presenting key Critical Legal Studies ideas

[104] Berkman Klein Center for Internet and Society at Harvard University, *The Bridge* <https://cyber.harvard.edu/research/bridge>.

under a number of headings. The entry offers a tiered page title, beginning with 'legal theory: critical theory', sitting just above the much larger 'Critical Legal Studies Movement'. The page itself is then broken up into six parts, beginning with a broad but detailed introduction and then five key areas under separate headings. These are: Indeterminacy, Law's Contribution to Group Inequality (or "Tilt"), Mystification and Legitimation, New Visions, and Opposition. Immediately there are several points of note; first, the use of 'Mystification' as a sub-heading, the first reference to the mystified nature of law within the online sources. Secondly, as was mentioned under both the Wikipedia and Wex entries, both sites cite the Bridge as a source that they have drawn from. When reviewing information on the Bridge, it appears that for Wikipedia specifically, the Bridge has been paraphrased, leading to a lack of clarity in the former. As such, the critical review of the Bridge will still address the entry as a whole, but focus will be given to the effect of the Bridge as a source for other websites and then its specific use of mystification.

The Bridge entry starts by presenting Critical Legal Studies as beginning in 1977 with the CCLS. There is no mention of other jurisdictions or the broad/narrow divide, keeping the entry firmly focused on cls1. Despite this narrow cls1 focus, the Bridge goes through an overview of Critical Legal Studies more comprehensively than the other entries; addressing prevalent themes such as law as politics, hierarchies and the masking of power, and the alleged neutrality of legal language. Amongst these points the entry also states that annual cls1 conferences and workshops were held between '1977 and 1992';[105] a statement which is not expanded or touched on again within the introduction, or any of the other sections. This is not an explicit mention of the cls1 death, however it acknowledges that cls1 in its fullest stopped soon after 1992. It is frustrating given the depth the Bridge goes into, that there is no discussion

[105] *Legal Theory-Critical Theory: Critical Legal Studies* The Bridge <https://cyber.harvard.edu/bridge/CriticalTheory/critical2.htm>.

of Critical Legal Studies post-1992, or any explanation of why the conferences and workshops ceased.

The Bridge doesn't list notable Crits, but instead details key author's positions within the relevant subheadings. For example, under the subheading 'New Visions' the focus is entirely on Roberto Unger, discussing concepts from *The Critical Legal Studies Movement*,[106] including super-liberalism and the deviationist doctrine, but without reference to the original text. These posts have a hyperlink reference to where these concepts are taken from, but none on the page seem to work. This is problematic as in the Unger example, these phrases are not common or easily searchable without knowing the primary text.[107] Other sections of the site follow this approach and focus separately on prominent Crits Duncan Kennedy and Mark Kelman, with Morton Horwitz and Joseph Singer discussed together in relation to law's contribution to inequality. This method provides summaries of some of the big cls1 ideas, without getting bogged down in their nuances and intricacies. Instead of being left with a list of names and no context, the Bridge uses the authors briefly but differentiates their approaches to cls1.

Notably, the Bridge also identifies opposition to Critical Legal Studies. Given the tumultuous reception cls1 received from the American academy, it is interesting that the raft opposition or attacks on it have not been discussed in the other entries. Following the same format as the other sections on the page, the Bridge dedicates a short paragraph to the criticism. The critics named are Owen Fiss and Paul Carrington individually, with Daniel Farber and Suzanna Sherry addressed together. Only the authors are mentioned, with no detail about where and how their critique took place. It is possible to deduce from what's stated that Fiss is referred to for his 1986 critique of cls1.[108] Likewise, Carrington's mention can be presumed to be his

[106] Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Harvard University Press, 1983).
[107] See, eg, ibid 41-42 for "Super-liberalism".
[108] Owen M Fiss, "Death Of The Law" (1986) 72(1) *Cornell Law Review* 1. Nb, this article does not aid the discussion of the cls1 death.

famous critique of cls1 in the *Journal of Legal Education* in 1986.[109] As a timeline these two critiques focus on cls1 at its prime,[110] aligning with the Bridge's earlier inference of cls operating between 1977 and 1992.

Interestingly, the critique by Farber and Sherry is likely to come from their 1997 book, *Beyond All Reason: The Radical Assault on Truth in American Law*.[111] The timing of the book's publication positions it as out of step with the earlier critiques, and the Bridge's own description of the Critical Legal Studies timeline. Stylistically the book moves away from the nuanced engagement of Fiss, who provides a clear overview of Kennedy's fundamental contradiction,[112] and instead focuses on 'extremists'[113] who share 'an abandonment of moderation and a death of common sense'.[114] In this way *Beyond All Reason* can be more fairly positioned with the aforementioned battle over legal education that Austin takes, and by comparison only offers a limited understanding of Critical Legal Studies. The difference in the calibre of critique can be seen when the authors' introduce Critical Legal Studies and state that '[m]uch of CLS[1] scholarship was aimed at deconstructing legal doctrine to show its indeterminacy'.[115] Factually this is an accurate statement, but it is also undeveloped, the statement is taken at face value without any attempt to codify or clarify what this actually means.[116] As the book progresses, Critical Legal Studies is lumped together with Critical Race Theory and Feminist Legal Theory, which are used collectively as precursors and influencers on the book's real target of "radical multiculturalists".

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[109] Paul D Carrington, 'Of Law And The River' (1984) 34 *Journal of Legal Education* 222; See Chapter 5 for a detailed discussion of this paper.
[110] See Chapter Four, Part I – cls1 timeline diagram.
[111] Daniel A Farber and Suzanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* (Oxford University Press, 1997).
[112] Fiss, above n 108, 12.
[113] Farber and Sherry, *Beyond All Reason*, above n 111, 3.
[114] Ibid.
[115] Ibid 20.
[116] They authors' offer an endnote that provides a reference to their definition, however their definition comes from a critique of cls1, rather than cls itself. See Lawrence B Solum, 'On the Indeterminacy Crisis: Critiquing Critical Dogma' (1987) 54 *Chicago Law Review* 462.

The inclusion of Farber and Sherry's book, given without any more context than 'treat[ing] critical legal studies as a simplistic and failed assault on liberal principles and Enlightenment notions of truth',[117] is one of the best examples of why the Bridge, as well as Wikipedia, and Wex, which both cite the Bridge as authority, is problematic. The inclusion of critiques and opposition to Critical Legal Studies is a necessary part of knowing what it did or did not do, however, the choice of critique or opposition matters. Although Critical Legal Studies is a prominent theme within *Beyond All Reason*, it sits equally alongside broad Critical Legal Studies with little to no meaningful engagement that warrants its inclusion over other more detailed and coherent pieces.[118]

Ostensibly the book does discuss cls1 and its attack on liberalism, but the inclusion of *Beyond All Reason* as a third of the Critical Legal Studies critiques given by the Bridge, is more conducive to its confusion and mystification. In an abstract sense this is a key issue with the way Critical Legal Studies has been remembered online, with each website offering a similar story that embellishes or removes issues in a sporadic and random approach, with no justification. This issue is then compounded when the sites begin to cite each other, as both Wikipedia and Wex have done. Taking this approach, the sites move further from a coherent and consistent understanding, and instead promulgate a feedback loop, which distorts the original subject matter. The citing of both Wex and the Bridge by Wikipedia provides a clear example of this process.

Within the assessment of Wikipedia's entry on Critical Legal Studies, it was noted that Wex and the Bridge were cited as sources.[119] Notably the Bridge citation is in regard to the key goals of Critical Legal Studies:

[117] The Bridge, above n 105.
[118] See, eg, Solum above n 116, which is far more engaged with cls1 than Farber and Sherry.
[119] See above, Critically Engaging with Generalist Texts: Online – Wikipedia.

> to demonstrate the ambiguity and possible preferential outcomes of supposedly impartial and rigid legal doctrines.
>
> [T]o publicize historical, social, economic and psychological results of legal decisions
>
> [T]o demystify legal analysis and legal culture in order to impose transparency on legal processes so that they earn the general support of socially responsible citizens.[120]

Wikipedia cites the Bridge, after stating that these points are understood as a "general consensus of what Critical Legal Studies did", in spite of the vast differences that came under the Critical Legal Studies banner. Given the structure of the website and limitations in hyperlinking pinpoint references, this general consensus appears to come from the introduction to Critical Legal Studies on the Bridge. In its original context the Bridge lists four common areas addressed by cls1 scholars to conclude its overview and introduction to the subject. These are stated as:

> seek to demonstrate the indeterminacy of legal doctrine and show how any given set of legal principles can be used to yield competing or contradictory results;
>
> [U]ndertake historical, socioeconomic and psychological analyses to identify how particular groups and institutions benefit from legal decisions despite the indeterminacy of legal doctrines;
>
> [E]xpose how legal analysis and legal culture mystify outsiders and work to make legal results seem legitimate; and
>
> [E]lucidate new or previously disfavored social visions and argue for their realization in legal and political practices in part by making them part of legal strategies.[121]

Aside from addressing one extra dot-point, the Bridge presented these concluding points as a logical refinement of the broad topics addressed by cls1 scholars. This assessment by the Bridge, was made after a much more detailed five paragraph introduction that provided a clear summary of cls1; at no point were these common areas considered to be the primary aims or

[120] Wikipedia, *Critical legal studies*, above n 92.
[121] The Bridge, above n 105.

goals of cls1. Conversely, Wikipedia presented its key Critical Legal Studies "goals" after three introductory sentences. The paraphrased and reduced approach taken by Wikipedia does not appear to have been undertaken maliciously, or to be intentionally deceptive, instead it is likely the paraphrasing was a way of positioning Critical Legal Studies in a more accessible way than the Bridge. However, given Wikipedia's prominence as the number one result for Critical Legal Studies,[122] this reduction, which changed from commonalties to goals, and lacked any real context, aids the mystification of Critical Legal Studies, specifically in how it is remembered or learned by those outside of the academy.

This thesis proposes that the way Critical Legal Studies is remembered and presented in a free and online state contributes to its mystification; that reduced or non-contextualised public discussions of Critical Legal Studies can damage the understanding of it as a whole. This proposal is not hyperbolic and is evidenced by a 2018 online article, by Andrew Kelman,[123] which focuses on a version of Critical Legal Studies taken primarily from the three aforementioned websites: Wikipedia, Wex, and the Bridge. Kelman's article was published online by *Quillette*, a modestly read,[124] self-proclaimed platform for 'free thought'.[125] Whilst it doesn't label itself as such, the professionally presented blog focuses this free thought on the conservative end of liberalism,[126] although it does offer more centrist articles in response to earlier writings.[127] The clues to Kelman's source materials come from the title of his article, 'Beyond All Warnings: The Radical Assault on Truth in the Law', itself an unabashed nod to Farber and Sherry's *Beyond All Reason* and their follow-up journal article, 'Beyond All

[122] Wikipedia, *Critical legal studies*, above n 92.
[123] Andrew Kelman, 'Beyond All Warnings: The Radical Assault on Truth in the Law', *Quillette* 2 April 2018 < http://quillette.com/2018/04/02/beyond-warnings-radical-assault-truth-law/>. It should be noted that Andrew Kelman does not appear to be related to crit Mark Kelman.
[124] The site displays a Facebook fan number of 17,267 (2 July 2018).
[125] Quillette, *What is Quillette?* About Page < https://quillette.com/about/>.
[126] See, eg, Avel Ivanov, 'The Student's Dilemma: Conformity or Education', *Quillette* 15 May 2018 <https://quillette.com/2018/05/15/students-dilemma-conformity-education/>; Katie Kelaidis, 'The Enlightenment's Cynical Critics', *Quillette* 15 June 2018 <https://quillette.com/2018/06/15/the-enlightenments-cynical-critics/>. These articles are about left-wing bias in higher-education and a distinction between the Enlightenment and slavery, respectively.
[127] See, eg, the response to Kelman's article: Matt McManus, 'In Defence of Critical Legal Theory: A Reply to Andrew Kelman', *Quillette* 14 April 2018 <https://quillette.com/2018/04/14/defence-critical-legal-theory-reply-andrew-kelman/>.

Criticism'.[128] Kelman's roughly 3,000-word article opens with a quote from conservative Canadian psychologist, Jordan Peterson, stating that both law and law schools are corrupt.[129] The quote comes from an earlier interview Kelman conducted with Peterson,[130] where Kelman discusses *Beyond All Reason* as a text that faced similar criticism to Peterson's own work.[131] The Kelman article in question, 'Beyond All Warnings', builds on this perceived connection to address radicals in the law school.

Kelman approaches the issue of law school left-wing radicalism through the lens created by Farber and Sherry, leading him to tackle Critical Legal Studies. This approach presents to two related issues, first that Critical Legal Studies is only a catalyst for what is important in Kelman's article, and that Kelman does not look too far beyond Farber and Sherry's understanding of Critical Legal Studies. The limits of this approach are immediately clear when Critical Legal Studies is introduced; Kelman states: '*Critical Legal Theory*, has its roots in the 1970s, when postmodern neo-Marxist radicals began challenging and overturning accepted norms and standards'.[132] With added adjectives,[133] Kelman's description is dreadfully similar to the opening line of the Wex entry on Critical Legal Studies: 'a theory that challenges and overturns accepted norms and standards in legal theory and practice'.[134] As the article continues, so does Kelman's reliance on Google to inform his understanding of Critical Legal Studies. Wikipedia is not directly cited, but when discussing critical law schools and academics, the examples chosen mirror the lists given on that site.[135] At one-point Kelman does cite the Wex link on Critical Legal Studies, but only in relation to a minor comment about

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[128] Daniel A Farber and Suzanna Sherry, 'Beyond All Criticism' (1999) 83 *Minnesota Law Review* 1735.
[129] Kelman, Beyond All Warnings', above n 123.
[130] Andrew Kelman, 'Walking the Tightrope Between Chaos and Order—An Interview with Jordan B Peterson', *Quillette* 27 January 2018<https://quillette.com/2018/01/27/walking-tightrope-chaos-order-interview-jordan-b-peterson/>.
[131] See, eg, Pankaj Mishra, 'Jordan Peterson & Fascist Mysticism', *The New York Review of Books* (online), 19 March 2018 < https://www.nybooks.com/daily/2018/03/19/jordan-peterson-and-fascist-mysticism/>.
[132] Kelman, Beyond All Warnings', above n 123.
[133] See Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (Harvard University Press, 1998) 283-294, for the distinction on cls1 and neo-Marxist legal critique. See also Akbar Rasulov, 'CLS And Marxism: A History Of An Affair' (2014) 5(4) *Transnational Legal Theory* 622.
[134] Legal Information Institute, *Critical Legal Theory* Wex <https://www.law.cornell.edu/wex/critical_legal_theory>.
[135] Wikipedia, *Critical legal studies*, above n 92.

Critical Legal Studies changing the landscape of legal theory; neither the Bridge nor Wikipedia are mentioned or linked to within the article. Kelman's article serves as an example of the direct effect Wikipedia, Wex, and the Bridge have on Critical Legal Studies. Whilst Kelman's article could not be considered indicative of all work developed from a Critical Legal Studies Google search, it is a prominent piece that displays the negative aspects of this approach; it presents a mystified understanding of Critical Legal Studies which in turn adds further to the mystification of Critical Legal Studies.

The final element that the Bridge raised, was the inclusion of the term "mystification". Although the Wikipedia goals included the term "demystify", there was no explanation of how this applied. Conversely, the Bridge listed that Critical Legal Studies sought to expose how legal culture mystified outsiders, and then presented a sub-heading titled 'Mystification and Legitimation'. Under this heading, the Bridge asks how law 'can … appear fair and objective and nonetheless predictably tend to perpetuate the power of the powerful?'[136] This simple question gets to the heart of the complex issue cls1 identifies through law's mystification. However, the format and sources used in response limits the impact of this question. Following the theme throughout the Bridge, only one Crit is used to answer the question, in this case it's Mark Kelman. The response to the question is focused on Kelman's work in psychology and law, specifically in regard to the concept of denial.[137] However, this is only dealt with in one sentence, which given the complexity of such a concept, leaves it under-explained and lacking in impact. Further, the paragraph as a whole is referenced, but as was mentioned above, the links are dead, making context difficult. It can be assumed that the Bridge is referring to Kelman's use of denial in the final chapter of *A Guide to Critical Legal Studies*, 'Toward a Cognitive Theory'.[138] However, if this is correct, the issue of context is compounded, as this chapter concludes Kelman's book, itself a very detailed assessment of Critical Legal Studies.

[136] The Bridge, above n 105.
[137] Kelman, *A Guide to Critical Legal Studies*, above n 45, 286.
[138] Ibid 269.

As the reference to Kelman ends, some space is given to an example of mystification and employment law, before addressing how mystification can be used to separate the Crits from the Legal Realists. The last point offers an important distinction, discussing the cls1 move away from their Realist roots, viewing law as a hindrance to, rather than a tool of, change. While the position taken by the Bridge addresses some forms of what can be considered mystification, there is very little that relates clearly to the demystification stated in their introduction and less still in regard to this thesis' use of mystification.[139]

V. Final Assessment and Concluding Remarks

This chapter has undertaken a specific assessment of how Critical Legal Studies is remembered in reference material and in the online space. This assessment focused on three legal dictionary entries, and the first three results from a Google search of "Critical Legal Studies". Methodologically this review was specifically critical, using the basic premise of a content analysis before critically assessing the results. Approaching the material through a critical lens, there were specific questions asked when assessing both the dictionaries and the websites. These questions relate to the arguments made in Chapter One: that the term Critical Legal Studies is multifaceted, and that the death of cls1 led to the creation of cls3.[140]

The argument that the cls1 death resulted in a schism between two modes of the US-based Critical Legal Studies, creating cls3 and amplifying the mystified nature of Critical Legal Studies, was not mentioned in any of the texts assessed. Instead, in the general jurisprudence texts and the texts which formed the content analysis, the death of cls1 could be inferred from some but not all, and was never explicitly mentioned. This lack of acknowledgement and

[139] See Introduction.
[140] See Chapter One.

discussion on the cls1-death promulgates the mystification of Critical Legal Studies by presenting limited but unified understandings.

From the six sources assessed in the content analysis, only one source, Wikipedia, mentioned British Critical Legal Studies (cls2). Wikipedia did this twice, in regard to difficulties within Critical Legal Studies and with reference to Costas Douzinas and Colin Perrin's four-volume work, *Critical Legal Theory*,[141] neither of which provided detail or differentiation on cls2. Broad Critical Legal Studies, Feminist Legal Theory and Critical Race Theory were also mentioned in the sources; however, they were tenuously connected to cls1 as both influences on and developing from it. Aside from these inclusions, all six texts focused on the original US-based Critical Legal Studies, cls1. The homogenous nature of the sources was specifically compounded with the websites interpreting and referencing one another in favour of primary sources.

No claim is made that all the information contained within the dictionaries and websites is wrong, more that it is reductive or incomplete. What must be noted, is the discernible thread running through all six sources, which creates an authority from which certain truths can be drawn. These truths are seen in unchanging elements, such as the relevant Critical Legal Studies being US-based, with only a selection of prominent thinkers and Crits focused on. Other elements, such as what Critical Legal Studies purported to do, can be understood when reading the sources collectively; reoccurring elements, albeit with varying degrees of assigned importance, emerge throughout the texts. The combination of these elements create epistemological certainties and regimes of truth.[142] As was highlighted in the reading of Andrew Kelman's article, these truths become further entrenched when they are used as the

[141] Douzinas and Perrin, above n 99.
[142] Madison, above n 60.

basis for new work discussing Critical Legal Studies. This thesis argues that these reduced understandings of Critical Legal Studies add to its mystification.

With regard to the proposed death of cls1, none of the sources discussed this event directly. While an inference can be taken from the timelines given, a more dominant theme is that cls1 just fizzled out.[143] Without an explicit mention of death, it is plausible to say that this event does not form part of the dominant cls1 narrative. As argued earlier in this chapter, the cls1-death is discussed by cls1 scholars and their critics, but there is no unity in the death itself, or what, if anything, came next. This thesis has proposed that a third variant of narrow Critical Legal Studies emerged after the death of cls1: cls3. The identification of cls3 allows a way to distinguish the pre and post-death US-based Critical Legal Studies. This relationship does not currently form part of the Critical Legal Studies history, which this thesis argues adds to its mystification. Unpacking the relationship between cls1 and cls3, is therefore the next act of demystification.

[143] Schlegel, above n 29, 968.

Chapter Three

The Haunting of Critical Legal Studies

'Oh He gives to us his joy, That our grief He may destroy: Till our grief is fled an gone He doth sit by us and moan.'

On Another's Sorrow – William Blake

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I. INTRODUCTION

Chapter One outlined a way of differentiating and understanding various "Critical Legal Studies".[1] The creation of the *Critical Legal Studies Family Tree* highlighted a schism in the narrow US-based Critical Legal Studies with the death of cls1 leading to the creation of cls3. This thesis argues that there is a marked change in the style and approach after the cls1-death, and that this posthumous writing is both mystified by, and continues to add to the mystification of Critical Legal Studies. For cls3 specifically, the effect of this mystification will be addressed through the difference in Critical Legal Studies writing, before and after the death of cls1. Namely, that cls3 works are comparatively constricted and regressive, which Chapter Four demonstrates through a comparative analysis of cls1 and cls3 texts. Before this analysis can be undertaken, this current chapter will outline a framework to position the relationship between cls1 and cls3.

The categorisation of the narrow US-based Critical Legal Studies into two limbs, cls1 and cls3, has been posited due to the death of cls1 and the continuation of the US-based Critical Legal Studies' works after this declaration.[2] Whilst cls1 experienced peaks and troughs prior to this,[3] this thesis proposes that the declaration of its death transformed the continuation of narrow US-based Critical Legal Studies. Chapter Two explored the death of cls1, concluding that although it is part of the Critical Legal Studies narrative,[4] it is not always present, especially in both non-critical texts and more easily accessible formats.[5] This thesis contends that the omission of the cls1-death is due to the mystified nature of Critical Legal Studies, rather than legitimate concerns over whether a death actually occurred.[6] Recognising the cls1-

[1] See Chapter One, Part II The Critical Legal Studies Family Tree.
[2] Ibid.
[3] See Chapter Four, Part I – cls1 timeline diagram.
[4] See Chapter One, Part IV The Slow Death of cls1.
[5] See Chapter Two.
[6] *Contra* John Henry Schlegel, 'CLS Wasn't Killed by a Question' [2007] 58(5) *Alabama Law Review* 967, 968.

death and its effect on the specific relationship between cls1 and cls3, will be discussed with the proposal that cls1 "haunts" cls3.

Positioning the cls1 and cls3 relationship as haunted is a response to the language used when describing the death of cls1. In Hope Yen's *Harvard Law Record* article, Duncan Kennedy exclaimed that cls1 is 'dead as a doornail';[7] a phrase which has since been used as an epitaph for cls1.[8] This chapter argues that by unpacking the phrase "dead as a doornail" a literary analogy can be drawn to position the cls1 and cls3 relationship. The analysis to be undertaken draws primarily from a close reading of Charles Dickens' *A Christmas Carol*,[9] itself providing analysis on what it means to be "dead as a doornail" and a model for the nature of a haunted subject. In keeping with Dickens' own frame of reference,[10] William Shakespeare's *Hamlet*, which presents a similar view of the haunted subject, will also be drawn from.[11] This chapter creates the novel concept of a passive-haunting, which relies on the non-appearance of a ghost, to address the cls1 and cls3 relationship. Passive as a prefix is used to denote the non-appearance of a ghost, in opposition to an "active" haunting through the presence of a ghost. This distinction will be unpacked within the latter part of this chapter.

The novel concept of cls1 passively-haunting cls3 is unique to this thesis. However, ideas of haunting and literary analogies to ghosts are not unique to analysis more broadly,[12] notably with Jacques Derrida's 'hauntology' in *Specters of Marx: The State of Debt, the Work of Mourning and the New International*.[13] Derrida's work, a direct response to Francis

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[7] Hope Yen, 'As HLS Mulls Its Mission, CLS Scholars Remain Quiet', *Harvard Law Record* (Cambridge), December 1 1995, 2.
[8] See generally, Arthur D Austin, *The Empire Strikes Back: Outsiders and the Struggle over Legal Education* (New York University Press, 1998) 83.
[9] Charles Dickens, *A Christmas Carol and Other Christmas Writings* (Penguin, 2003).
[10] Ibid 33-34.
[11] William Shakespeare, *Hamlet* (Bernard Lott (ed), Longman, first published 1968, 1997 ed).
[12] See generally Margaret Thornton, 'Gothic Horror In The Legal Academy' (2005) 14(2) *Social & Legal Studies* 267; Noël Carroll, *The Philosophy of Horror or Paradoxes of the Heart* (Routledge, 1990); Eugene Thacker, *In the Dust of this planet: Horror of Philosophy* (Zero Books, 2011) vol 1. These sources are quite disparate in their approach but demonstrate the broad application and impact of horror.
[13] Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International* (Peggy Kamuf trans, Routledge, 1994) [trans of: *Spectres de Marx* (first published 1993)].

Fukuyama's *The End of History and the Last Man*, utilises spectres and hauntings to counter an "end" of history.[14] Within *Specters of Marx* Derrida also draws from *Hamlet*,[15] with his response to Fukuyama coming a few years before cls1 is officially pronounced dead. Given Derrida's influence on Critical Legal Studies, notably through the use of deconstruction in cls1,[16] the similarities of terms relating to the two hauntings, and the time-period of *Specters of Marx*, it would be remiss not to acknowledge this history.

This chapter proceeds with a brief overview of Derrida's *Specters of Marx* and specifically the use of "hauntology". To contextualise Derrida's text, Fukuyama's original 'End of History?' article is also discussed.[17] Aside from the similarities outlined above, the discussion and influence of Derrida's *Specters of Marx*, is presented to differentiate the passive-haunting proposed by this thesis and to explain why an application of hauntology would not achieve the same level of demystification. Once this overview and argument are presented, the rest of this chapter will be spent outlining and applying the passive-haunting, before concluding that cls1 had a chance to re-emerge with the reissuing of key texts, but instead solidified cls3's passively-haunted state.

II. GHOSTS AND THE END OF HISTORY

To talk of the death of Critical Legal Studies in a serious manner and to draw from this an idea of cls1 haunting cls3 could in the first instance seem farfetched or fanciful. This fancy is then compounded when the proposed legitimacy is offered through the literary interpretation of the

[14] Francis Fukuyama, *The End of History and the Last Man* (The Free Press, 1992).
[15] Derrida is not alone in his use of *Hamlet* as an allegorical or metaphorical text, with a number of interpretations being derived from it. See especially Anselm Haverkamp, 'The Ghost Of History: Hamlet And The Politics Of Paternity' (2006) 18(2) *Law and Literature* 171. For psychoanalytic readings, see generally Peter Alexander, *Hamlet: Father and Son* (Oxford University Press, 1955); Avi Erlich, *Hamlet's Absent Father* (Princeton University Press, 1977); Peter Buse and Andrew Stott (eds), Ghosts; Deconstruction, Psychoanalysis, History (MacMillan Press, 1999). See also Bonnie Honig, *Antigone, Interrupted* (Cambridge University Press, 2013) 147-150, on Carl Schmitt's use of "Hamletization"; see also Victoria Kahn, 'Hamlet or Hecuba: Carl Schmitt's Decision' (2003) 83(1) *Representations* 67, 80-87.
[16] See Introduction.
[17] Francis Fukuyama, 'The End Of History?' (1989) 16 *The National Interest* 3.

phrase "dead as a doornail". However, at the time cls1 was dying,[18] the idea of its death was not farfetched or fanciful; in fact, it was not even particularly unique.[19] By presenting a brief discussion of the creation of Jacques Derrida's term hauntology, this chapter will demonstrate that the motif of death was commonplace at the time, in related facets of academic study.[20] In this context both the death of cls1 and the proposal that it passively-haunts cls3, is a logical way of understanding the two Critical Legal Studies.

Hauntology was coined by Derrida in *Specters of Marx*, as a response to Francis Fukuyama's book *The End of History and the Last Man*.[21] Broadly, Derrida proposes the haunting and return of a spectre in response to Fukuyama's premise of a final stage of history. Somewhat simply Derrida states 'one can never distinguish between the future-to-come and the coming-back of a specter'.[22] For Derrida, Fukuyama's definite "end of history" is problematic as the future will always be littered with ghosts from the past.

To appreciate the importance of Derrida's hauntology, as well as its similarities and differences to the proposed passive-haunting of cls3, it is beneficial to begin with the assertion that led to hauntology, Fukuyama's suggestion of the "end of history". Although this term was popularised in his 1992 book,[23] the idea was originally published as an article in the late 1980s.[24] It is this original article which forms the starting point for this chapter's analysis on Derrida's hauntological response, as well as understanding the motif of death that Fukuyama help promulgate. Fukuyama's work is thematically loaded and offers insight into much broader political and ideological issues of the late-20th century. The discussion of Fukuyama's "end of history" highlights the climate in the late 1980s and early 1990s and contextualises Derrida's response. It will be argued that Fukuyama affected cls1, however this affect was peripheral and

[18] See Chapter One, Part IV The Slow Death of cls1.
[19] See generally Samuel Moyn, *The Last Utopia* (The Belknap Press, 2010) 5.
[20] Ibid.
[21] Derrida, *Specters of Marx*, above n 13, 13.
[22] Ibid 46.
[23] Fukuyama, *The End of History and the Last Man*, above n 14.
[24] Fukuyama, 'The End Of History?', above n 17.

subsequently so is the discussion of Fukuyama within this thesis. A more detailed assessment of Fukuyama falls outside the scope of this thesis.

In 1989 Francis Fukuyama published an article in *The National Interest*, titled 'The End of History?'.[25] Thematically, the article is an attempt by the author to reclaim Georg Wilhelm Friedrich Hegel's concept of the end of history. Fukuyama proposes his renewed Hegelian interpretation by positioning himself in opposition to Karl Marx's existing inversion of Hegel.[26] Tellingly, Fukuyama's opposition to Marx does not engage with critiques of Marx's reading of Hegel,[27] or the complexity of their relationship.[28] Fukuyama is focused on rejecting Marx's proposed 'communist utopia' as the end of history.[29] Within the article, Marx is used as a strawman, an icon of communism against whom Fukuyama can present his alternative at the end of the Cold War, which for Fukuyama, is Western liberal democracy.[30] The author states that, for 'the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government'.[31]

Fukuyama legitimises his right-wing Hegelian approach by drawing from Alexandre Kojève's interpretation of Hegel, specifically his reading of a 'universal homogenous state' as the end of history.[32] Fukuyama makes the somewhat obvious claim that Kojève's interpretation is more truthful to Hegel than Marx's inversion,[33] with Kojève following Hegel's direct identification of the year 1806 AD as the end of history.[34] For Hegel and Kojève, the year 1806

[25] Ibid.
[26] See, eg, J J Clarke, '"The End Of History": A Reappraisal Of Marx's Views On Alienation And Human Emancipation' (1971) 4(3) *Canadian Journal of Political Science* 367.
[27] See generally, Norman Levine, *Marx's Discourse with Hegel* (Palgrave Macmillan, 2012).
[28] Carl Schmitt, 'Hegel and Marx' *Historical Materialism* 2014 22(3-4) 388, 389.
[29] Fukuyama, 'The End Of History?', above n 17, 2.
[30] See generally Louis Menand, 'Francis Fukuyama Postpones the End of History', The New Yorker (online), 3 September 2018 < https://www.newyorker.com/magazine/2018/09/03/francis-fukuyama-postpones-the-end-of-history>. Menand reads Fukuyama's 'The End of History?' as luckily well-timed, preceding events which initially strengthened his proposal.
[31] Fukuyama, 'The End Of History?', above n 17, 1.
[32] Ibid 3.
[33] Clarke, above n 26, 367.
[34] Fukuyama, 'The End Of History?', above n 17, 3.

and the defeat of the Fourth Coalition by Napoléon Bonaparte at the Battle of Jena-Auerstedt, established the basis for the homogenous state. Fukuyama builds on Hegel and Kojève and argues that whilst 1806 was not a contemporary vision of the Western liberal democracy, it enshrined its basic principles:

> While there was considerable work to be done after 1806 - abolishing slavery and the slave trade, extending the franchise to workers, women, blacks, and other racial minorities, etc. - the basic principles of the liberal democratic state could not be improved upon.[35]

As the article progresses, Fukuyama's central argument on the benefits of liberal democracy is expanded. Fukuyama presents the increase in post-World War liberal democratic States as testament to the political ideology's rightful place at the end of the history. Following this train-of-thought, Fukuyama argues that the World Wars aided this outcome, stating: 'If we admit for the moment that the fascist and communist challenges to liberalism are dead, are there any other ideological competitors left?'[36] The rhetorical question, which presents all reasonable competition as dead, leaves the reader with Fukuyama's vision of Western liberal democracy as the "final form" of human government. Fukuyama sees this final form exemplified by the United States,[37] even going so far as to suggest even Marx's initial inversion had also been satisfied, positioning the US as a classless society:

> Kojève (among others) noted, the egalitarianism of modern America represents the essential achievement of the classless society envisioned by Marx. This is not to say that there are not rich people and poor people in the United States, or that the gap between them has not grown in recent years.[38]

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[35] Ibid.
[36] Ibid 13.
[37] See Menand, above n 30, who believes it reads more as Europe than America, a point Fukuyama also makes in this Guardian article: Francis Fukuyama, 'The history at the end of history', *The Guardian* (online), 3 April 2007 <https://www.theguardian.com/commentisfree/2007/apr/03/thehistoryattheendofhist>.
[38] Fukuyama, 'The End Of History?', above n 17, 8.

Fukuyama then proposes that the status of rich and poor Americans is separate from the egalitarian nature of liberalism, tying residual inequality to 'premodern' factors: 'black poverty in the United States is not the inherent product of liberalism, but is rather the "legacy of slavery and racism" which persisted long after the formal abolition of slavery'.[39]

Fukuyama's article is full of such broad and unironic analysis which draws from, but does not engage, with Marx or Kojève in a meaningful way. However, in the current context what is important is that despite these flaws in Fukuyama's article, its impact normalised the discussion of death in relation to movements and ideologies, highlighted through the author's statement that alternatives to liberalism are dead.[40] As Fukuyama phrased it, this is an unquestionable fact, and something that needs to be admitted to by those who see historical alternatives (i.e. fascism or communism) as anything but lifeless.

The effect of competing ideas between "utopias" and "death" was seen in other progressive and left-wing fields, with Samuel Moyn highlighting that the rise of human rights relied on its utopian vision,[41] and its survival as 'the god that did not fail while other political ideologies did'.[42] Similarly, Corinne Blalock saw this trend broadly as well as affecting cls1 directly:

> [cls1] is seen as another casualty of the more general death of metatheory in the postmodern era … a historical crisis of the leftist political imaginary at the end of the twentieth century. After the fall of communism, the story goes, the left was incapable of imagining an alternative to the model of democratic market-capitalism that had been the object of the crits' critique. This inability to imagine an alternative—experienced by the left as a cessation of progress and as an inability to escape the realities of the present moment—is oftentimes referred to as the "end of history."[43]

[39] Ibid.
[40] Ibid 13.
[41] Moyn above n 19, 4.
[42] Ibid 5.
[43] Corinne Blalock, 'Neoliberalism And The Crisis Of Legal Theory' (2014) 77 *Law and Contemporary Problems* 71, 78-79.

‘The End of History?’ is not law-specific, however, its argument that ideologies outside of Western liberal democracy were dead, as well as its reinvigoration of “the end of history” fits into the broader narrative that surrounded left versus right politics. As Blalock and Moyn identify, this climate affected a number of left-wing ideologies, including cls1.[44] It is worth noting that despite Fukuyama not interacting directly with cls1, his original lecture, which spawned his article and book on the end of history was requested by Law and Economics’ corporate donors, the Olin Foundation.[45] Fukuyama has continued to receive criticism on his proposed end of history, and in recent years has distanced himself from his thesis.[46] However, the impact of *The End of History and the Last Man* in 1992, was felt broadly and presented the end of history argument to a much wider audience.

The End of History and the Last Man, continues and expands on the same themes and approach as ‘The End of History?’. Fukuyama enforces his pro-liberal, pre-neoliberal, stance through Hegel and Kojève, introducing Immanuel Kant to bolster ideas of individualism and competition leading to a more egalitarian society;[47] Fukuyama reiterating that ‘[a]t the end of history, there are no serious ideological competitors left to liberal democracy’.[48] Louis Menand offers a more favourable reading, stating that ‘“The End of History and the Last Man” is not a journal article on steroids. It is a thoughtful examination of the questions raised by the piece in The National Interest’.[49] Whilst this can be accepted through a detailed reading of the work, the book does not offer any more relevant content to this thesis. In

[44] There is no direct engagement with Fukuyama from the Crits or cls1, or vice versa. However, the implications of Fukuyama’s thesis, the “end of history”, was broadly opposed by Duncan Kennedy in 1981: ‘the left doesn't need a counter-theory that *ends* with rights. We need utopian thinking, but the short-term, practical and creative manner, rather than in the form of rationalist "end-of-history" deductions of the ideal state of mankind’. See Duncan Kennedy, ‘Critical Labor Law Theory: A Comment’ (1981) 4 *Industrial Relations Law Journal* 503, 506 (emphasis in original).

[45] In both the article and book Fukuyama identifies that his initial talk on the end of history was given at the John M Olin Center at the University of Chicago.

[46] Fukuyama, ‘The history at the end of history’, above n 37; see also Eliane Glaser, ‘Bring back ideology: Fukuyama's “end of history” 25 years on’, *The Guardian* (online), 21 March 2014 < https://www.theguardian.com/books/2014/mar/21/bring-back-ideology-fukuyama-end-history-25-years-on>.

[47] Fukuyama, *The End of History and the Last Man*, above n 14, 58-59.

[48] Ibid 211.

[49] Menand, above n 30.

context, the benefit of Fukuyama's theory in book rather than article form, is its broader accessibility and the reactions to it, specifically the response by Jacques Derrida.

Derrida's 1993 book *Specters of Marx* draws its ghoulish title thematically from the opening line of Karl Marx and Friedrich Engels' *The Communist Manifesto*,[50] itself stating that '[a] spectre is haunting Europe – a spectre of Communism'.[51] Despite the prominence of the spectre in *The Communist Manifesto*, it, nor hauntings, feature again. Instead the spectre is symbolic for what the authors believe is an impending revolution in Germany.[52] However, in *Specters of Marx*, Derrida develops the titular symbolism further, bringing ghosts, spectres, and hauntings from modes of fiction to modes of interpretation.

In the first instance, the themes of death and haunting are a direct response to the ideas presented by Fukuyama in *The End of History and the Last Man*. Derrida presents the idea of the "specter" as a way to play with ideas and concepts that have been prefaced with 'the end'.[53] The author balances Fukuyama's idea of the end of history, with similar earlier claims made, specifically drawing on 1950s concepts relating to 'ends of man… [and] ends of philosophy'.[54] Derrida's effect here is twofold, first there is the immediate reduction in both the relevance and seriousness of Fukuyama's claims, with the argument that they are no more than a 'tiresome anachronism'.[55] The second is Derrida's response that Fukuyama's argument is flawed when it proposes that there is a clear-cut death of liberalism's rivals. Derrida argues homophonically, drawing on the term "ontology" to create 'hauntology',[56] offering a related but different sense of being; hauntology describing something that has been disavowed but continues.[57] Derrida provides the contextual example of hauntology as visible in the attempted installation of neo-

[50] Karl Marx and Friedrich Engels, *The Communist Manifesto* (Penguin Classics, 2002).
[51] Ibid 218.
[52] Ibid 258.
[53] Derrida, *Specters of Marx*, above n 13, 16.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] Ibid 46.

capitalism and neo-liberalism (Fukuyama's Western liberal democracy), which cannot rid themselves of certain ghosts of Marx and Marxist thought.[58]

However, it is the justification Derrida gives for the scholastic rather than fantastic use of ghosts and spectres, more so than Marx specifically, which is pertinent here:

> There has never been a scholar who really, and as a scholar, deals with ghosts. A traditional scholar does not believe in ghosts – nor in all that could be called the virtual space of spectrality. There has never been a scholar who, as such, does not believe in the sharp distinction between the real and the unreal, the actual and the inactual, the living and the non-living, being and non-being.[59]

Derrida's justification for his methodology is also part of the critique of Fukuyama as a "traditional scholar"; Fukuyama could not conceive of ghosts which prevent the end of history. Derrida's justification grounds the worth and usefulness in his application of spectres and hauntings. However, the author's own justification has been surpassed by the uptake and application from other scholars using his methodology. Primarily, hauntology as 'the idea that there is something from the past which is always present in the present; and, also, that this something is waiting for its return in a future to come',[60] provides an alternative to teleological understandings of history. This re-conception of how time is conceived has led to a thread in the work of Martin Hägglund,[61] Mark Fisher,[62] and Chris Hughes,[63] amongst others who use hauntology as a way to address non-linear modes of time.

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[58] Ibid.
[59] Ibid 12. However, see especially Colin Davis, '*E´Tat Pre´Sent*: Hauntology, Spectres and Phantoms' (2005) 59(3) *French Studies* 373, 376. Davis addresses the overlooked contribution made to this field by Nicolas Abraham and Maria Torok.
[60] Chris Hughes, 'Dialogue Between Fukuyama's Account Of The End Of History And Derrida's Hauntology' (2012) 7(18) *Journal of Philosophy: A Cross-Disciplinary Inquiry* 13, 15.
[61] Martin Hägglund, *Radical Atheism: Derrida and the Time of Life* (Stanford University Press, 2008).
[62] Mark Fisher, 'What is Hauntology?' (2012) 66(1) *Film Quarterly* 16.
[63] Hughes, above n 60.

This focus on hauntology as a specific tool,[64] isolated from the argument against Fukuyama or other concepts presented in *Specters of Marx*, does not reduce its scope or application. In fact, it follows a similar path to Derrida's earlier influential method of deconstruction, with Peter Goodrich, arguing that it was the idea of 'deconstruction' rather than the text *Of Grammatology* that was seized upon in the United States.[65] It is Wendy Brown, however, who situates the importance of hauntology and its place alongside concepts by Michel Foucault and Friedrich Nietzsche as revolutionising historical consciousness, stating in *Politics Out of History* that

> Derrida endeavors to reconceive the press of history on the present, an endeavor that may break even more radically with progressive historiography than does genealogy as formulated by Nietzsche and Foucault. In his porous schema of spectrality that includes ghosts, haunting, and conjuration, Derrida experiments with a mode of historical consciousness that does not resort to discredited narratives of systematicity, periodicity, laws of development, or a bounded, coherent past and present.[66]

This positioning of hauntology by Brown gives rise to a logical argument of viewing Critical Legal Studies, itself unbounded and incoherent, through the lens of hauntology. However, in response to this thesis' task of demystification, a strict Derridean approach would not be as effective in achieving the same level of understanding of Critical Legal Studies. Instead, what can be taken from Derrida's response to Fukuyama's end of the world thesis, is the very real theme of death in the late-1980s and early-1990s, affecting related areas of law and academia.[67] It would not be an overstatement to conclude that this theme's prominence existed to such an extent, that Kennedy's act of declaring cls1 dead, was no more than an *en*

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[64] *Contra* Peter Goodrich, 'Europe In America: Grammatology, Legal Studies, And The Politics Of Transmission' (2001) 101(8) *Columbia Law Review* 2033, 2038.
[65] Ibid. In his article, Goodrich proposes this separation led to the misinterpretation of deconstruction. However, unlike deconstruction, hauntology benefits from its separation and broader application. The original context of hauntology relies on continued and dated reference to Fukuyama, who has now distanced himself from the "end of history" thesis.
[66] Wendy Brown, *Politics Out of History* (Princeton University Press, 2001) 143.
[67] See generally Moyn, above n 19.

vogue cultural statement. It should also be understood that the established influence of haunting and hauntology, moves the far-fetched and fanciful nature of cls3 being passively-haunted, to a relative and appropriate way of addressing the schism in US-based Critical Legal Studies.

Having grounded the concept of hauntings and haunted subjects in the existing literature, this chapter now turns to an outline of the passive-haunting affecting cls3. It should be noted that while the chapter makes some use of elements from Derrida's hauntology, this engagement is confined to the author's foundational use of Shakespeare's *Hamlet*. Whilst the cls3 haunting draws primarily from Charles Dickens' *A Christmas Carol*, *A Christmas Carol* also draws from, and is comparable to, *Hamlet*.[68] The passive-haunting of cls3 subsequently makes mention of *Hamlet*, but in a different and less-developed way than Derrida.

III. THE HAUNTING OF CLS3: A FRAMEWORK

To address how cls1 is to be understood as passively-haunting cls3, the specific language used to describe the death of cls1 will be examined. As has already been argued, the texts that acknowledge the death of cls1, offer little engagement with the associated language. However, in Duncan Kennedy's statement in the *Harvard Law Record* and Arthur Austin's *Empire Strikes Back*, itself drawing from Kennedy, the term as 'dead as a doornail' is used to describe cls1.[69] The proposed importance of this phrase is easily overlooked as initially, it just reinforces the motif of death around cls1 and nothing more. However, as this thesis outlined in its introductory chapter, the language used by cls1 was deliberate and enforced its legal-subcultural status. [70] As such this chapter argues that the limited but consistent use of "dead as

[68] Dickens, *A Christmas Carol*, above n 9, 33.
[69] Yen, 'As HLS Mulls Its Mission', above n 7; Austin, *The Empire Strikes Back*, above n 8.
[70] See Introduction, Part III Counterculture, Minor Jurisprudence, and Legal-Subculture.

a doornail" to describe cls1 offers a way of understanding its death. Intentionally or not, the choice of words used by Kennedy come attached with certain etymological roots, which have specific connotations. These roots and connotations will be discussed so as to illuminate the passively-haunted subject.

Originating in the late-14th century the phrase "dead as a doornail" has been described to mean something that is completely or certainly dead;[71] employed as a simile to give a totalising effect. The history of this phrase, specifically where it has been used and questioned, shapes what type of death it is associated with. For example, if Kennedy had exclaimed that "cls was as dead as a dodo", the phrase would have different etymological roots, a different understanding, and in-turn a different type of death would be implied. Within the current context, the relevance of being "dead as a doornail" is the competing issue of declaring cls1 as completely or certainly dead, whilst cls3 continues. To reconcile this impasse, this thesis draws upon the use and discussion of the phrase within Dickens' *A Christmas Carol*.[72]

Culturally, *A Christmas Carol* is famous for its use of ghosts representing visions to the protagonist, Ebenezer Scrooge. A key cultural trope presented within the book is of ghosts both representing and displaying the past, present, and future to Scrooge. This aspect of *A Christmas Carol* is one that has been picked-up and used in a multitude of other stories;[73] as such, it is often these ghosts who are synonymous with the story as a whole. However, the concept of a haunting that relates to the phrase "dead as a doornail" and is therefore relevant to the relationship between cls1 and cls3, is the haunting of Scrooge by his former business partner, Jacob Marley; the first ghost to appear in the story.

[71] *Oxford English Dictionary*, under "dead" section 32B 'dead as a doornail'.
[72] Dickens, *A Christmas Carol*, above n 9, 33.
[73] See, eg, *It's A Wonderful Life* (Directed by Frank Capra, Liberty Films, 1946), as well a large number of television shows that use this trope, especially around Christmas.

As a text, *A Christmas Carol* is broken-up into staves, rather than chapters, with Dickens titling the first stave 'Marley's Ghost',[74] beginning with the eponymous line 'Marley was dead: to begin with'.[75] The juxtaposition in this sentence summarises the difficulties with death as both a finality and a beginning, and in context it pre-empts the return of Marley in his spectral form. The opening paragraph ends with the standalone sentence: '[o]ld Marley was as dead as a door-nail'.[76] In and of itself, the mere use of this phrase would not be significant given its commonality and use in other texts.[77] However, in *A Christmas Carol*, the initial use of this phrase precedes a discussion the narrator has with himself about the use of this specific simile and its relation to death:

> Mind! I don't mean to say that I know, of my own knowledge, what there is particularly dead about a door-nail. I might have been inclined, myself, to regard a coffin-nail as the deadest piece of ironmongery in the trade. But the wisdom of our ancestors is in the simile; and my unhallowed hands shall not disturb it, or the Country's done for. You will therefore permit me to repeat, emphatically, that Marley was as dead as a door-nail.[78]

In context, the narrator is repeating *ad nauseam* that Marley truly was dead, and that the most emphatic way of stating this is through the phrase "dead as a doornail". The reason for the narrator's repetition is, as the stave's title depicts, Marley will soon return to the mortal world. However, the analysis given by the narrator, can also be read as a way to understand that "dead as a doornail" means dead, but not fully gone. As the narrator knows Marley will return as a ghost, the initial confusion and deference to holier and wiser ancestors, can be understood as signifying that this choice of words symbolises a different type of death, one in which a revenant returns, or a haunting will occur. Following this logic, the use of a different simile and death, i.e. one as dead as a coffin nail, will have a different outcome for Marley himself.

[74] Dickens, *A Christmas Carol*, above n 9, 33.
[75] Ibid.
[76] Ibid.
[77] See, eg, William Shakespeare, *Henry VI*, Part 2, Act 4, Scene 10.
[78] Dickens, *A Christmas Carol*, above n 9, 33.

Applying this understanding to the declaration that cls1 was as dead as a doornail, provides a way for cls1 and cls3 to be explored from this same position.

What this haunting means for cls3, can be further explained by addressing the relationship between Scrooge and Marley. It should be noted, however, that Scrooge and Marley are not being presented as allegories for cls1 and cls3, rather their relationship allows a way to discuss the haunting effect on two parties: the one who haunts and the haunted subject. The concept of a haunted subject can be understood through the importance of Marley's death. As outlined in the first sentence of *A Christmas Carol*, Marley was dead, but only to begin with. This premise paired with the stave's title foretells Marley's return, which by the end of the first page, includes reference to *Hamlet,* making it explicitly clear that Marley was dead, but would return as a ghost. Flagging this for the reader, the narrator states

> [i]f we were not perfectly convinced that Hamlet's Father died before the play began, there would be nothing more remarkable in his taking a stroll at night, in an easterly wind, upon his own ramparts, than there would be in any other middle-aged gentleman rashly turning out after dark in a breezy spot—say Saint Paul's Churchyard for instance—literally to astonish his son's weak mind.[79]

To appreciate the return of Marley (or the dead King Hamlet), the reader must first be convinced that Marley was truly dead. So, whilst this stave introduces Scrooge as the protagonist, it is set-up in such a way that once the reader is convinced Marley did in fact die, they are waiting for his reappearance. The effect this has on the first stave is that only the appearance of an undead-Marley will begin the story proper. As such any discussion of Marley's death and Scrooge's life pre-Marley's ghost are only there to set the scene. The common purpose of the period between acknowledging Marley's death and Marley's ghost visiting Scrooge, is perhaps most logically understood as also introducing other prominent characters to the story, such as Scrooge's nephew Fred, and clerk, Bob Cratchit. Reference to

[79] Ibid 33-34.

Marley in this section is scarce, only mentioned in passing when Scrooge is asked to donate to a charity, with the reader learning from this that Marley died seven years ago to the day, on Christmas Eve.[80]

It is worth noting that culturally the commonality of this story and its adaptions have followed a similar glossing over of Scrooge's existence pre-Marley's spectral return. In the 1984 film adaptation,[81] *A Christmas Carol*,[82] the importance of the phrase "dead as a doornail" is stated, with the narrator following this description of Marley with: 'this must be distinctly understood, if not nothing wonderful can come of this story I am going to relate'.[83] Whilst this contraction of the opening page still gives the same gist as the text, the film skips over any further mention of Marley until he appears to Scrooge as a ghost.[84] Within the text and its adaptations this period for Scrooge can be seen as merely a precursor. However, for the purpose of this thesis, it is this period between Marley being declared as a dead as a doornail, and his spectral appearance to Scrooge that develops the haunting framework.

A. *Two Hauntings*

This thesis proposes that the form of haunting taken from the relationship between Scrooge and Marley in *A Christmas Carol* can be broken-up into two distinct categories: passive and active. Briefly, the passive-haunting is Scrooge's life post-Marley's death and pre-Marley's return as a ghost, and the active-haunting is Scrooge's life after he is visited by Marley's ghost. This division between passive and active haunting is not unique to *A Christmas Carol* but is perhaps best exemplified by it. For example, Dickens' reference to *Hamlet* is both a tell for the reader that Scrooge is about to be visited by a ghost, but also an existing and famous example

[80] Ibid 38.
[81] This version was chosen given its release date in the midst of cls1. See Chapter Four, Part I – cls1 timeline diagram.
[82] *A Christmas Carol* (Directed by Clive Donner, Entertainment Partners, 1984).
[83] Ibid 0:0:29 – 0:0:40.
[84] Ibid 0:20:34.

of this transformative haunting trope. In both texts the arrival of a ghost transforms the protagonists' direction, acting as a mechanism to allow the narrative to transpire, i.e. but for Hamlet's father, or but for Marley, neither Hamlet nor Scrooge would have embarked upon the stories that make up *Hamlet* and *A Christmas Carol* respectively. However, this chapter argues that the transition achieved through the arrival of the ghost demonstrates that before this event, both Hamlet and Scrooge are passively-haunted.

For cls3 this haunting distinction is vital as there has been no spectre or ghost of cls1 which has appeared and created a transition to an actively haunted cls3. The effect of the cls1 death and the proposed argument that this has caused cls3 to be comparatively regressive and constricted therefore relies on its passive-haunting by cls1. To understand more clearly what is meant by a passively-haunted subject, this thesis will address how the idea of haunting can be reinterpreted from a supernatural trope to a lens to view cls1 and cls3. Whilst this can be justified in a simple way through the use of the language surrounding the cls1 death, the concept of haunting and its creation as a framework to understand the cls1/cls3 relationship is more in-depth. This thesis has posited that both Scrooge and Hamlet experience two types of haunting, one that is passive and one that is active, however, the positioning of haunting as a duality in this way is unique to this thesis. This uniqueness relates to the dominant understanding of a haunting as occurring when a ghost, or spiritual being, visits a subject. However, to say that this is a totalising use of the term "haunting" would be misleading.

In terms of definitions, the verb "haunt" also means '[t]o visit frequently and habitually with manifestations of their [ghosts or spirits] influence and presence'.[85] Whilst the dominant premise of a haunting relies on the supernatural, the associated ideas of influence and presence after death, can be understood as occurring before the arrival of a ghost. For example, in both *A Christmas Carol* and *Hamlet*, the influence of Marley or King Hamlet are still felt before

[85] *Oxford English Dictionary*, "haunt", section 5b.

either ghost arrives.[86] Commonly these pre-haunting periods could be conflated with mourning or bereavement, however, there is an expectation within dominant religious practice, and broader society, that these periods are somewhat structured and eventually end.[87] As such the idea of a passive-haunting can vary by continuing past the mourning or bereavement of a death and into the reality of a continual or permanent "influence" or "presence" of the deceased.[88] In this way the subject is haunted without a ghost manifesting; that is, they are passively-haunted, potentially unaware of the influence and presence of the deceased in a very different way to when a ghost appears, and the subject is actively-haunted.

The key issue in the division between passive and active hauntings rests on the non-appearance of a ghost and subsequently whether this process can justifiably be called a haunting. Although the argument can be made that in *A Christmas Carol* and *Hamlet* both passive and active hauntings have taken place, they occur symbiotically. The proposed idea of establishing a passive-haunting as an independent occurrence is therefore problematic. Despite the non-existence of ghosts as they are portrayed in fiction such as *A Christmas Carol* or *Hamlet*, an active haunting, the dominant understanding of a haunting, requires this element. The proposed concept of passive-haunting requires only the effect of death and its continued influence or presence, rather than a ghost per se. The lack of a supernatural element required in a passive-haunting removes it from the position of an allegorical fiction and makes it an applicable lens for viewing subjects that have experienced death or finality in an unsatisfactory manner.

The acceptance of two haunting types, rather than one unified understanding of "haunting", does however, come with some immediate problems. The most obvious issue that arises is that if no ghost appears and everyone experiences death, either their own or the

[86] See below Passive-Haunting.
[87] Within the Abrahamic religions, for example, the practice of Shiva in Judaism lasts a week; in Islam, Iddah lasts four months and 10-days, and Catholicism, depending on the relationship, will last 30-days to six months.
[88] *Oxford English Dictionary*, "haunt", above n 85.

witnessing of someone else's, then is a passive-haunting justifiable, or conversely, does everyone suffer from it? With regards to the latter issue and the universal experience of death, it can be argued that in the specific texts relied upon, not all characters are haunted, either passively or actively. As can be seen in *A Christmas Carol*, it is only Scrooge who is, to the reader's knowledge, visited by Marley and the other ghosts. Similarly, in *Hamlet*, despite a number of characters seeing and interacting with the King's ghost, it is only Hamlet himself who is passively then actively haunted. Neither text denies broad experiences of death, perhaps exemplified most in the final scene in *Hamlet*,[89] but not all deaths result in either form of haunting. Whilst differences can be highlighted between Scrooge and Hamlet, and those who are not haunted, there is no perfect schema or model that can delineate why this is.

It is theoretically possible to turn to another work of fiction and rely on the definition of 'un-dead' created by Bram Stoker to describe the affliction facing the namesake in *Dracula*.[90] Stoker's now commonplace description relates to something clinically dead, but not yet at rest.[91] That if the subject matter, either Marley or cls1, were not at rest, their un-dead status could lead to the passive haunting of Scrooge or cls3. However, within the overall aim of demystifying Critical Legal Studies, the drawing upon further works of fiction, which requires the blending of supernatural beings such as ghosts and vampires, seems to be counterproductive. Instead, what can be understood is that only some subjects will be passively-haunted, and that this affliction should be discernible from the facts presented.

B. *The Passive Haunting*

This thesis proposes that *A Christmas Carol* provides an example of Scrooge's passive-haunting, seen in the way he is affected after Marley's death, but before his spectral return. The

[89] Shakespeare, *Hamlet*, above n 11, 205-225.
[90] Bram Stoker, *Dracula* (Penguin Classics, 2003).
[91] *Oxford English Dictionary*, the adjective "un'dead" is attributed to Stoker's use in *Dracula* in 1897.

demonstration of Scrooge's passive-haunting will be outlined in parallel to the passive-haunting of cls3, to present how a subject can still be haunted when a ghost does not appear. As was addressed above, the first stave of *A Christmas Carol* is purposefully introductory, and a dominant reading would reflect this. However, in isolation, away from the broader context of Marley's actual ghost, there are minor images and statements about Scrooge's life post-Marley's death that demonstrate a passively-haunted subject. The elements drawn from *A Christmas Carol*, are contextually relieved when Marley appears and Scrooge is exposed to the other ghosts in the story. For cls1 and cls3 the parallels will be presented but with no comparative relief provided, as such they will demonstrate the continuing effect of a passively-haunted subject.

Within the opening page of *A Christmas Carol*, the narrator outlines that upon Marley's death, 'Scrooge was his [Marley's] sole executor, his sole administrator, his sole assign, his sole residuary legatee, his sole friend and sole mourner'.[92] The narrator then discloses that despite a relationship that had lasted 'I don't know how many years',[93] Scrooge did not attend Marley's funeral: '[a]nd even Scrooge was not dreadfully cut up by the sad event, but that he was an excellent man of business on the very day of the funeral, and solemnised it with an undoubted bargain'.[94] In context, the assumption initially taken would be the affirmation of Scrooge's miserly and uncaring ways. However, this position can be challenged with the narrator's statement that Scrooge was at once the sole mourner and not dreadfully cut up by the death.[95] Whilst these seem like somewhat oppositional stances to take, there is a similar sentiment in the reaction to the cls1 death by Duncan Kennedy: 'I think that while CLS[1] is

[92] Dickens, *A Christmas Carol*, above n 9, 33; The concept of friendship between Marley and Scrooge and a possible correlation to cls1 and cls3 could be drawn here, however, this would add a necessary element in cls3 work that the cls3 authors are *known* to their cls1 "friends", limiting the haunting effect. Further, the definition of friendship from which to differentiate is outside the scope of this thesis, see, eg, Giorgio Agamben, 'Friendship' (2004) 5 *Contretemps* 1, 6.
[93] Dickens, *A Christmas Carol*, above n 9, 33.
[94] Ibid.
[95] Ibid.

dead as a doornail, there is still a very significant public interest movement, which I for one strongly support'.[96]

For both Scrooge and cls1, it is reasonable to assume that the respective deaths were acknowledged, but that their significance was either downplayed or not fully appreciated.[97] However, as time progressed, the impact of the deaths became more apparent and the elements of a passive-haunting can be drawn out. For Scrooge this appears on the second page of *A Christmas Carol*, where the narrator states:

> Scrooge never painted out Old Marley's name. There it stood, years afterwards, above the warehouse door: Scrooge and Marley. The firm was known as Scrooge and Marley. Sometimes people new to the business called Scrooge Scrooge, and sometimes Marley, but he answered to both names: it was all the same to him.[98]

This excerpt demonstrates the static nature of the passively-haunted subject. The progression of time leads new users to the business, in turn Scrooge's choice to retain Marley's name above the warehouse door, leads to the assumption, seen with the use of either name, that Marley's death changed nothing. Whilst relatively minor, the direct effect of Scrooge being referred to as his dead partner keeps the "presence" and "influence" of Marley with him at all times.[99] This effect is then compounded when the narrator outlines Scrooge's living arrangements: 'He lived in chambers which had once belonged to his deceased partner. They were a gloomy suite of rooms … [i]t was old enough now, and dreary enough, for nobody lived in it but Scrooge'.[100]

In both excerpts taken, Scrooge is presented as assuming significant elements of Marley's life: both his name and his home. The direct effect of this is the keeping of Scrooge

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[96] Yen, 'As HLS Mulls Its Mission', above n 7.
[97] See, eg, Ernest Becker, *The Denial of Death* (Free Press Paperback, first published 1973, 1997 ed). This work demonstrates the common theme of denial when dealing with death.
[98] Dickens, *A Christmas Carol*, above n 9, 34.
[99] Ibid; See Chapter One.
[100] Dickens, *A Christmas Carol*, above n 9, 41.

in some sort of stasis, where he is still living but not progressing; or another way, that Marley's passive-haunting of Scrooge means he is regressive and constricted. For cls3 the passive-haunting effect of cls1 can be seen in a similar way. First, there is the issue of names. Whilst cls3 has been designated by this thesis to clarify which Critical Legal Studies is which,[101] the more common approach is for the posthumous Critical Legal Studies to just be called "Critical Legal Studies". Second is the issue of a home. For cls3, the idea of a shared home is one less specific than the image Laura Kalman provided in *Yale Law School and the Sixties*,[102] and instead aligns with the idea of a home or position that Critical Legal Studies has in legal academia. This idea can be seen in a number of already cited works, such as the reference works addressed in Chapter Two that identify the existence of Critical Legal Studies, but do not provide an end-date.[103] However, it is at this point Critical Legal Studies and *A Christmas Carol* diverge. Shortly after Scrooge returns to his dreary abode, Marley's ghost appears and Scrooge experiences an active-haunting. For cls3 no such ghost appeared and as will be argued, no such ghost of cls1 will emerge. Instead, cls3 remains in stasis, crippled by the regressive and constricting nature of a passive-haunting.

IV. CONCLUDING WITH A REGRESSIVE AND CONSTRICTED CLS3

The ability to defiantly state that cls3 will remain passively-haunted and will not experience the relief of an active-haunting, comes from the reissuing of two seminal cls1 texts during the cls3 period. In 2004, Duncan Kennedy's *Legal Education and the Reproduction of Hierarchy: a Polemic against the System* was reissued,[104] with Roberto Unger's *The Critical Legal Studies Movement* (with a new subheading: *Another Time, A Greater Task*), reissued in 2015.[105] Both

[101] See Chapter One.
[102] See Chapter One, Part III The cls1 Eulogy.
[103] See Chapter Two, Part V Final Assessment and Concluding Remarks.
[104] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (New York University Press, 2004).
[105] Roberto Mangabeira Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso, 2015).

original texts set the tone for two distinct cls1 approaches,[106] and as reissues, rather than reprints,[107] they included additional materials. However, whilst both texts included addenda, these took the form of retrospective insights, rather than a way forward, or a call to arms.

In *Legal Education and the Reproduction of Hierarchy*, Kennedy gives a brief introduction to the new edition, but provides a longer assessment in his 'afterword'. [108] Within the afterword, Kennedy provides some thoughts on the end of cls1, touching on a range of different factors that affected its death. Kennedy affirms the timeline for cls1's decline, identifying that in 1992 the writing was on the wall, with Mark Tushnet stating that the cls1 conference was 'just another academic conference';[109] what had made cls1 unique, was no longer possible. Although, Kennedy does try to revive some optimism by outlining the cls1 influence on most areas of law,[110] stating that 'the sun never sets on Critical Legal Studies'.[111] There are reasons provided for why cls1 ended[112] but these follow the author's earlier statements.[113] Kennedy's continued optimism offers a new critical approach to law, but one that is not cls1 and one that he does not have to found:

> there is a lot of radical legal scholarship and scholarly activity still around for the student who is willing to look for it, even if there is not the sense of an all-inclusive open movement to join or rebel against. It's time for something new here, too.[114]

[106] See Chapter One, Part III The cls1 Eulogy – The cls1 Founders.
[107] *Contra* Peter Goodrich, 'Duncan Kennedy As I Imagine Him: The Man, The Work, His Scholarship, And The Polity' (2001) 22 *Cardozo Law Review* 971, 976. Goodrich highlights a potential argument with both reissues and reprints with regard to Kennedy's *Sexy Dressing etc*: 'I … said that it was unfortunate that the book consisted entirely of papers that had already been published and that he had not had anything new to say'. See a further discussion at 978-981. However, this thesis argues that the addenda in these reissues had scope to alleviate the passively-haunted state.
[108] Kennedy, *Hierarchy*, above n 104, 202.
[109] Ibid 219.
[110] Ibid 220.
[111] Ibid 221.
[112] Ibid 219-220.
[113] See Duncan Kennedy, 'Two Globalizations Of Law & Legal Thought: 1850-1968' (2003) 36(3) *Suffolk University Law Review* 631; Yen, 'As HLS Mulls Its Mission', above n 7.
[114] Kennedy, Hierarchy, above n 104, 221.

Where Kennedy's tone is encouraging but non-directional, Unger is far more blunt. Although he addresses cls1 in great detail across an additional two-chapters in the reissued *The Critical Legal Studies Movement*, he succinctly states that, '[c]ritical legal studies was never intended to generate a permanent genre of legal writing, or to take its place among a standing cast of schools of legal theory. It was a disruptive engagement in a particular circumstance'.[115]

The authors' approaches are stylistically different and are taken several years apart, however, both Unger and Kennedy can be read as in agreement that cls1 is dead and neither have any interest in returning to or revitalising it. With this unified approach these founders of cls1 extinguish any chance of an active haunting relieving the passively-haunted cls3. The definitive nature of this statement can be understood through a return to Derrida's concept of hauntology, which relies exclusively on the appearance of a ghost. Drawing from *Hamlet*, Derrida positions the effect of hauntology before the return of the ghost, in what this thesis has dubbed the passive-haunting phase. In this state, Derrida describes the palpitation and sense of excitement that surrounds the possibility of the ghost's return:

> As in *Hamlet*, the Prince of a rotten State, everything begins by the apparition of a specter. More precisely by the *waiting* for this apparition. The anticipation is at once impatient, anxious, and fascinated: this, the thing ("this thing") will end up coming. The *revenant* is going to come. It won't be long. But how long it is taking. Still more precisely, everything begins in the imminence of a re-apparition, but a reapparition of the specter as apparition *for the first time in the play.* The spirit of the father is going to come back and will soon say to him "I am thy fathers Spirit" (I, iv), but here, at the beginning of the play, he comes back, so to speak, for the first time. It is a first, the first time on stage.[116]

In *Hamlet*, Hamlet's excitement is created due to the sighting of the ghost by Bernado, Marcellus, and Horatio.[117] In *A Christmas Carol*, Marley serves a similar purpose, warning or foretelling Scrooge that spectres will come to visit him. For cls3, the return would be in the

[115] Unger, above n 104, 4.
[116] Derrida, *Specters of Marx*, above n 13, 2.
[117] Shakespeare, *Hamlet*, above n 11, 3.

form of Kennedy or Unger, ghosts of cls1, exciting the passively-haunted cls3 to a state where the 'anticipation is at once impatient, anxious, and fascinated: this, the thing ("this thing") will end up coming. The *revenant* is going to come. It won't be long'.[118] However, in reissuing their texts, a forum where this would have been possible, both authors are adamantly not creating this type of anticipation. Instead, the tone aligns with TS Eliot's sentiments on death, that cls1 ends not with a bang, but with a whimper.[119]

This chapter has presented the argument that contemporary US-based Critical Legal Studies "cls3", is haunted by its predecessor, cls1. Viewing the relationship between cls1 and cls3 as a passive-haunting has been argued due to the death of cls1 and the specific language used to recognise this event. The passive-haunting itself is one unique to the relationship between cls1 and cls3, differing from other similar uses, notably Derrida's hauntology. The passive-haunting experienced by cls3 is reliant on the non-appearance of a ghost, leaving cls3 constricted and regressive after the death of cls1. The creation of this passive-haunting approach allows an assessment of both US-based Critical Legal Studies which provides an historical reason for their inherent differences. To demonstrate these differences the following chapter will give a detailed comparative reading of a cls1 and cls3 text.

[118] Derrida, *Specters of Marx*, above n 13, 2.
[119] TS Eliot, *Collected Poems 1909-1962* (Harcourt Brace Jovanovich, 1991) 77.

Chapter Four

Roll Over Beethoven and Law School Enters the Matrix: a Comparison of cls1 and cls3

'This is your last chance. After this, there is no turning back. You take the blue pill—the story ends, you wake up in your bed and believe whatever you want to believe. You take the red pill—you stay in Wonderland, and I show you how deep the rabbit hole goes. Remember: all I'm offering is the truth. Nothing more'

Morpheus – The Matrix

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I. INTRODUCTION

To demonstrate the effect of a passive-haunting, this chapter presents a comparative reading of two journal articles, a cls1 and cls3 text. This reading demonstrates the constricted and regressive nature of the passively-haunted cls3. This chapter is focused on two texts, Peter Gabel and Duncan Kennedy's 1984 cls1 article 'Roll Over Beethoven'[1] and Jerry Anderson's 2004 cls3 article 'Law School Enters the Matrix: Teaching Critical Legal Studies' ('Law School Enters the Matrix').[2] This chapter contains two parts, the first addresses the readings of 'Roll Over Beethoven' and the second addresses the reading of 'Law School Enters the Matrix'.

Before presenting the readings of both texts, the chapter outlines why these two texts have been chosen and why they can be considered fair representatives of cls1 and cls3. Beginning with 'Roll Over Beethoven', this chapter argues that there are two dominant readings of this text: first as verbatim, a literal transcript of a conversation, and second as a script. Both readings position the text uniquely as either a candid conversation between Gabel and Kennedy, or as a piece of theatre playing into tropes and characterisations expected from cls1. Finally, the chapter argues that the publication of 'Roll Over Beethoven' can be interpreted as a performative act, following avant-garde and revolutionary modes of theatre.

In contrast, 'Law School Enters the Matrix' has only one plausible reading: Anderson's article on teaching Critical Legal Studies, which he presents as a return to cls1, is in fact an acceptance of cls3. Finally, the chapter concludes that the constricted and regressive nature of cls3 reveals it as a passively-haunted subject.

[1] Peter Gabel and Duncan Kennedy, 'Roll Over Beethoven' (1984) 36(1/2) *Stanford Law Review* 1.
[2] Jerry L Anderson, 'Law School Enters The Matrix: Teaching Critical Legal Studies' (2004) 54(2) *Journal of Legal Education* 201.

A. *Choosing Law School Enters the Matrix: Teaching Critical Legal Studies*

The argument presented in Chapter Three was that the death of cls1 led to the passive-haunting of cls3. Subsequently, the haunting has resulted in the constricted and regressive nature of cls3. Therefore, to demonstrate the effect of the passive-haunting through a comparative reading, the issue arises of whether equal papers can be chosen to compare and contrast. Knowing that the cls3 paper will be comparatively constricted and regressive, both papers are selected on their themes, the strength of their arguments, and their categorisation as cls1 and cls3 respectively.

Both 'Roll Over Beethoven' and 'Law School Enters the Matrix' use popular culture in relation to Critical Legal Studies. The titles of both articles reference this connection to popular culture, with 'Roll Over Beethoven' drawing on the song title of Chuck Berry's 1956 hit *Roll Over Beethoven*, and 'Law School Enters the Matrix' referencing the 1999 Wachowski Brothers film, *The Matrix*.[3] The popular culture link is strengthened further in the body-of-text of 'Roll Over Beethoven', when Gabel and Kennedy dispense with musical references and turn to the film *Invasion of the Body Snatchers* as an allegorical text.[4] The dystopian science-fiction themes anchor both papers and the respective relationships cls1 and cls3 have to a non-critical world.

'Law School Enters the Matrix's time of publication places it squarely as a cls3 paper. Anderson's article was published in 2004, sitting nearly 10-years after Kennedy's declaration that cls1 was 'dead as a doornail'.[5] 'Law School Enters the Matrix' follows a thematic trend amongst a number of cls3 articles published around the turn of the millennium, due in part to the publication of papers from the '2001 CLS Symposium' in the *Cardozo Law Review*.[6] And

[3] *The Matrix* (Directed by the Wachowski Brothers, Warner Brothers, 1999).
[4] *Invasion of the Body Snatchers* (Directed by Don Siegel, Walter Wanger Productions, 1956).
[5] Hope Yen, 'Crits at HLS a Dying Breed?', *Harvard Law Record* (Cambridge), December 1 1995, 4.
[6] See, eg, the 2001 CLS Symposium in the (2000-2001) 22 *Cardozo Law Review*.

a number of other papers outside this collection that also question what happened to cls1.[7] After 'Law School Enters the Matrix', the closest contender for a cls3 comparative text, was E Dana Neacsu's 1999-2000 paper 'CLS Stands for Critical Legal Studies, if Anyone Remembers'.[8] Neacsu's paper demonstrates a similar theme to 'Law School Enters the Matrix', with an emphatic call to remember and return to cls1. Anderson approached this through a practical pedagogical approach, whereas Neacsu focused on what could be salvaged from Kennedy's *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System*.[9] Despite the different approaches in their calls for a return or remembrance of cls1, both papers exemplify this theme of yearning for cls1. There is a pragmatic hope in these articles, that cls1, dead or otherwise, is able to be resuscitated;[10] a stance exemplified by a third cls3 paper, Jeremy Paul's introductory article to the '2001 CLS Symposium'.[11] Paul's article concludes by arguing 'for the cls[1] project to prosper, we must look to push each other hard, to talk to rather than at each other, to ask hard questions, and to think hard about why we aren't yet getting through'.[12]

Arguably, any of these papers could represent this theme in cls3, however, it is only Anderson's article which outlines a practical way for the reintroduction of cls1 to transpire. Despite Neacsu presenting a similar resuscitation of cls1 through a popular-culture lens, it uses a more tenuous analogy. The author presents a way to return to cls1 through the animated series *South Park*,[13] and specifically the ever-dying character Kenny McCormick. It is through Kenny's ability to die and be resurrected that Neacsu pairs him with cls1, hoping a similar fate with occur if people are reminded of cls1's benefits.[14] The author finishes framing cls1 as

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[7] See Jack M Balkin, 'Critical Legal Theory Today' in Francis J Mootz III (ed), *On Philosophy in American Law* (Cambridge University Press, 2009) 64.
[8] E Dana Neacsu, 'CLS Stands For Critical Legal Studies, If Anyone Remembers' (1999-2000) 8(2) *Journal of Law and Policy* 415.
[9] Ibid 416-417.
[10] Ibid 433.
[11] Jeremy Paul, 'CLS 2001' (2001) 22 *Cardozo Law Review* 701.
[12] Ibid 720.
[13] *South Park* (Directed by Trey Parker, Comedy Central, 1997).
[14] Neacsu, above n 8, 416.

following the path of Kenny, by referring to the TV show's feature length film:[15] 'just as Kenny found his post-mortem voice and purpose in *South Park: Bigger, Longer, & Uncut*, CLS[1] also might rediscover its own'.[16] The timing and popular culture basis for the article, as well as the acknowledgement that cls1 did in fact die, made it a strong contender to be chosen as the representative of the cls3 works. However, the *South Park* analogy, whilst novel, lacked the applicability of Anderson's 'Law School Enters the Matrix'.

> Like Kenny, who is an outsider and who speaks a language unintelligible to all except, astonishingly, his classmates, CLS[1] no longer seems to possess a voice comprehensible to anyone outside its own small circle. Kenny, unlike all other cartoon figures, dies in every episode. Significantly, often Kenny's death has been self-inflicted - though not necessarily intentional - when, for instance, he ignores warnings of imminent danger. Like Kenny, CLS[1] has suffered many often self-inflicted injuries. Like South Park, generally, CLS[1] is certainly colorful, but often little more than that and, as in the cartoon, except for the certainty of Kenny's death and later resurrection, there seems more flash than substance in its existence. We are left to guess whether CLS[1] will prove to be as resilient after apparent death, as Kenny.[17]

Comparatively, Anderson's use of *The Matrix* synergises better with cls1 as a whole, as the author states:

> Consider, for example, that the main thrust of CLS[1] is that the entire legal system is merely an apparatus designed to appease the masses, fooling them into thinking that their needs may be addressed, while in fact its purpose is merely to keep them docile while perpetuating the hierarchy that provides the upper class with its advantages. Instead of pods filled with bodies attached to the power plant, just substitute workers stuck in cubicles in a high-rise office building, all working to feed the vast machine that lines the pockets of the CEO. If I were to try to create a metaphorical vision of CLS[1], it would look a lot like The Matrix.[18]

[15] *South Park: Bigger, Longer & Uncut* (Directed by Trey Parker, Scott Rudin Productions, 1999).
[16] Neacsu, above n 8, 416.
[17] Ibid.
[18] Anderson, above n 2, 211-221.

Reading Anderson's analogy in conjunction with an excerpt from Gabel and Kennedy's 'Roll Over Beethoven' provides a continuity in themes, that is not present in the Neacsu's 'CLS Stands for Critical Legal Studies, if Anyone Remembers':

> So there's this conflict, which is, on the one hand, you want to get the best one you can; you want to be lucid; you want to be explicit; you want to get clear. But unfortunately the body snatchers are always nearby, and you wake up and they're all pods. The whole conceptual structure has been turned into a cluster of pods.[19]

Amongst a cohort of similar thematic articles, Anderson's 'Law School Enters the Matrix' takes the cls3 yearning for cls1 and makes a practical claim for how it can be presented to students in an accessible and beneficial way. Through his use of *The Matrix*, Anderson taps into the popular-culture roots of cls1[20] and offers a way to reinvigorate interest in cls1 through film and the allegorical connections to the vast illusion of law.[21] In doing this, Anderson connects with the themes that underpin Gabel and Kennedy's 'Roll over Beethoven'. Anderson even makes reference to their article in 'Law School Enters the Matrix', however he doesn't draw on the popular culture connection himself, a failing which will be addressed in the reading of his article. However, articulated by Anderson or not, the connection is there and links the two papers as candidates to be compared and contrasted, in turn demonstrating the passively-haunted state of cls3.

B. *Choosing Roll Over Beethoven*

Having addressed why 'Law School Enters the Matrix' has been chosen as the cls3 text, this section outlines why 'Roll Over Beethoven' has been chosen as the cls1 text. Comparatively,

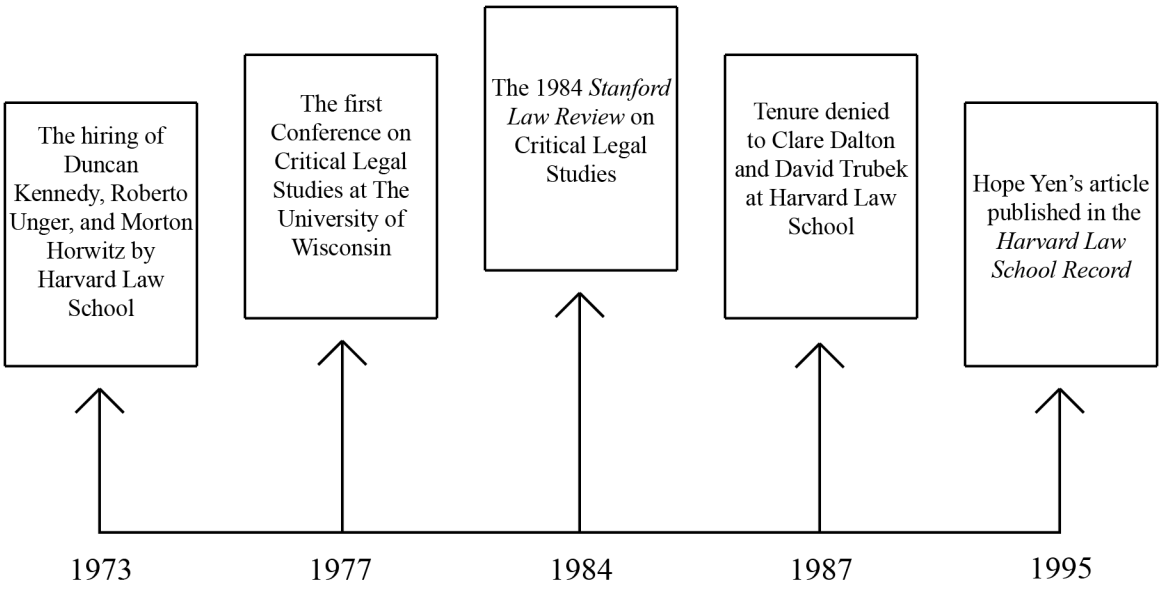
[19] Gabel and Kennedy, 'Roll Over Beethoven', above n 1, 7.
[20] See Introduction, Part III Counterculture, Minor Jurisprudence, and Legal-Subculture.
[21] Anderson, above n 2, 214.

there are a greater number of cls1 articles than cls3, which stands to reason given the posthumous nature of cls3. Having a greater pool of articles to choose from comes with a similar but different set of criteria to the selection of 'Law School Enters the Matrix'. For cls1, the criteria also relates to the article's themes and time, but also to the authors, the article's prominence, and how much the article exemplifies cls1. It is with these criteria in mind that 'Roll Over Beethoven' has been chosen. Not only is the article a cls1 piece in terms of time and content, but through its unusual structure within a prestigious journal, it also acts as a demonstration of cls1.

'Roll over Beethoven' was published in 1984, in volume one of the *Stanford Law Review*. The two-volume edition was the "cls1 edition", hosting a collection of articles presented as part of the Critical Legal Studies Symposium; alleged to be the 'largest-selling single law review issue in history'.[22] And as Hendrik Hartog remembers in 2012, 'its appearance was, for many in legal education at the time, an event'.[23] The year 1984 is important to cls1 more broadly,[24] unbeknownst to those at the time, it sits almost at the midway point of cls1's existence, starting with the hiring of Roberto Unger, Morton Horwitz, and Duncan Kennedy by Harvard Law School in 1973 and the first Conference on Critical Legal Studies in 1977. Following this timeline, the 1984 *Stanford Law Review* sits several years before the cls1 decline proposed in Chapter One; prior to the tenure denials in 1987, and the finality of Hope Yen's article in 1995.[25] An argument can be made that 1984 provides examples of cls1 at its prime:

[22] David Luban, 'Legal Modernism' (1986) 84(8) *Michigan Law Review* 1656.
[23] Hendrik Hartog, 'Introduction To Symposium On "Critical Legal Histories": Robert W. Gordon. 1984. Critical Legal Histories. Stanford Law Review 36:57–125' (2012) 37(1) *Law & Social Inquiry* 147, 147.
[24] See Steven M Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton University Press, 2008) 193-194.
[25] Yen, 'Crits at HLS a Dying Breed?', above n 5; Hope Yen, 'As HLS Mulls Its Mission, CLS Scholars Remain Quiet', *Harvard Law Record* (Cambridge), December 1 1995, 2.

Figure 1. The cls1 Timeline



The *Stanford Law Review* was not the only major publication in 1984, with Duncan Kennedy and Karl Klare's 'A Bibliography of Critical Legal Studies' also being published.[26] While this article contained a more comprehensive list of cls1 works, it acted as a point of reference not a repository of accessible articles. 'A Bibliography of Critical Legal Studies' provides an alphabetical list of a selection of cls1 authors and their respective works, re-listing pieces if there are multiple authors. The article was written to provide 'many people, including lawyers, teachers, students, and reseachers [sic] in a variety of fields'[27] a substantive but self-proclaimed incomplete list of cls1 works.[28] When addressing cls1, this bibliography is a good place to start, as Kennedy and Klare state '[t]he idea was to provide in a readily accessible form a document that tells people where they can go to read CLS[1]-type works, not to establish a research clearinghouse'.[29] The 1984 *Stanford Law Review* houses a collection of cls1 from its prime,

[26] Duncan Kennedy and Karl E Klare, 'Bibliography Of Critical Legal Studies' (1984) 94(461) *The Yale Law Journal* 461.
[27] Ibid 461.
[28] Ibid 462.
[29] Ibid.

rather than being a publication of reference during this same period. The journal itself also adds to the selection of 'Roll over Beethoven', with an implied prominence, as the *Stanford Law Review* is constantly the third most cited US law journal, behind the *Harvard* and *Yale Law Reviews*.[30] Whilst these types of measures do not ensure a calibre of the articles published, it is a useable metric to assume readership and visibility.

In its original format as a two-volume hardcopy journal, the first article in the 1984 *Stanford Law Review* is 'Roll Over Beethoven'.[31] 'Roll Over Beethoven' as a demonstration of cls1 through its format and content, was evidenced through its juxtaposition to the journal itself. In a pre-digital age, 'Roll Over Beethoven' was the first article, but not the first page of the journal. Instead, within the first volume of the physical copy of the 1984 *Stanford Law Review* there are a number of introductory and preliminary pages. These pages lead-up to the article itself and play into the juxtaposition that it presented. Following the title page, and in place of the more traditional colophon, is a visual hierarchy of the Stanford University School of Law and Law Review Editorial Board.[32] The *verso* categorically lists, in order of importance, the administrative officers, emeritus faculty, current faculty, and lastly the lecturers in law. Each name is followed by the individual's abbreviated qualifications, and any named positions they hold. The *recto* moves away from the list style and uses a structure more akin to a family tree for the editorial Board of the Law Review, descending from the President down to the other roles. These two introductory pages are followed by 22 pages of detailed indexed notes and references to the forthcoming articles and reviews in the edition. As these pages conclude a reader is greeted by page one of the journal proper:

[30] See Fred R Shapiro and Michelle Pearse, 'The Most-Cited Law Review Articles of All Time' (2012) 110(8) *Michigan Law Review* 1483, 1502. This article shows the *Stanford Law Review* as a constant 3rd most-cited journal, behind the *Yale Law Journal* and the *Harvard Law Review*.
[31] Gabel and Kennedy, 'Roll Over Beethoven', above n 1, 1.
[32] These would be pages ii–iii, they are not numbered in the journal.

Roll Over Beethoven

Peter Gabel & Duncan Kennedy

Roll over Beethoven
Tell Tchaikovsky the news
I got the rockin' pneumonia
Need a shot of rhythm and blues.
Chuck Berry

Duncan

You are betraying our program by conceptualizing it. To accept or even sympathize with a statement like, "the goal is to return to the unalienated situation . . ."

Peter

Not that. We've never been there. The project is to realize the unalienated relatedness that is immanent within our alienated situation. I don't like "goal" and we can't return to what hasn't yet been realized.

Duncan

This sounds like a logical quibble, but I don't think it is. I think it's an essential, metaphysical/spiritual paradox in our real position, which is that we will go right ahead and apply to that formulation the basic premise of the limits of knowledge, the limits of conceptual understanding.

Peter

Why shouldn't we state a positive vision of what we believe is possible? It often seems to me that you don't want to carry your own committed decision toward realizing a particular social reality; you don't want to carry it for fear that it would become falsified in some way . . . you don't want to claim it, so you always elide it, if that's the right expression; you step to the side of someone who is trying to put you in the net and take a position toward yourself and what you're doing that is. . . It's like the way that when you give speeches, you sometimes slip into making a joke of something dead

On page one, there is huge marked change not only between the preceding formality of the journal's introduction, but also of what is a "standard" or "normal" article. 'Roll Over Beethoven' then enforces its primacy, not only with its place, but the names of its authors. Interestingly, despite Kennedy's dominance in cls1, he takes second place to Peter Gabel. The article itself doesn't seem to favour one author's opinion over another and given its layout there seems to be an equal contribution from both parties. As can be seen in the excerpt above, the piece opens with a statement from "Duncan" and there is some record of Kennedy presenting this paper, with no direct mention of Gabel.[33] As this journal places the articles alphabetically according to the author's surname, it could be hypothesised that Kennedy taking the position of the second author was to ensure that 'Roll Over Beethoven' was the first article a reader of the 1984 *Stanford Law Review* would encounter.

If the author's names had not been in this order, the reader of the 1984 *Stanford Law Review* would have been greeted by Robert Gordon's 'Critical Legal Histories', an equally critical, but less radically presented text. Similar to the earlier decision made between 'Law School Enters the Matrix' and 'CLS Stands for Critical Legal Studies', Gordon's piece was a contender for the chosen cls1 text. The article's focus is a critique of evolutionary functionalism,[34] challenging this dominant historical form and providing 'a brief account of the impulses that have prompted the Critical scholars to their chosen ways of writing history (or rather histories, since the movement has actually spawned several different historiographical practices)'.[35] 'Critical Legal Histories' was revisited with a symposium in 2012 and is an important part of the cls1 history. However, it is clear and well-structured, as many of the other 1984 *Stanford Law Review* articles are.[36] So, while it makes a convincing

[33] Gary Minda, *Postmodern Legal Movements: Law And Jurisprudence At Century's End* (New York University Press, 1995) 46.
[34] Robert W Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57; Robert W Gordon, '"Critical Legal Histories Revisited": A Response' (2012) 37(1) *Law & Social Inquiry* 200.
[35] Gordon, 'Critical Legal Histories', above n 34, 57.
[36] See, eg, Allan C Hutchinson and Patrick J Monahan, 'Law, Politics, And The Critical Legal Scholars: The Unfolding Drama Of American Legal Thought' (1984) 36 *Stanford Law Review* 199.

argument explaining a cls1 position, it does not "perform" cls1 in the same way as 'Roll over Beethoven'.

'Roll over Beethoven', from the title's nod to Chuck Berry, to its unconventional structure, can be read as the myth of cls1 come to life. The authors are the 'white male heavies'[37] from privileged backgrounds[38] that led to some of the *ad hominem* critiques of cls1 as a whole.[39] The article, within a prestigious journal is immediately juxtaposed by the introductory text and seems to be demonstrating the fears of the liberal-class that cls1 had infiltrated the law school and presented a real threat to them.[40] The article is a cls1 version of cls1, a performative piece with content that addresses issues facing cls1, but approached in a cls1 way; 'Roll over Beethoven' is metonymical of cls1. 'Roll over Beethoven' is confrontational, jargonised, critical, flippant, and written from a position of privilege,[41] and it is for these reasons that it will be used to demonstrate cls1 in comparison to cls3.

1. *Roll Over Beethoven's Position in cls1*

Before providing the two readings of Gabel and Kennedy's 'Roll Over Beethoven', a summary of the article and the article's place in cls1 history will be briefly discussed. This discussion will frame the analysis to be undertaken and will demonstrate the complexity in this cls1 work. To begin, this thesis will draw upon Ian Ward's summary of 'Roll Over Beethoven'.[42] Ward's

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[37] David M Trubek, 'Foundational Events, Foundational Myths, and the Creation of Critical Race Theory, or How To Get Along with a Little Help from Your Friends (2011) 43(5) *Connecticut Law Review* 1503, 1506.
[38] Aside from their connection education at Harvard, both Gabel and Kennedy were educated privately at two highly ranked private schools: Gabel at Deerfield Academy: Deerfield Academy, *Peter Gabel '64* Class Notes <https://deerfield.edu/alumni/class-notes/2015/06/peter-gabel-64/10223689/>; and Kennedy at Phillips Academy, Andover. See Tor Krever, Carl Lisberger and Max Utzschneider, 'Law on the Left: A Conversation with Duncan Kennedy' (2015) 10(1) *Unbound* 1, 3.
[39] See generally James D Gordon III, 'Law Review And The Modern Mind' (1991) 33(2) *Arizona Law Review* 265, 268-269.
[40] Chapter One, Part IV The Slow Death of cls1.
[41] See generally Richard D Kahlenberg, *Broken Contract: A Memoir of Harvard Law School* (University of Massachusetts Press, 1992) 83-85. See also reviews of Kahlenberg's book by Robert Gordon and Arthur Austin: Robert W Gordon, 'Bargaining With The Devil' (1992) 105(8) *Harvard Law Review* 2041; Arthur D Austin, 'Life at Harvard Law School: "Sometimes it's tough to get out of bed when you're wearing silk pajamas."' [1993] 78 *Iowa Law Review* 427.
[42] Ian Ward, *Introduction to Critical Legal Theory* (Routledge Cavendish, 2nd ed, 2004).

approach takes on the somewhat difficult task of reducing the article to a concise few lines. For Ward, ‘Roll Over Beethoven’

> provided a vivid illustration of the rival positions which emerged within CLS[1] and which remain largely unresolved, perhaps by definition unresolvable. Gabel and Kennedy assumed these very different, indeed polar, positions within CLS scholarship: whilst Gabel advocated some form of reconstructive enterprise, Kennedy maintained a more radical and uncompromising position determined to concentrate on 'trashing' liberal legalism.[43]

Ward builds on Kennedy’s approach in the first eight pages of ‘Roll Over Beethoven’, summarising Kennedy’s tone for the article as a whole:

> [w]hilst approving the appeal to political action, Duncan Kennedy dismissed all this talk about 'experienced reality' and 'intersubjective zap' as 'abstract bullshit'. Philosophy does not provide the answer to the real political problems experienced by modern men and women. Rather, it turns people into 'pods', incapable of thinking for themselves, and merely the voicepieces of someone else's ideology. Instead of philosophy, Kennedy suggested that critical lawyers must operate through more familiar media, such as 'soap opera, pop culture, all that kind of stuff'. Such an approach, Kennedy alleged, was intellectually and appropriately ironic. Critical lawyers must proceed by being ironic, and will operate more effectively by 'communicating' with 'jokes' than they ever will with 'abstract formulation'.[44]

Whether this method worked for Kennedy is not clear, given his proceeding works did not shy away from philosophy.[45] However, Ward’s summary demonstrates ‘Roll Over Beethoven’ as the coming together of two voices in cls1, the articulation of their differences, and some changes to how cls1 was practiced. Similarly, Gary Minda identifies ‘Roll Over Beethoven’ as a significant point of change for cls1, as Kennedy ‘recanted his own theory of “fundamental

[43]Ibid 146.
[44] Ibid 147; See also, Peter Goodrich, ‘Satirical Legal Studies: From The Legists To The *Lizard*’ (2004) 103(3) *Michigan Law Review* 397.
[45] See, eg, Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (Harvard University Press, 1998); See also Peter Goodrich, ‘Duncan Kennedy As I Imagine Him: The Man, The Work, His Scholarship, And The Polity’ (2001) 22 *Cardozo Law Review* 971.

contradiction"',[46] something which Neil Duxbury also addresses as a significant part of cls1's history.[47]

However, more broadly than any transformations to cls1 itself, was the visceral impact of 'Roll Over Beethoven', seen through readers' reactions to the piece, which Gary Minda collates:

> The political significance of *Roll Over Beethoven* can be judged by the effect it had on its audience. It has been reported that one "well-known professor was so upset when Kennedy presented *Roll Over Beethoven* at the Columbia Legal Theory Workshop, that he totaled his car on the way home." Another law professor, David Luban of the University of Maryland School of Law, admitted that his "initial reaction" to the piece was that it was a "pile of crap." These reactions illustrate how the second generation of CLS scholarship is now perceived as even more radical and dangerous than the first.[48]

In collating the responses to 'Roll Over Beethoven', Minda refers to Luban's 1986 article 'Legal Modernism', which positions cls1 as the legal equivalent of modernist art, '[t]he thesis that I want to explore here is roughly this: CLS[1] is to legal theory as modernist art was to traditional art. CLS[1] is legal modernism'.[49] Luban's in-depth analysis of 'Roll Over Beethoven' continues, with the author stating that 'the one CLS[1] piece I know of that is through-and-through modernist, Peter Gabel and Duncan Kennedy's "article" Roll Over Beethoven'.[50] Luban's overview is less methodical than Ward's, however it still conveys a relatable position: 'It is exhausting to read - fifty-four pages of transcript that often sounds like a pair of old acid-heads chewing over a passage in Sartre'.[51] It is Luban who articulates the complexity of 'Roll Over Beethoven' through allusion to modern art, a lens which he uses to assess and reassess the piece:

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[46] Minda, above n 33, 122.
[47] Neil Duxbury, *Patterns of American Jurisprudence* (Clarendon Press, 1995) 462-463.
[48] Minda, above n 33, 122.
[49] Luban, above n 21, 1656.
[50] Ibid 1672.
[51] Ibid 1671.

> My own initial reaction to *Roll Over Beethoven* was that it was a pile of crap. How dare they waste my time with a self-indulgent rap session! I was able to read only the first half of the article - it *is* tiring - then dipped into a few more pages to assure myself that it was all of a piece, then made fun of it to everyone within earshot. It's boring. It's rude. If Duncan Kennedy weren't notorious (and from Harvard), no journal would touch it without using tongs. Gabel ought to burn his library of phenomenology and take a cold shower. Anyone can turn on a tape-recorder and reel off a lot of pretentious pickle-smoke. You recognize a classic reaction to modernism. Anyone can do a drip-painting. Anyone can make random percussion sounds. It isn't real art, or music, or legal theory, or philosophy, or, or, or ....[52]

In his final line, Luban starts to recognise what he comes to term as a 'courageous article' moving through stages of how and why 'Roll Over Beethoven' has so many different layers.[53] It is these layers that this thesis will address with two readings. The first is the dominant reading of a transcribed conversation and the effects of this both stylistically and in terms of content. The second reading will address 'Roll Over Beethoven' as a script and how this article can be read as political theatre. Once these readings have been given, there will be a final assessment on understanding the publication of the article as an act of political theatre. These readings will demonstrate the depth and breadth of cls1 and position it to be contrasted with cls3's constricted and regressive approach in Anderson's 'Law School Enters the Matrix'.

II. READING ROLL OVER BEETHOVEN: VERBATIM

A. *Visual*

The text of 'Roll over Beethoven' is dense with each of the 55 pages that make up the article offering insight into cls1. This insight includes the relationship between Gabel and Kennedy, the ideas each author represents, and this epoch in cls1's history. To focus the two readings,

[52] Ibid 1672; Arthur Austin makes a similar claim in: Arthur Austin, 'The Top Ten Politically Correct Law Review Articles' [1999] 27 *Florida State University Law Review*, 233, 253: 'After reflection, **I** concluded that *Roll Over* anticipated Live Painting, in which artists covered themselves with car paint and hang for hours on hooks, talking or staring at onlookers'.
[53] Luban, above n 21, 1672.

this chapter undertakes a close reading of the first page of 'Roll Over Beethoven'. Given the non-traditional structure of the article, its first page is a useful example of the article as a whole, rather than being a more traditional introduction. This thesis proposes that the dominant reading of 'Roll Over Beethoven' is as a transcript of a real conversation,[54] as such the verbatim reading will be presented first. The purpose of the verbatim reading is to unpack the effect of 'Roll Over Beethoven' through both its visual and textual content. This reading will approach the article as if it was a transcribed conversation between the authors, Peter Gabel and Duncan Kennedy.

The first area addressed in the verbatim reading of 'Roll over Beethoven' is the article's visual style, before addressing the text itself. As was mentioned above, the visual structure of the article stands in stark contrast to traditional academic articles, including others within the 1984 *Stanford Law Review*. This thesis will argue that the depth and effect of 'Roll Over Beethoven' is achieved with the combination of its visual presentation and the text within this structure. Visually the article begins with a centred title, not italicised or with punctuation; Roll Over Beethoven is not a citation, but a new use for a phrase, previously popularised by a song, but no longer exclusive to that. Semiotically the title is likely to denote the Chuck Berry song of the same name, perhaps even as far as creating a musical memory for those who know the song. For those not familiar with the song, the connotative understanding is about the need for a long-dead composer to move out of the way, still offering a similar effect to the dominant understanding. To strengthen the connection to the song, the authors include four lines of lyrics after their names, and before the body of text:

> Roll over Beethoven
>
> Tell Tchaikovsky the news
>
> I got the rockin' pneumonia
>
> Need a shot of rhythm and blues[55]

[54] Ibid.
[55] Gabel and Kennedy, 'Roll Over Beethoven', above n 1, 1.

The lyrics are laid out as they would be in the liner notes on a record, with each sentence representing a bar of the song. The first two lines finish a verse, before the next two lines start a new one. In this verbatim reading, it is hypothesised that the placement of this excerpt and the title of the article were chosen after the conversation was transcribed. This proposal is based on the fact that there is no other reference to the song in the body of text, despite other popular culture references throughout. Due to this lack of reference, it seems unlikely that Gabel or Kennedy decided to discuss their views on cls1 with this specific song in mind or with any direct relation to it. As an example of post-script however, the title and the lyrics guide the reader in pre-empting what the article is about: the need for new ideas as a cure to classical ailments and a changing of the guard.

The use of the song sets a tone for the article, but perhaps more so for cls1 as a movement. In a literal sense *Roll Over Beethoven* is about the rebellious and new wave of rock 'n' roll, taking over from established and revered classical composers Ludwig van Beethoven and Pyotr Ilyich Tchaikovsky. The allusion between rock versus classical music and cls1 versus a liberal or formalist approach to law can be drawn from this. In both the song and the early works of cls1, the critique moved beyond any immediate predecessor, instead tackling what the authors believed were more foundational elements. For example, in the song, Berry isn't deriding jazz or blues, instead he's challenging a dominant understanding of what "proper" music should be. Similarly, this type of critique can be seen with Kennedy's approach in 'The Structure of Commentaries',[56] which challenges Blackstone's foundational 18th century tome.

After this lyrical sub-heading, the transcribed conversation begins.[57] The first page of the article contains four blocks of text, each assigned to a speaker, either Duncan or Peter. The language is punctuated in a conversational style with short sentences that bring about a sense that the conversation was already underway when somebody decided to press the record-

[56] Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 *Buffalo Law Review* 209.
[57] Gabel and Kennedy, 'Roll Over Beethoven', above n 1, 1.

button. This notion is demonstrated in Duncan's opening line '[y]ou are betraying our programme by conceptualizing it'.[58] Despite being a fully-formed sentence it bears little resemblance to a standard introductory line. Given the lyrical flow of the preceding sub-heading, Duncan's sentence is a jarring introduction to the piece. However, despite this juxtaposition, the opening line introduces the reader to a dominant theme within the article: the play between doing cls1 and conceptualising it. The difference between this is seen throughout as Duncan and Peter toy with how and if cls1 could or should be conceptualised.

The image of the article, and specifically the opening page, set expectations for what is being presented. The authors do not declare a reason for their stylistic choice, but there are certain possible or plausible reasons that can be implied from it. Luban who, in his framing of cls1 as modern art, offers a very in-depth analysis of 'Roll Over Beethoven'. When addressing his rereading of the article and specifically addressing its style, he simply asks the reader '[b]ut why do it that way?'[59] Although Luban then gives six points on his understanding of 'Roll Over Beethoven', he quite deliberately doesn't answer this question. Instead he finalises his section on the article by stating that '[i]t keeps working on you after you have set it aside'.[60] This openness is one of the challenges of 'Roll Over Beethoven' as a text and one to which any number of meanings could be associated. For example, one could take a Derridean approach and argue that in presenting speech-as-text, the authors are engaging with Jacques Derrida's logocentric bias, which contextually privileges certain ideas over another.[61] In this case, a law journal is a written rather than spoken text and the speech-to-text nature of 'Roll Over Beethoven' challenges this established hierarchy.[62] If the authors did take this approach, it would also play into Derrida's preference for speech over text in *Of Grammatology*.[63]

[58] Ibid.
[59] Luban, above n 21, 1672.
[60] Ibid 1675.
[61] Minda, above n 33, 118.
[62] Ibid.
[63] Ibid 117. See Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans, Johns Hopkins University Press, 1976) [trans of: *De la Grammatologie* (first published 1967)] 97-316.

However, any such connection is one made by the reader, rather than explicitly by the authors, and whilst a Derridean reading of this style could be applicable, it is unlikely to be the first thing that springs to every readers' mind. As such, this verbatim reading will take a more general approach and will relate 'Roll Over Beethoven' to other contemporary speech-to-text and transcribed texts.

The verbatim reading, as a reading of the dominant approach to 'Roll Over Beethoven', will focus on how the use of transcription aligns the article with other critical works of the time, which also included transcriptions of interviews and lectures.[64] Whether this alignment was deliberate or not, is not something that can be taken from the text itself, however, it can be argued through the authors' connections to other works and approaches. In presenting 'Roll Over Beethoven' as a transcription, there is an implicit categorisation with other philosophical and theoretical works that use transcriptions of their lectures and interviews, specifically in the works of cls1-influencers Claude Levi-Strauss and Michel Foucault. Through Kennedy's work specifically there is a connection to both authors, which aids the argument that 'Roll Over Beethoven' was deliberately mirroring this format. In 1994, reminiscing about his early influences, Kennedy states that he 'liked to go to coffee houses and listen to Joan Baez and Bob Dylan type stuff. Then I got interested in structuralism, particularly in people like Levi-Strauss and Piaget'.[65] Levi-Strauss specifically appears throughout Kennedy's work, notably in 'The Structure of Blackstone's Commentaries'[66] and *A Critique of Adjudication (fin de siècle)*.[67] Levi-Strauss's work also took on a similar transcribed format, for example, his 1978 book *Myth and Meaning* is a compilation of lectures given by the author as part of the CBC radio series *Ideas*.[68]

[64] See, eg, Jacques Lacan, *Écrits: The First Complete Edition in English* (Bruce Fink trans, W W Norton, 2006).
[65] Gerard J Clark, 'A Conversation With Duncan Kennedy' *The Suffolk University Law School Journal* (1994) 24(2) 56.
[66] Minda, above n 33, 115; Kennedy, 'The Structure of Blackstone's Commentaries', above n 56.
[67] Kennedy, *A Critique of Adjudication*, above n 45, 133 nn 2.
[68] Claude Lévi-Strauss, *Myth and Meaning* (Routledge, 1989) v.

Moving from transcribed lectures to transcribed interviews, this same speech-to-text style is found within the 1980 compilation of Michel Foucault's works, *Power/Knowledge*.[69] Most notably there is a similarity between 'Roll Over Beethoven' and an interview with Foucault titled 'Confessions of the Flesh',[70] led by Alain Grosrichard. Although it comes several years later, Kennedy does utilise this same collection for his 1991 article 'The Stakes of Law, or Hale Foucault!'[71] In both 'Roll Over Beethoven' and 'Confessions of the Flesh', the texts appear to offer an insight into other works of the authors, providing fly-on-the-wall access, or acting as addendums to the texts in question. For Foucault this is his use of the term *dispositif* and his first volume of *The History of Sexuality*.[72] For Gabel and Kennedy, it is cls1 as a whole, or at least cls1 at its current point in time. However, despite the similarities between the structures of 'Confessions of the Flesh' and 'Roll Over Beethoven', the texts differ greatly with who leads the discussion and the resulting content. In 'Confessions of the Flesh' Foucault is being asked by Grosrichard et al about certain aspects of his work and elaborating on, or defending them. In contrast, 'Roll Over Beethoven' is a conversation between two colleagues; a discussion rather than an interview. By adopting the transcribed format for what Luban calls a 'rap session'[73], 'Roll Over Beethoven' stylistically aligns itself with a format that is more open, or at least less driven by two promulgators of a theory. Whilst the format of 'Roll Over Beethoven' appears more open and less structured than a "traditional" article, the content itself is insular, with its direction manipulated by Gabel and Kennedy.

With this interpretation, there is an uneasiness to the text, as it sits someway between the recording of a public discussion and a curated article. The reader is left not knowing if they are reading a natural discussion on cls1, or what Gabel and Kennedy want to be read on cls1.

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[69] Michel Foucault, *Power/Knowledge* (Colin Gordon trans (ed), Leo Marshall, John Mepham, Kate Soper, The Harvester Press, 1980).
[70] Ibid 194.
[71] Duncan Kennedy, 'The Stakes Of Law, Or Hale And Foucault!' (1991) 15(4) *Legal Studies Forum* 327; See also Ben Golder, 'The Distribution of Death: Notes Towards a Bio-Political Theory of Criminal Law' in Matthew Stone, Illan rua Wall and Costas Douzinas (eds), *New Critical Thinking: Law and the Political* (Routledge, 2012) 91.
[72] Michel Foucault, *The History of Sexuality: Volume One and Introduction* (Robert Hurley trans, Pantheon Books, 1978).
[73] Luban, above n 21, 1672.

Whilst this combination of visual structure and rhetoric manipulates the reader, it also demonstrates a great deal of depth to the points being made. On a practical level, this format still allows the addendum or companion text insights, for example, Peter addressing the issue of rights:

> Exactly what people don't need is their *rights*. What they need are the actual forms of social life that have to be created through the building of movements that can overcome illusions about the nature of what is political, like the illusion that there is an entity called the state, that people possess rights.[74]

This statement gets to the heart of a controversial approach taken by cls1 towards rights,[75] but isn't bound by the conventions of a traditional article. Instead Peter can clearly articulate a position without the necessary formality required in a traditional journal article, i.e. citations, or signposting leading to this statement. The downside to this approach is that such a clear statement critiquing rights is left buried two-thirds of the way through the article. This issue leads to the next part of the verbatim analysis, the conflict between the simplistic layout and the complexity of the text.

B. *Textual*

The complexity of the text can be seen by returning to Duncan's utterance in the opening line '[y]ou are betraying our program by conceptualizing it'.[76] The statement's audience is ambiguous; if this were a private conversation, then the statement is to Duncan's counterpart, Peter. However, if this were a traditionally written paper, the opening line would more likely be a response to whomever asked for cls1 to be conceptualised. Alternatively, Duncan's

[74] Gabel and Kennedy, 'Roll Over Beethoven', above n 1, 33 (emphasis in original).
[75] Chapter Five, Part II Critiquing the Crits.
[76] Gabel and Kennedy, 'Roll Over Beethoven', above n 1, 1.

audience could be anyone with an interest in cls1 who has asked "what is cls1?" However, the following lines offer little in the way of clarification. Still addressing the anonymous "you" from the opening line, Kennedy rejects the associated idea that the cls1 'goal is to return to the unalienated situation'.[77] In response, Peter states simply that it's '[n]ot that', before he reasons with Duncan that the Crits need to realise that there is an 'unalienated relatedness that is immanent within our alienated situation'.[78] This reply, however, does little to clarify whether or not it was Peter who asked for a conceptualisation of cls1, or if he is merely clarifying issues of semantics and syntax in Duncan's original statement.

Similarly to the different readings of the article's image, the text itself is open to different levels of interpretation. Duncan's opening line does, however, invite the reader to understand the nature of the conversation, and the focus on the idea of "conceptualising" cls1 within the article as a whole. [79] The one constant across a variety of possible readings, is that the reader is always an observer of the conversation taking place.[80] Even if they are the "you" referred to within Kennedy's opening line, they are acknowledged but not engaged with directly; privy to this intimate cls1 discussion only as a voyeur. This voyeuristic position is strengthened with the familiarity in tone between Duncan and Peter, which arguably further distances the reader, adding to the mix of formality and informality throughout. This thesis proposes that in doing this, 'Roll Over Beethoven' is demonstrating the complexity and associated issues that come with 'a relatively large, loosely organized theory group'.[81] From the use of the author's full names at the top of the page, to their first-names only designating who has said what, of an old pop song and terms like 'intersubjective zap',[82] the article makes

[77] Ibid.
[78] Ibid.
[79] See, eg, ibid 7.
[80] *Contra* Luban, above n 21,1670, who states that 'by forcing the reader out of the voyeuristic mode in which we customarily appropriate scholarship'.
[81] Jeff Manza, 'Critical Legal Studies' (1990) 35 *Berkeley Journal of Sociology* 137, 137.
[82] Gabel and Kennedy, 'Roll Over Beethoven', above n 1, 4.

a deliberate demonstration, not only of the difficulty of cls1 being conceptualised, but of cls1 as a whole.

Reading 'Roll Over Beethoven' as a demonstration of cls1, via the publication of an intimate conversation, a greater sense of purpose can be attributed to the article as a whole. 'Roll Over Beethoven' demonstrates the difficulties with addressing subtleties and nuances that can lead to an article of this depth and length. In doing this Gabel and Kennedy also demonstrate the difficulties they face tackling other questions including the biggest question that cls1 faced.[83] Richard Michael Fischl restates the question most succinctly in the way it was put to him: '[t]he problem with critical legal studies [cls1] is that it didn't offer any alternative program. Now I'm no great defender of the rule of law, but what would you put in its place?'[84] The question, in Fishcl's 1992 article, is considered not to have been answered. Leaving aside the ramifications that would come from providing a specific plan or map to non-doctrinal mode of thought,[85] 'Roll Over Beethoven' demonstrates a reason as to not only why this didn't occur, but a glimpse at the mess in trying to formulate an answer. When Gabel and Kennedy address the conceptualisation of cls1, a related but significantly smaller question, they demonstrate the jargonised, drawn-out, and generally futile nature of trying to answer the much bigger question: what they would put in place of the rule of law?

As the article continues with some natural stream-of-conscious banter, it is always returning to the "idea" of cls1; now that it exists how does it continue without being further co-opted? The conversation remains reflective, addressing cls1 retreats, important terminology, and the fears (primarily from Duncan) associated with creating something without being able to control it. As each term and topic is addressed, the language surrounding the discussion

[83] *Contra* Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (New York University Press, 2004) 204: 'I've been asked a million times why CLS "failed," but it seems a more interesting question how such an overtly leftist, anti-mainstream academic movement, with no outside funding of any kind, could take off, expand so quickly, and last for about fifteen years as a highly visible factor in legal academia (of all places)'.
[84] Richard Michael Fischl, 'The Question That Killed Critical Legal Studies' (1992) 17(4) *Law & Social Inquiry* 779, 780.
[85] See Introduction.

from both Peter and Duncan is progressive, examining how cls1 might or should continue. The verbatim reading of the text allows the reader to experience a candid account of an organic and lively field of critique and jurisprudence, bearing witness to the intricacies and difficulties experienced by those partially responsible for it. Although the article deals with a number of issues that would eventually lead to the end of cls1, the authors tackle these with optimism and progress, rather than harking back to earlier-cls1 for guidance.

III. READING ROLL OVER BEETHOVEN: SCRIPTED

Having addressed 'Roll Over Beethoven' as a "verbatim" reading, where it is assumed that the authors transcribed a recording of an actual conversation, this chapter will now present a reading of the article as a script. This reading will analyse 'Roll Over Beethoven' as a two-man play, with the characters Peter and Duncan. The plausibility of reading 'Roll Over Beethoven' as a script relates to the visual layout of the article, where the segregated paragraphs are positioned below the speakers' name.[86] If 'Roll Over Beethoven' was not published in a law journal, the lack of context would suggest it was a script as much as a transcription. Given the discussion on the visual power of this article already, the presentation as scripted in plain sight adds yet another layer to the article's depth. In terms of scripting conventions, there are several within the article. Notably the repetition of a symbol, which appears throughout: a trefoil, looking like a black club with a line a through it. Symbolically this breaks-up the conversation, perhaps where the tape was stopped or passages were edited from the verbatim reading, however it can be read here as signifying a change of scene.[87] Finally there are the clear and

[86] See Goodrich, 'Satirical Legal Studies', above n 44, 451 nn 266; see generally Jurgen Wolff and Kerry Cox, *Successful Scriptwriting* (Writer's Digest, 1991); Charlie Moritz, *Scriptwriting for the Screen* (Routledge 2nd ed, 2008); Linda Aronson, *Scriptwriting Updated: New and Conventional Ways of Writing for the Screen* (Allen and Unwin, 2000).
[87] Gabel and Kennedy, 'Roll Over Beethoven', above n 1, 14, 26, 36, 44.

separate voices of Peter and Duncan, who maintain their individual character and direction throughout, even when agreeing or discussing the same theme.

A. *The Title*

The use of 'Roll Over Beethoven' as the title of the script, aligns it with other plays that use metaphoric titles. From a theatrical perspective 'Roll Over Beethoven' can be matched with plays like Henrik Ibsen's *A Doll's House*,[88] or Tennessee Williams' *The Glass Menagerie*,[89] which are, respectively, not about doll's houses or glass cages for animals. Instead these titles are metaphors for the themes of the plays, in the same way that 'Roll Over Beethoven' conjures lyrical imagery about a cultural revolution, rather than the physical movement of classical composers; collectively these titles represent their script's content. Whilst this is implied in the verbatim reading, this thesis argues that the lineage of metaphoric titles is more closely aligned with fictional or allegorical tales than with traditional academic articles, allowing clarity and a stronger purpose in this scripted reading. The metaphoric title also sets-up the reader to wonder what is real, what is fiction, and what is metaphoric within the body of the text.

B. *The Music*

An excerpt of Chuck Berry's lyrics follows the title; which were presented in the verbatim reading to position and reinforce the reference to *Roll Over Beethoven*. Within the scripted reading, the usage is similar, however in the production of 'Roll Over Beethoven' these lyrics would not be read or spoken, instead they and the song would be heard by the audience. There are two dominant ways for songs and sound to be incorporated into a performance, as either diegetic or non-diegetic sound. Diegetic sound is the sound coming from within the script, i.e.

[88] Henrik Ibsen, *A Doll's House* (CreateSpace, 2013 ed).
[89] Tennessee Williams, *The Glass Menagerie* (Penguin, 2009 ed).

Peter or Duncan speaking. Non-diegetic sound originates for the audience only, for example the shark's *leitmotif* in *Jaws*,[90] or Celine Dion's *My Heart Will Go On* in *Titanic*.[91] The characters in both these films do not hear either piece of music, instead the audience is given an auditory clue that the shark is coming closer in *Jaws*, with Dion's song emphasising the visual romance displayed in *Titanic*.

The excerpt of music that begins 'Roll Over Beethoven' could therefore be either diegetic so that Peter and Duncan could hear it, or non-diegetic and for the audience only. The application of a non-diegetic use of the song would give a similar effect to the lyrics being stated in the verbatim reading, framing the content for the audience only. However, a diegetic use would expand the effect. If the song is heard by the characters, then there is a potential causality between the direction of the conversation on revolutionary ideas and popular culture, influenced (on some level) by hearing that song. As such, the scripted use of the song gives a comparatively deeper meaning than the verbatim reading.

C. *The Scene*

As a script, 'Roll Over Beethoven' lacks any stage direction. This does not remove it from the realms of being a script, more that this would be the imposition of a director or that the publication is itself the performance and would not require direction.[92] As such this thesis will provide minor elements of direction to set the scene for 'Roll Over Beethoven', to move it from the textual to the visual. A scene is normally set under the title and before the scene begins, as such in 'Roll Over Beethoven' it would appear under the title and before the excerpt of music.

[90] *Jaws* (Directed by Steven Spielberg, Universal Studios, 1975).
[91] *Titanic* (Directed by James Cameron, Twentieth Century Fox, 1997).
[92] See below Roll Over Beethoven: The Performance.

This direction is, as with any direction in a script, fairly idiosyncratic;[93] however there are some basic directions that should be included. For 'Roll Over Beethoven' these are the location, the set, and the characters. This thesis proposes that the jargonised and dense text of 'Roll Over Beethoven', lends itself to an informal setting. Within the verbatim reading 'Roll Over Beethoven' is an academic journal article, despite its different approach, its dominant reading is literally bound by this context. Within the scripted reading, and the addition of stage direction, 'Roll Over Beethoven' can take place as a conversation between two characters outside of this implied formal setting.

This thesis proposes that the direction should juxtapose preconceptions of Harvard Law School, the celebrity of Peter Gabel and Duncan Kennedy within cls1, and the content of the text, by placing them visually within a diner. The traditional Americana implied by the diner,[94] sits at odds with the Ivy League scholars and their critics' assumptions of their lifestyles.[95] The proposed visualisation of this image will borrow from the directorial eye of Jim Jarmusch, who has previously created a similar juxtaposing effect. In 2003, Jarmusch released a feature length film *Coffee and Cigarettes*,[96] a collection of vignettes that centred on scripted interactions between people over coffee and cigarettes. Specifically, this thesis draws an allusion to a vignette involving Tom Waits and Iggy Pop.[97] The Cannes *Palme d'Or* winning piece shows the interaction between two stars of alternative music meeting in a traditional diner.

[93] See, eg, Arthur Miller's emphasis on specific character direction in *Death of a Salesman*; conversely see the more reserved direction in August Strindberg's *The Father*. Arthur Miller, *Death of a Salesman: Certain Private Conversations in Two Acts and a Requiem* (Penguin, 2000); August Strindberg, *Three Plays* (Peter Watts trans, Penguin, 1975).
[94] See Daniel R Viveiros, *The Rise and Fall of the American Diner 1920–1960* (PhD Thesis, Salve Regina University, 2000) 16.
[95] Gordon, 'Law Review And The Modern Mind', above n 39, 269.
[96] *Coffee and Cigarettes* (Directed by Jim Jarmusch, Asmik Ace Entertainment, 2003).
[97] Although *Coffee and Cigarettes* came out in 2003 the scene with Tom Waits and Iggy Pop was released as a short film in 1993 as *Coffee and Cigarettes: Somewhere in California*. Also known as: *Coffee and Cigarettes III* (Directed by Jim Jarmusch, Cinesthesia Productions, 1993).

Figure 3. Iggy Pop and Tom Waits – Cigarettes and Coffee (2003)

The dated décor, from the chequered table to the wood panels and lighting, sit at odds with the perception of glamour and celebrity, as well as with the expected, or perceived, alternative lifestyles of the musicians. This image juxtaposes the perception and preconception of Waits and Pop, in a similar way to how this setting would juxtapose the perception and preconception of Peter and Duncan. The fly-on-the-wall approach is presented here on screen; however, it would be easily transposed to stage as a two man, one-set play.

In spite its insular and dense nature, the text of 'Roll Over Beethoven' is conversational. The stage direction proposed by this thesis plays-up to this style, in turn not requiring much direction for the characters themselves, i.e. they are talking at table. Instead, what this casual setting provides is a balance between the informal image and the insular nature of the text's wording. This interpretation provides a way to understand this presentation of cls1 as "fascinating", in the traditional sense of fascinate,[98] that is to bewitch or cast a spell over. This fascinated approach plays into the voyeuristic qualities seen in both readings, as well as

[98] *Oxford English Dictionary*, "fascinate", verb.

offering insights into the reactions of those who found the premise of cls1 fascinating, but felt let down by those behind it.[99] The scripted reading of 'Roll Over Beethoven' allows this fascination to be fed, offering the reader (viewer or audience) a layered glimpse at the inner workings of cls1, leaving them to wonder how much of this interaction is based on fact. The informal image of Peter and Duncan at a diner, gives scope for a potentially more in-depth analysis, as visually it allows the viewer to be privy to the private workings of cls1 while its complex text still holds them at arm's length.

IV. ROLL OVER BEETHOVEN: THE PERFORMANCE

The demonstration of two possible readings of 'Roll Over Beethoven' is to contrast the singular reading of 'Law School Enters the Matrix', demonstrating the passively-haunted nature of cls3. As Luban mused, 'Roll Over Beethoven confronts us with the question of whether it actually is the transcript of a taped conversation between its authors, rather than a composed dialogue between the literary personae "Peter" and "Duncan"'.[100] Building on this assessment and the two readings provided, this thesis argues that there is another way to understand 'Roll Over Beethoven'. Taking cues from the scripted reading this final analysis will view the publication of 'Roll Over Beethoven' as a 'Performance'.[101] It will be argued that on top of the impact the article had as a conversation or script, that the performance of 'Roll Over Beethoven' targeted those opposed to, or critical of, cls1, specifically through the use of cultural artefacts.

To appreciate the idea of 'Roll Over Beethoven' as a performance, this thesis draws on the avant-garde understanding of a performance being "performance art". Simon Shepherd and Mick Wallis use Sally Banes' account of 'Performance' and its associated analysis to clarify

[99] Patricia J Williams, 'Alchemical Notes: Reconstructing Ideals From Deconstructed Rights' [1987] 22 *Harvard Civil Rights – Civil Liberties Law Review* 401, 401-402; Goodrich, 'Duncan Kennedy As I Imagine Him', above n 45.
[100] Luban, above n 21, 1673.
[101] Simon Shepherd and Mick Wallis, *Drama/Theatre/Performance* (Routledge, 2004) 82.

how this term can be applied to non-traditional performances.[102] The authors unpack the idea of performance as not bound by a theatre or stage: '[t]he "mediumless genre" of Performance is too heterogeneous to be captured by "essential definitions"'.[103] This capitalisation and transformation to a proper noun "Performance" denoting the mediumlessness of this term, can be seen in contrast to the general, and common noun usage, "performance". Shepherd and Wallis investigate the idea of Performance as art and specifically its ties to the 1960s' desire to 'break down barriers'.[104] Drawing on the work of Antonin Artaud and Noël Carroll the authors argue that through this lens Performance is used to emphasise spectacle and was seen through this period in 'Happenings and Living Theatre'.[105] With relation to cls1, there are strong thematic crossovers with relations to theatre, post-modernism, and its countercultural roots.[106] As Kimberlé Crenshaw remembers in a 2011 reflection on cls1: 'CLS[1] conferences were a mix of heavy theory, whimsical aspiration, dramatic performances, and other remnants of 1960s counter-culturalism'.[107] Similarly to Luban's analysis of 'Roll Over Beethoven' as modern art, is the idea of 'Roll Over Beethoven' as a "spectacle". [108]

Positioning 'Roll Over Beethoven' as a Performance provides the article with a power to say things that the verbatim or scripted readings cannot, a sub-text that is not immediately visible or that gains greater impact through the Performance. As a Performance there is a theatrical history to this power, seen within *Hamlet* and the *Murder of Gonzago* (the famous play within a play),[109] or *The Crucible*,[110] and its critique of McCarthyism through its Salem-based allegory. However, given the radical political nature of 'Roll Over Beethoven', as well as the philosophical influences on cls1, a closer ally for analysis could be Bertolt Brecht's Epic

[102] Ibid.
[103] Ibid.
[104] Ibid 83.
[105] Ibid.
[106] See Introduction, Part III Counterculture, Minor Jurisprudence, and Legal-Subculture.
[107] Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43(5) *Connecticut Law Review* 1253, 1288.
[108] Luban, above n 21, 1671-1677.
[109] William Shakespeare, *Hamlet* (Bernard Lott (ed), Longman, first published 1968, 1997 ed) 105-128.
[110] Miller, above n 93.

Theatre.[111] With the influence of the Frankfurt School and Karl Marx on both Brecht and cls1,[112] it is plausible to analyse 'Roll Over Beethoven' using this Brechtian method.

A key aspect of Epic Theatre was to address or ventilate problems, [113] with '[i]ts expository character and its emphasis on virtuosity'.[114] These aspects of Epic Theatre can be seen in 'Roll Over Beethoven', with its expository character seen via the self-reflective cls1 critique of cls1, literally exposing its inner workings. The virtuosity of 'Roll Over Beethoven' is more subjective but can arguably be identified in the time and effort spent by Peter and Duncan on perceivably minor issues, evidencing their concern with the trajectory of cls1; how to critique without crystallisation. Whilst these identifications can be made, 'Roll Over Beethoven' does fall short on a tenet of Epic Theatre: alienation.

In his development of Epic Theatre, Brecht focused on the emotional alienation of the audience; that they knew they were watching a play:[115]

> The integration of experience into teaching means not only that knowledge is not solely derived from the outside – as if the students simply had to be made to see, their false consciousness stripped away as if removing a blindfold – but that it includes the experience of alienation: the relation between what is and what ought to be, between real and ideal, between ideology and the everyday. For Brecht, the goal was for a collective to examine its own conditions and to chart the parameters of its possibilities for change.[116]

'Roll Over Beethoven' does make numerous mentions of alienation and 'alienating their audience',[117] which demonstrates an alignment with the criteria Brecht used. However, in his

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[111] W B Worthen, *The Wadsworth Anthology of Drama* (Thomson Wadsworth, 4th ed, 2004) 919-922; see also Phyllis Hartnoll, *A Concise History of the Theatre* (Thames and Hudson, 1978) 252-256.
[112] The connection to Brecht is more clear, see eg, Philip Glahn, *Bertolt Brecht* (Reaktion Books, 2014) 93-121: 'Work, Class and the Struggle with Marxism, 1929–33'; see also Mark Tushnet, 'Critical Legal Studies: A Political History' (1991) 100(5) *Yale Law Journal* 1515, 1525; see generally Akbar Rasulov, 'CLS and Marxism: A History Of an Affair' (2014) 5(4) *Transnational Legal Theory* 622.
[113] Worthen, above n 110.
[114] Ibid.
[115] Ibid.
[116] Glahn, above n 112, 100.
[117] See, eg, Gabel and Kennedy, 'Roll Over Beethoven', above n 1, 1 for "alienate", page 3 for "alienation" both terms are then used throughout the article.

description of Brecht's alienation, Glahn continues that the examination undertaken by the collective was 'an active, participatory process: "The *Lehrstück* [Brecht's Epic Theatre] teaches by being played, not by being seen"'.[118] Given the dominant view of 'Roll Over Beethoven' as a transcript, which is read or seen, but not interacted with in the way Brecht intended, it is likely not to be considered as Epic Theatre. However, 'Roll Over Beethoven' is not far off this definition and whilst it is not strictly Epic Theatre, as Performance 'Roll Over Beethoven', can still be seen to have roots in this radical approach.

Following the historical development of radical theatre, the Performance of 'Roll Over Beethoven' aligns more closely with a follower and critic of Brecht's, the creator of Invisible Theatre, Augusto Boal.[119] Boal's developments on radical theatre related to a critique of Brecht's idea of alienation and the audience viewing the Performance.[120] In his Invisible Theatre, Boal situates theatrical performances within non-traditional spaces, [121] presenting issues to people who do not know they're watching something rehearsed. Through this method, Boal describes the newly awakened audience as 'spect-actors',[122] arguing this guerrilla approach is a true form of theatre from its earliest origins.[123] In Boal's Invisible Theatre there is a way to highlight issues through performance with an unknowing audience.

> The chosen subject must be an issue of burning importance, something known to be a matter of profound and genuine concern for the future spect-actors. From that starting point, a small play is constructed. The actors must play their parts as if they were playing in a traditional theatre, for a traditional audience.

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[118] Glahn, above n 112, 100-101.
[119] Augusto Boal, *Theatre of the Oppressed* (Charles A McBride trans, Theatre Communications Group, 1993) 83.
[120] See Worthen, above n 110, 922.
[121] See generally Yasco Horsman, *Theaters of Justice: Judging, Staging, and Working Through in Arendt, Brecht, and Delbo* (Stanford University Press, 2011) 91-92: in this chapter Horsman addresses the relationship between Brecht and Sergej Tretiakov and their desire to restructure the theatrical stage, changing the perception between audience and stage. Whilst Brecht did this, it was pushed further still by Augusto Boal and his Invisible Theatre. See also, Jacques Rancière, *The Emancipated Spectator* (Gregory Elliott trans, Verso, 2011) 2-3.
[122] Augusto Boal, *Games for Actors and Non-Actors* (Adrian Jackson trans, Routledge, 1999) xxx.
[123] Boal, *Games for Actors*, above n 122, xxvi. See also Rancière, above n 121, 4: 'What is required is a theatre without spectators, where those in attendance learn from as opposed to being seduced by images: where they become active participants as opposed to passive voyeurs'.

> How-ever, when the play is ready, it will be performed in a place which is not a theatre and for an audience which is not an audience.[124]

The subtlety in Boal's last line portrays the reader of the 1984 *Stanford Law Review* as 'an audience which is not an audience'.[125] Those who picked up the journal were there to read articles not witness an act of theatre, and as such those who read 'Roll Over Beethoven' reacted more strongly than if this had been a "standard" article;[126] reacting to 'Roll Over Beethoven' not as readers, but as spect-actors.

As a piece of radical Invisible Theatre, the audience is central to the author's mind and as Boal articulated, the topic must be a genuine concern for the spect-actors.[127] In 'Roll Over Beethoven' the topic is cls1, a genuine concern for the audience. The audience is likely to be made up from Crit fellow travellers and those with an interest in cls1, a sizeable proportion of whom would be concerned about the spread and influence of cls1.[128] Broadly, this category of reader can be lumped together as critics of cls1: generally, liberals and conservatives (amongst others) who would read the 1984 *Stanford Law Review*. With this audience in mind, the subtext in 'Roll Over Beethoven', which taunts and targets its critics, can be seen more clearly through the Performance analysis.

In both the verbatim and the scripted readings there are jabs woven within the text, subtly responding to the common critiques and questions launched at cls1.[129] These jabs can be seen more clearly within the Performance analysis through the idea that 'plays are not meaningful in themselves', but that the context in which they are read or performed creates this meaning.[130] For example, the impact felt within *Hamlet* by the performance of the *Murder of*

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[124] Boal, *Games for Actors*, above n 122, 6: "wereplaying" [sic] in original translation.
[125] Ibid.
[126] See, eg, Minda, above n 33.
[127] Boal, *Games for Actors*, above n 122, 6.
[128] See generally Teles, above n 24.
[129] See Chapter Five.
[130] Worthen, above n 110, 7.

Gonzago, would not have comparable if the royal family had not been in attendance. Similarly, *The Crucible* needs to be contextualised with reference to McCarthyism for it to move beyond a story of witch-hunts in Massachusetts. Given the prevalence of the 1984 *Stanford Law Review* this thesis proposes that the references to popular culture operating as "cultural artefacts" in 'Roll Over Beethoven', are used to insult critics of cls1.

One of the notably strange, but seemingly overlooked issues with 'Roll Over Beethoven', is that despite being published in 1984 it uses a song title from 1956. In the first instance the use of this song could be justified if nothing with similar revolutionary themes had come about in the 28-years since its release. However, the musical revolution of the 1960s had occurred and directly affected broader society; Robert Albrecht articulates this impact, describing the music of the 1960s as 'an essential motivating force – not just a sonic wallpaper – behind the rebellions of the period'.[131] Moving closer to 1984, the rise of cls1 can also be seen as parallel to the initial rise of punk, with seminal British and US punk bands forming and releasing albums in the mid-1970s to the mid-1980s. Releases during this time included The Ramones *Rocket to Russia* in 1977, Sex Pistols *Never Mind The Bollocks* in 1977, The Clash *London Calling* in 1979, and Dead Kennedys *Plastic Surgery Disasters* in 1982, any of which contained songs with similar allegorical or cultural artefact titles. While the readers of the *Stanford Law Review* may not have been as familiar with Dead Kennedys as they were with Chuck Berry, there was a litany of terminology within the 1984 *Stanford Law Review* that they would have been equally unfamiliar with. Instead, this thesis proposes that the familiarity of *Roll Over Beethoven* was deliberate, not as an aid to the readers, but as a way to taunt and position those who opposed to cls1.

[131] Robert Albrecht, '"In My Life": The Transformative Power of Music and Media during the Rebellions of the 1960s' in Brian Cogan and Thom Gencarelli (eds), *Baby Boomers and Popular Culture: An Inquiry into America's Most Powerful Generation* (Praeger, 2015) 191.

The idea of *Roll Over Beethoven* as a cultural artefact taken to taunt readers, is strengthened with the use of a second pop culture reference, the "pods" from *Invasion of the Body Snatchers*, which was also released in 1956.[132] In both *Roll Over Beethoven* and *Invasion of the Body Snatchers* there is a clear divide of characters, broadly seen as the establishment versus the rebels; and in both, the narrative presents the rebels as the heroes or the "right" side to be on. For *Roll Over Beethoven*, this dichotomous analysis was touched on above, as a title, a lyrical reference point, and potentially diegetic sound. However, this thesis posits that *Invasion of the Body Snatchers* was also chosen for this dichotomy. The movie is first referenced by Duncan several pages into 'Roll Over Beethoven', referencing both 'body snatchers' and 'pods'.[133] Their mention comes in the context of likely usurpation of cls1 ideas by non-crits.[134] In the endnotes, the journal editors[135] explain that '[t]he reference illustrates the manner in which one's ideas and expressions can be appropriated by others for their own purposes'.[136] This telling quote summarises most of the explicit arguments put forward in 'Roll Over Beethoven', about the delicate and dangerous nature of defining and inevitably crystallising an idea. However, what is more important to the current argument is the identification of the "others" and who this moniker to applies to.

The premise of *Invasion of the Body Snatchers* is that aliens arrive on Earth and after finding a sleeping body, they replicate the form, killing the original and using the duplicate body for their own alien purpose.[137] The analogy to the appropriation of ideas is clear, but this description also provides a classic trope: the alien versus humans, or more universally, good versus evil. In the movie, the alien invasion is only thwarted by those who rebel against the seemingly serene, but non-human existence. Those who accept or don't fight the alien invasion

[132] *Invasion of the Body Snatchers*, above n 4.
[133] Gabel and Kennedy, 'Roll Over Beethoven', above n 1, 7.
[134] Ibid.
[135] Luban, above n 21, 1673. Luban makes the claim that it's the editors who entered the notes, rather than Gabel or Kennedy: 'And it is too, too perfect that the editors of the Stanford Law Review added their own footnotes to try to tame'. Despite saying "footnotes", Luban is referring to the 14 endnotes that conclude 'Roll Over Beethoven' above n 1, 54-55.
[136] Gabel and Kennedy, 'Roll Over Beethoven', above n 1, 55
[137] Ibid 54.

are soon turned into "pods" before being born again as conformists to the new regime. *Invasion of the Body Snatchers* echoes the division in *Roll Over Beethoven*, dividing those with an interest in cls1 as either cool and heroic Chuck Berry rock 'n' rollers, who would stop an alien invasion, or stuffy, evil gatekeepers who welcome a non-thinking alien existence.

Framed in this way, the specific use of Both *Roll Over Beethoven* and *Invasion of the Body Snatchers* starts to make more sense than any contemporary critical film or song. Both artefacts were originally released in 1956. Between their release and the 1984 publication of 'Roll Over Beethoven' both artefacts had been re-released, either as cover songs,[138] or as remakes.[139] The film and the song would have been originally released in the childhoods of Gabel and Kennedy, and by extension a large part of their audience. The repetition of each artefact, both being remade in the 1960s and 1970s, would serve as constant reminders about their divisions. The impact of this exploitation by Gabel and Kennedy can be understood further through Daniel Marcus' exploration of cultural nostalgia and its influence on the present. Marcus argues that '[f]or those alive in the 1950s and/or the 1960s, media imagery mixed with personal memories … form the subject material for personal historical interpretation',[140] i.e. those listening to *Roll Over Beethoven* or watching *Invasion of the Body Snatchers* were likely to position themselves as part of the good guys, those who fought against the aliens, or those who supported the rise of rock 'n' roll. However, by laying claim to these cultural terms, Gabel and Kennedy create a dichotomy that plays into the audience's cultural memory and individual identity.[141] Cls1 are now the protagonists and the rebels, conversely those wanting to co-opt or remove the existence of cls1 are the bad guys, making any argument against cls1 tinged with this realisation.

[138] The Beatles in 1963; Electric Light Orchestra (ELO) in 1973.
[139] *Invasion of the Body Snatchers* (Philip Kaufman, Solofilm, 1978).
[140] Daniel Marcus, *Happy days and wonder years: the fifties and the sixties in contemporary cultural politics* (Rutgers University Press, 2004) 92.
[141] Ibid 95.

V. From Invasion of the Body Snatchers to The Matrix

The readings and final analysis of 'Roll Over Beethoven' demonstrated the depth and ways in which cls1 broke cultural barriers both in its content and the way in which it was presented. In contrast, it will be argued that the passively-haunted nature of cls3 demonstrated through Jerry Anderson's 'Law School Enters the Matrix: Teaching Critical Legal Studies' ('Law School Enters the Matrix') is comparatively regressive and constricted. After providing what is the only plausible reading of the paper, this thesis will then outline where and how the paper could have been developed. This demonstration will show that whilst Anderson's ideas and premise were good, the passive-haunting of cls3 renders any calibre of cls3 work as regressive and constricted.

'Law School Enters the Matrix' was published in the *Journal of Legal Education*, a location which aids the understanding of Anderson's argument. In 'Law School Enters the Matrix', Anderson is not offering a call-to-arms for a full-blown resurgence of cls1, instead he is asking for cls1 to be considered as a mechanism for teaching law students about legal critique.[142] Broadly, 'Law School Enters the Matrix' is trying to convince the reader that cls1 is more than a subversive, Marxist, movement of the 1980s.[143] In effect, Anderson is calling for a reimagination of sorts, positioning a new cls1 towards an acceptable usage in law schools, asking the question: 'is it possible to separate the analytical tools of CLS from the ideological baggage the movement brings with it?'[144] Anderson's reimagination is focused strongly on the image of cls1, how it is and was perceived, and how this can be safely challenged to provide a valuable teaching tool. Due to the context, subject matter, and Anderson's perceived audience of 'Law School Enters the Matrix', the proposal is for a safe and legitimate cls1 to be used as way to both engage and benefit law students.

[142] Anderson, above n 2, 201.
[143] Ibid 202.
[144] Ibid 205.

Anderson's perspective on cls1 may have been shaped by his own graduation from Stanford Law School in 1984,[145] the year of the cls1 *Stanford Law Review*, witnessing cls1 first hand as a student, and then as a professor of law.[146] Anderson posits his reimagination of cls1 as a teaching tool, via the use of popular culture, specifically with the use of the cultural artefact, *The Matrix*.[147] His analogy draws comparisons between the characters awaking to the "real" in the movie and the awakening that students, like himself, received when cls1 was alive. *The Matrix* is used to offer contemporary students a contemporary way of learning about, or understanding the broad premise of cls1 without the jargon-heavy original texts; a potentially approachable way to replace Roberto Unger or Mark Kelman's more complex summary works:[148]

> there is no question that if you start students off with CLS[1] jargon, such as the old "unalienated relatedness/ fundamental contradiction" mumbo jumbo, you might get a few blank stares and some downright rude scoffs, especially from those who didn't major in philosophy. But if you say, "you know, like *The Matrix,"* all of a sudden the lights go on and they may *get it*.[149]

The premise of Anderson's analogy to *The Matrix* is good and clear lines can be drawn to cls1, however, beyond the simple recognition of similar themes, Anderson does not offer much depth to his analysis of either cls1 or *The Matrix*. This thesis proposes this lack of depth is a direct result of the passively-haunted cls3 state, which affects how Anderson interacts with both cls1 and *The Matrix*.

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[145] Drake Law School, *Jerry Anderson Profile* Faculty and Staff Directory <http://www.drake.edu/law/facstaff/directory/jerry-anderson/>.
[146] Ibid.
[147] *The Matrix*, above n 3.
[148] Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Harvard University Press, 1983); Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1987).
[149] Anderson, above n 2, 214.

A. *Law School Enters the Matrix: its approach to Critical Legal Studies*

Anderson begins his paper with a clarification of two differing Critical Legal Studies, which would both be classified as cls1 under this thesis' proposed *Family Tree*. Anderson refers to them as the 'movement' and a 'method of legal analysis';[150] it is expressly stated by Anderson that the latter form of cls1 is the subject of his paper. The division Anderson uses is reminiscent of Kennedy's approach to the death of cls1 in the *Harvard Law Record*,[151] which he reiterated in 'Two Globalizations of Law and Legal Thought: 1850-1968'.[152] Even without this thesis' classification, by his own admission Anderson's description of differing Critical Legal Studies types, and the version he is arguing for, is a posthumous Critical Legal Studies, what can be cynically understood as a set of 'bibliographical headings'.[153] In making this distinction and identification of his preferred cls1, Anderson does not mention the death per se, instead proposing that cls1's disappearance was due its classification as (wrongly) passé or discredited.[154] Although 'Law School Enters the Matrix' argues why these assumptions were wrong, the cls1 Anderson is vouching for is already a constricted version,[155] one he proposes is shaped to fit into the mould of the law school mission statement that requires students to engage 'critically'.[156] Given Anderson's preferred type of cls1, this thesis proposes that 'Law School Enters the Matrix' is not advocating a return to cls1, but is a cls3 paper advocating and engaging with a discussion on cls3; following a similar understanding of 'Roll Over Beethoven' as a cls1 paper engaging with cls1.

Stylistically, 'Law School Enters the Matrix' is well presented through Anderson's deliberate rhetoric. Instead of positioning himself as a Crit or an ardent fan of cls1 scholars,

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[150] Ibid 201.
[151] Hope Yen, 'As HLS Mulls Its Mission', above n 25; Yen, 'Crits at HLS a Dying Breed?', above n 5.
[152] Duncan Kennedy, 'Two Globalizations Of Law & Legal Thought: 1850-1968' (2003) 36(3) *Suffolk University Law Review* 631.
[153] Yen, 'HLS Mulls Its Mission', above n 25.
[154] Anderson, above n 2, 201.
[155] Chapter One, Part II The Critical Legal Studies Family Tree.
[156] Anderson, above n 2, 201.

Anderson positions himself as a moderate (read: liberal) offering others within the same categorisation the opportunity to (re)look at the moderate cls3. From this position, Anderson wastes no time addressing the likely fears of the fellow moderate, focusing on dominant critiques of cls1: its language, its relation to radical thought, and its associated progressive subversion of law schools.[157] Anderson mitigates concerns moderates might have in broad strokes, rather than engaging with subtleties and nuances that might be present:

> some argue that the theory does not add anything to the insights provided by legal realism and that, to the extent it goes beyond legal realism to attack the perpetuation of hierarchy, it basically preaches communism or anarchy, which most of us have no interest in promoting. The Marxists lost the Cold War, after all, and continuing to teach CLS[1] is riding a dead horse … [n]evertheless, I hope to demonstrate in the next section that, even for those who do not accept the CLS theory wholeheartedly, the use of CLS analysis provides students insights beyond those of legal realism.[158]

By pre-emptively mitigating fears that fellow moderates might have, Anderson is free to position cls3 as a lens for analysing law: a teaching tool.[159] Anderson demonstrates this teaching tool through the application of a cls3 approach to classroom-type examples on questions of property and nuisance law, giving scenarios that are at once expanded in scope and consideration through his cls3 lens.[160] The examples Anderson uses are effective in showing the broader ability one may gain in using this cls3 technique, both as a student and as an educator. However, the analysis that this cls3 approach takes is one of being aware of judicial ramifications and causes, not of addressing or questioning the system that perpetuates them. This simplicity is easy to demonstrate and arguably offers a way of critiquing existing judgments, but Anderson provides no way of taking this further.

[157] Anderson, above n 2, 206 nn 16.
[158] Anderson, above n 2, 202, 205-206.
[159] Ibid 206.
[160] Anderson, above n 2, 206-210: "Property Ownership Through a CLS Lens".

The justification for Anderson's simplistic approach is in the premise that this new cls3 gives law students a grasp of critique as well educators, who might have been baffled by cls1. Anderson refers to himself as a 'merely mortal professor who will quite frankly admit that he doesn't quite understand everything crits have written and isn't quite sure he agrees with it all',[161] concluding that 'I suspect there are quite a few of us in this category'.[162] The relief Anderson finds in this new simplicity is highlighted throughout the paper, with a focus on the original impasse found with the Crit's language and accepted codes.[163] However, in spite of Anderson's justifications for the new simplicity he is choosing to bring to legal theory, this thesis proposes that Anderson is instead reflective, demonstrating the only US-based Critical Legal Studies that exists in 2004, cls3. Anderson presents the simplistic cls3, because there is no other Critical Legal Studies available to him. The cls3 Anderson presents is both regressive: harking back to cls1 and its original theorists, but also constricted: presenting a narrow approach under the guise of the safer and more simplistic cls3.

B. *Law School Enters the Matrix: its approach to The Matrix*

Anderson's approach to cls3 uses *The Matrix* as an analogy and teaching tool. The simplicity employed in the author's demonstration of cls3, continues with the author's own volition in his analysis of *The Matrix*.[164] Anderson introduces the film with a similar mitigating approach to his introduction of cls3, prefacing the first mention of *The Matrix* by 'only half whimsically' using the film as an analogy.[165] Similarly to his introduction of cls3, this perceived whimsy appears related to his audience rather than his own thoughts on the film's usefulness as a teaching tool. Anderson's caution may be better understood in context, with the broad Critical

[161] Ibid 206, quotation marks omitted for continuity.
[162] Ibid 206, quotation marks omitted for continuity.
[163] Ibid 206.
[164] Ibid 202.
[165] Ibid.

Legal Studies of Law and Popular Culture, emerging as its own field at a similar time. For example, it wasn't until 2007 that William MacNeil's seminal *Lex Populi* was published,[166] itself compiling articles on *Buffy the Vampire Slayer* from 2003,[167] and *The Lord of the Rings* (both the films and books)[168] from 2004.[169] As a prominent, if not the preeminent voice in Law and Popular Culture, MacNeil's development of this broad Critical Legal Studies can be seen as a benchmark for its emergence more generally.

In this developing stage, Anderson's cautious approach can be better appreciated. As well it helps to categorise 'Law School Enters the Matrix' less as Law and Popular Culture and more as a link to the cls1 use of popular culture and cultural artefacts, specifically 'Roll Over Beethoven's use of science fiction. The author makes this link explicit by citing 'Roll Over Beethoven' after stating that 'Duncan Kennedy himself could have given the creators of *The Matrix* the idea for the movie in a conversation with Peter Gabel back in 1984'.[170] The analysis Anderson provides compares the plight of cls1, specifically via 'Roll Over Beethoven', with the plot of *The Matrix*:

> the main thrust of CLS[1] is that the entire legal system is merely an apparatus designed to appease the masses, fooling them into thinking that their needs may be addressed, while in fact its purpose is merely to keep them docile while perpetuating the hierarchy that provides the upper class with its advantages. Instead of pods filled with bodies attached to the power plant, just substitute workers stuck in cubicles in a high-rise office building, all working to feed the vast machine that lines the pockets of the CEO.[171]

[166] William P MacNeil, *Lex Populi: The Jurisprudence of Popular Culture* (Stanford University Press, 2007); See also, Austin Sarat, Lawrence Douglas, Martha Merrill Umphrey (eds), *Law on the Screen* (Stanford University Press, 2005). This book predates *Lex Populi*, drawing from a conference at Amherst in 2003, however, it doesn't tackle "popular-culture" in the same way.
[167] William P MacNeil, '"You Slay Me"!: Buffy as Jurisprude of Desire', (2003) 24(6) *Cardozo Law Review* 2421.
[168] MacNeil, above n 166, 61.
[169] William P MacNeil, 'One *Recht* to Rule Them All! Law's Empire in the Age of *Empire*' in Andrew T Kenyon and Peter D Rush, *An Aesthetics of Law and Culture: Text, Images, Screens* (*Studies in Law, Politics, and Society*) (JAI Press, 2004) 279.
[170] Anderson, above n 2, 213.
[171] Ibid 211-212.

The analysis that Anderson provides, however, does not go much further than this. There is scope for Anderson to address this connection in more depth, especially with the benefit of a "standard" article format. For example, the pods and their significance in 'Roll Over Beethoven' are assumed rather than explicit, seen with the editors including them in the article's end notes.[172] In Anderson's paper the initial analysis and connection builds a foundation that could tackle this theme of pods and hierarchies that he identifies 20-years later. Instead, Anderson focuses on the power of popular culture as a teaching tool. He states that *The Matrix*, and more broadly, popular culture as a whole can be beneficial for 'modern students'.[173] Anderson does not elaborate much further on why this is the case,[174] but a fair reading of his approach is due to the accessibility and commonality of popular cultural knowledge. Although Anderson does not mention the work, this was the same pedagogical reasoning given by John Denvir in *Legal Reelism* several years earlier.[175]

Anderson framed 'Law School Enters the Matrix' as 'simple'[176] and an 'entrée into CLS[1] theory',[177] and for both subjects this is achieved. However, the paper used these terms to help breakdown the exclusivity and accessibility of cls1: 'CLS[1] tools will never be widely accepted if they remain the province only of those who speak in the accepted code',[178] and not to provide a 'CLS[1] for Dummies'.[179] The paper is short, only 16-pages, and while it covers an interesting theory it never moves beyond this surface level analysis. Within 'Law School Enters the Matrix' Anderson positions himself as reminding readers of cls1, but instead provides an introduction to cls3. Openly Anderson invokes a constricted and regressive cls3, a

[172] Gabel and Kennedy, 'Roll Over Beethoven', above n 1, 54-55; Luban, above n 21, 1673.
[173] Anderson, above n 2, 211.
[174] Ibid. Despite discussing specific instances using the films *Titanic* and *Body Heat*, the article is not concerned with detailing the intricacies of using popular culture as a teaching tool, just that in Anderson's experience it has been successful.
[175] This technique is discussed at length by Denvir in: John Denvir (ed), *Legal Reelism: Movies as Legal Texts* (University of Illinois Press, 1996). The common nature of film allows an understanding of themes throughout a broader percentage of the population.
[176] Anderson, above n 2, 202.
[177] Ibid 211.
[178] Ibid 202.
[179] Ibid.

version of Critical Legal Studies that simply leaves the difficulties of cls1 behind. These difficulties are in the first instance replaced by Oscar-winning special effects,[180] which as a teaching tool has merit. However, by the end of the article Anderson has given some specific cls3 classroom examples, and a fitting analogy to cls1, but not much more beyond this, with no real insight into achieving any critical aims through the cls3 outlined.

C. *Using The Matrix as an Analogy for cls1*

This thesis argues that the constriction demonstrated in 'Law School Enters the Matrix', is due to the passively-haunted state of cls3. This final analysis will briefly demonstrate themes and applications of *The Matrix* that may have aided Anderson's want to reinvigorate cls1, but were not included in his analysis, due to its constriction. 'Law School Enters the Matrix' spends roughly two thirds of its content introducing and demonstrating the potential of cls3. It is not until the final five pages, that Anderson introduces '*Using* The Matrix *to Teach CLS*'.[181] Under this heading, Anderson leaves the "how" to teach cls3 examples and focuses on comparisons with *The Matrix*. There is an earlier mention of the film, proposing its purpose in the paper as a mechanism to introduce students to cls1. This mention, with a minor error regarding the dates (misremembered as being released in 1996 not 1999)[182] is the only mention until Anderson's section on how this mechanism can be applied. Unlike Gabel and Kennedy in 'Roll Over Beethoven', the inclusion of popular culture is not nuanced throughout the article but introduced and then applied. This difference in technique, in and of itself, is not problematic, however, it is the already discussed simplicity in this application which demonstrates the haunted nature of the paper. As, despite Anderson's unique cls1 comparison, at the time of

[180] *The Matrix Awards* IMDb < http://www.imdb.com/title/tt0133093/awards>.
[181] Anderson, above n 2, 211.
[182] Ibid 203.

publication the film was not new to academic work, with a host of resources available to further develop his theory.

The Matrix was released in 1999 placing it within a significant cultural shift in technology and the impending new millennium. In the lead-up to the end of the 20th century, a time of pre-smartphones and pre-social media as it is currently known, the online world held a subcultural status for those who engaged with it, especially seen through their representation in film. For example, 1995 films like *Hackers* and *The Net* showed similar powers of technology and how they could be manipulated by those who were able to use them.[183] These films showed a shift in the depiction of the online world with their focus on "reality". Especially evident when compared to previous science fiction heavy computer-based dystopias, such as the *Terminator* franchise,[184] or life and death virtual realities, such as *TRON*.[185] Although *The Matrix* is science fiction, it is contextually conditioned by this subcultural grouping and view of "reality" for underground hackers and technophiles. The film's release also sat within a moral panic surrounding the possibility of "Y2K" with associated uncertainty in regard to technology, machines, and data.[186] Collectively this helped solidify *The Matrix* as a well-known and influential cultural artefact.

By 2006, a collected edition of articles addressing *The Matrix* was published: *Matrix in Theory*.[187] Despite being published two-years after Anderson's article, the works contained within the collection make reference to earlier phenomena, such as 'conference papers, symposia, journal articles, edited collections … and university courses on philosophy and *The*

[183] *Hackers* (directed by Iain Softley, United Artists, 1995); *The Net* (Directed by Irwin Winkler, Columbia Pictures, 1995).
[184] See, *The Terminator* (Directed by James Cameron, Hemdale, 1984); *Terminator 2: Judgement Day* (Directed by James Cameron, Carolco Pictures, 1991).
[185] *TRON* (Directed by Steven Lisberger, Walt Disney Productions, 1982).
[186] See, for example, John Quiggin , 'The Y2K Scare: Causes, Costs and Cures' (2005) 64(3) *Australian Journal of Public Administration* 46.
[187] Myriam Diocaretz and Stefan Herbrechter (eds), *The Matrix in Theory* (Rodopi, 2006); See also Kirsty Duncan, 'Tracing the Law Through The Matrix' (2001) 10(2) *Griffith Law Review* 160.

Matrix', which pre-date 'Law School Enters the Matrix'.[188] As a cultural artefact *The Matrix* has had a continued cultural effect,[189] which had begun before Anderson's article was published. Specifically, within the legal field this effect was evident in a practical rather than theoretical sense. In the early-2000s there were a number of criminal cases where pleas of insanity related to defendants believing they were in *The Matrix*. From CNN in 2003:

> Hamilton, Ohio, resident Tonda Lynn Ansley was found not guilty by reason of insanity after claiming she thought her landlord was part of a conspiracy to brainwash and kill her. Ansley shot the woman several times in the head in July 2002. [Quoting Ansley] "They commit a lot of crimes in 'The Matrix,' … That's where you go to sleep at night and they drug you and take you somewhere else and then they bring you back and put you in bed and, when you wake up, you think that it's a bad dream"[190]

Whilst legal in nature, these cases would not be directly relevant to Anderson's thesis. However, they were discussed publicly and could have been introduced to differentiate his legal use of the film. The more applicable area from which Anderson could have drawn, however, was *The Matrix*'s focus on philosophy and then philosophy's focus on *The Matrix*. From a philosophical standpoint, an immediate connection can be drawn to Jean Baudrillard's *Simulacra and Simulation*.[191] Not only does the book appear in the film,[192] but there are direct connections to the author's concept of 'the real'.[193] The concept, which draws on people's connection to virtual or hyper-realities (TV, Film, et cetera) compared to reality itself, is dominant in *The Matrix* and compounded by a line from Morpheus to the protagonist Neo,

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[188] Chris Falzon, 'Philosophy in The Matrix' in Myriam Diocaretz and Stefan Herbrechter (eds), *The Matrix in Theory* (Rodopi, 2006) 97, 97-112.This collection came out in 2006, however, the references Falzon and other authors use are from previous years, including many that pre-date Anderson's article.

[189] See, eg, the use of "the red pill" from *The Matrix* co-opted for an extreme men's rights group on the website reddit: *The Red Pill* Reddit < https://www.reddit.com/r/theredpill>.

[190] Matt Bean, '"Matrix" makes its way into courtrooms as defense strategy', *CNN* (online), 21 May 2003 < http://edition.cnn.com/2003/LAW/05/21/ctv.matrix.insanity/>; Mark Schone, 'The Matrix defense', *The Boston Globe* (online), 9 November 2003 <http://archive.boston.com/news/globe/ideas/articles/2003/11/09/the_matrix_defense/>.

[191] Jean Baudrillard, *Simulacra and Simulation* (trans Sheila Faria Glaser, University of Michigan Press, 1994) [trans of: *Simulacres et Simulation* (first published 1981)] 1.

[192] *The Matrix*, above n 3, 0:08:27.

[193] Baudrillard, above n 191, 1.

'welcome to the desert of the real'.[194] The connection between Baudrillard and *The Matrix* was then discussed further by Slavoj Žižek in his 2002 book *Welcome to the Desert of the Real*.[195] In either Baudrillard's original use or Žižek's updated interpretation, Anderson would have found a stronger grounding for his want to connect cls1 and *The Matrix*.

There are a number of reasons why Anderson did not need to use any of the presented materials which engaged with *The Matrix* above. However, this thesis maintains that Anderson was constricted through his writing about cls3, and that this limited the level of scope and engagement he could give throughout his article. An initial reading of 'Law School Enters the Matrix' presents a seemingly acceptable way to teach law students about an existing mode of critique and keep them engaged through film. However, once it is read in conjunction with other works on cls1 or *The Matrix*, the lack of development in the article is staggering. This thesis contends that Anderson's premise was novel and worth developing, however, overall 'Law School Enters the Matrix' remains constricted and regressive.

VIII. CONCLUSION

To demonstrate the effect of a passively-haunted subject, this chapter has provided comparative readings of two papers with similar themes. Peter Gabel and Duncan Kennedy's cls1 text, 'Roll Over Beethoven', was able to be read in three distinct ways, as a verbatim transcript, a script to be performed, and as a Performance. In each, different levels of insight were gained into cls1, demonstrating what it was and what it could or could not do. In Jerry Anderson's cls3 text, 'Law School Enters the Matrix: Teaching Critical Legal Studies' ('Law School Enters the Matrix'), only one plausible reading was given, itself highlighting gaps or areas that could have strengthened or developed in the argument presented. In contrast to 'Roll Over Beethoven',

[194] *The Matrix*, above n 3, 0:41:13.
[195] Slavoj Žižek, *Welcome to the Desert of the Real* (Verso, 2002).

‘Law School Enters the Matrix’ could not be read in different ways, nor did it provide a clear demonstration of the intricacies in cls1, instead embracing the constricted and regressive cls3.

This thesis contends that the difference in these journal articles is primarily due to the death of cls1 and the effect of its passive-haunting of cls3. Despite approaching similar themes and closely aligned cultural artefacts, the papers were separated by the way in which they interacted with these subjects. In ‘Roll Over Beethoven’ the authors do not shy away from the troubles and difficulties facing cls1, however they challenge and critique its contemporary position with the aim to move forward. Conversely, ‘Law School Enters the Matrix’ harks back to cls1 but presents a weaker cls3 as the preferred method of enquiry. As has been argued, this regressive and constricted approach is present in works that engage with cls1 after its death.[196] However, the identification of cls3 and its passively-haunted state does not mean that cls1 should be viewed as a complete or perfect mode of legal critique. The final chapter of this thesis will now address critiques of cls1 outlining a scale that will aid in the categorisation of positioning and the potential (re)use of cls1 texts.

[196] See Chapter Three, Part The Haunting of cls3: a Framework.

Chapter Five

Navigating cls1

'Into this wild Abyss the wary Fiend
Stood on the brink of Hell and looked a while,
Pondering his voyage; for no narrow frith
He had to cross.'

John Milton – Paradise Lost

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I. INTRODUCTION

Having identified both limbs of the US-based Critical Legal Studies, cls1 and cls3, this thesis has argued that cls1 passively-haunts cls3, resulting in cls3 works being comparatively regressive and constricted. In Chapters Three and Four, this framework was developed and then presented through a comparative reading of 'Roll Over Beethoven' and 'Law School Enters the Matrix: Teaching Critical Legal Studies'. Having demonstrated the limitations of cls3, this final chapter addresses cls1. Whilst cls1 was not regressive or constricted, it still faced its own issues; according to its critics this ranged from the way the Crits dressed,[1] to the universities they taught at,[2] and the more substantial issue of what their work actually meant.[3] Cls1 faced these critiques from liberals as well as both broad and narrow Critical Legal scholars. These critiques ranged from meaningful interactions with cls1 to *ad hominem* criticism of the Crits. By engaging with these critiques, this chapter argues that the varied cls1 works can be better understood, aiding the demystification of cls1 and Critical Legal Studies as a whole. Notably, this chapter focuses on the critique that Patricia Williams presents in the 1987 article, 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' ('Alchemical Notes') as a useful insight into the demystification of cls1.[4]

In 'Alchemical Notes', Williams presents a mixture of personal and allegorical stories to critique and position cls1. The article's focus on rights as well as the author's development of intersectionality under the term "alchemy", presents a complex and engaging critique of cls1. The allegorical story 'The Brass Ring and the Deep Blue Sea',[5] initially used to explain to a friend what cls1 '*really* was all about',[6] provides a way of thinking about the location of

[1] See *The New Republic* (Washington D.C.) March 17 1986. The front page bears the heading "Punk Professors".
[2] James D Gordon III, 'Law Review And The Modern Mind' (1991) 33(2) *Arizona Law Review* 265.
[3] Mari J Matsuda, 'Looking To The Bottom: Critical Legal Studies And Reparations' (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 323.
[4] Patricia J Williams, 'Alchemical Notes: Reconstructing Ideals From Deconstructed Rights' [1987] 22 *Harvard Civil Rights – Civil Liberties Law Review* 401.
[5] Williams, 'Alchemical Notes', above n 4, 401-402.
[66] Ibid 402 (emphasis in original).

cls1 in relation to law. Out of the various critiques of cls1, this thesis proposes that Williams' allegorical story unintentionally offers a way to clarify the relationship between individual cls1 works. Taking the framework and locations created in 'The Brass Ring and the Deep Blue Sea', this chapter presents a way to plot and position individual cls1 works. Under the title of the *Geography of cls1*, this scale aids the demystification of cls1, providing the ability to understand the relationship between cls1 works, law, and non-law. The application of this scale provides a way to apply cls1 works to contemporary legal issues, without being constricted or regressive. Before creating the *Geography of cls1*, this chapter will first address critiques of cls1 from liberal and critical scholars, before engaging with Williams' 'Alchemical Notes'.

II. CRITIQUING THE CRITS

The critiques levelled at cls1 can be divided into two general groupings, critiques from those outside cls1 (primarily legal liberals) and critiques within Critical Legal Studies (both broad and narrow categorisations). The critiques of cls1 took different forms stylistically and thematically, however there are some identifiable trends in the two groupings. Generally, the critiques levelled at cls1 from those outside were more critical of cls1 as a whole, not engaging with any nuance or subtleties in the individual cls1 works. Collectively the critiques from outside cls1, position it as illegitimate, resulting in less-substantial or intricate critiques. There are exceptions to this, however, these are a minority in the literature.[7] Conversely, those critiquing cls1 from within Critical Legal Studies were more inclined to view cls1 as a legitimate enterprise but took issue with certain issues or theorists. It should be noted, however, that these considered critiques of cls1 should not be mistaken for sympathy or sycophantism, as some of the following examples clearly show. To demonstrate these trends in the critiques

[7] See eg, Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton University Press, 1990); Richard Bauman, *Ideology and Community in the First Wave of Critical Legal Studies* (University of Toronto Press, 2000).

of cls1, this chapter will present a liberal critique, a cls2 critique, a brief engagement with Feminist Legal Theory, and lastly (pre) Critical Race Theory critiques of cls1.

A. *Liberal Critiques*

In 1984 at the height of cls1,[8] Paul Carrington published 'Of Law and the River',[9] a short article in which he contrasts Mark Twain's *Life on the Mississippi* with nihilistic legal teaching.[10] The article assesses the professional training in Twain's book and the author's preference for law schools to train future lawyers;[11] something which he believes "legal nihilism" hinders. Carrington gives no definition of what he means by legal nihilism, he does however equate it with disbelief and incompetence in the individual.[12] Similarly, the author does not openly name cls1 as the nihilism in the law school, however, the only reference in the article which is not to Twain, is Roberto Unger's *The Critical Legal Studies Movement*.[13] Unger is referenced on the second to last page of the article, from which a thinly-veiled attack on cls1 can be drawn:

> In an honest effort to proclaim a need for revolution, nihilist teachers are more likely to train crooks than radicals. If this risk is correctly appraised, the nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy.[14]

The article's pernicious approach to cls1 drew a raft of criticism and concern from those associated with cls1, including Robert Gordon, Paul Brest, Guido Calabresi and Owen Fiss.[15]

[8] See Chapter Four, Part I – cls1 timeline diagram.
[9] Paul D Carrington, 'Of Law And The River' (1984) 34 *Journal of Legal Education* 222.
[10] Ibid 222.
[11] Ibid.
[12] Ibid 226-227.
[13] Ibid 227 nn 21; Roberto Unger Mangabeira, *The Critical Legal Studies Movement* (Harvard University Press, 1983).
[14] Ibid 227.
[15] Peter W Martin, '"Of Law And The River," And Of Nihilism And Academic Freedom' (1985) 35 *Journal of Legal Education* 1.

The concern was metered between academic freedom, a perceived return to 'red baiting',[16] and Carrington's dichotomy between the university and the law school.[17] Gordon's response to Carrington was the most detailed and was either the first, or the first replied to, in a collection detailing the correspondence by Peter Martin in '"Of Law and the River," and of Nihilism and Academic Freedom'.[18] Despite the length and seriousness of Gordon's reply, it can be summed up in his exasperation at Carrington's unfounded conclusions: 'Just as I cannot think of anyone in American law teaching who thinks law is nothing but official whim, I can't think of anyone either who preaches the revolutionary overthrow of legality. This seems to be another imaginary bogey-man'.[19] In response to Gordon, Carrington also wrote at length, but instead of doubling-down, he articulated the underdeveloped nature of his original argument:

> If you are right about that, then my comments to which you take offense have little point. I am certainly aware that my concern is not appropriate with respect to all the persons having some sympathy or connection with CLS[1]; it is for that reason that I tried to avoid referring to CLS[1] as a corporate body, and chose to comment instead on Legal Nihilism, a phrase which I had thought likely to claim for their banner, but which may nevertheless apply to some.[20]

The response Carrington provides is not one of staunch opposition, as Gordon states in his next reply '[y]our letter helps considerably to clarify the issues between us, as well as revealing more agreement than I would first have suspected to exist'.[21] And instead appears to vindicate Gordon's argument of an 'imaginary bogey-man'.[22] In the context of this chapter, it is not Carrington's critique of cls1 which is concerning, but his lack of substance or engagement with cls1 in this critique. Carrington's original article demonstrates a reactionary and dichotomous approach, which in spite of Carrington's later admission, spawn's similar reactionary and

[16] Ibid 16.
[17] Ibid 26.
[18] Ibid.
[19] Ibid 4.
[20] Ibid 10.
[21] Ibid 13.
[22] Ibid 4.

dichotomous responses, praising the author's opposition to cls1. For example, in response to Paul Brest's concerns with the article, Louis Schwartz replied that he 'found Carrington's piece brilliant, civilized, and insightful'.[23] 'Of Law and the River' is only eight-pages long and whether it does or does not unfairly target cls1, it is underdeveloped and objectively hard to call brilliant or insightful. However, for those in support of Carrington, the calm 'correspondence in so leisurely 18th century fashion' that occurred between the author and Gordon,[24] is replaced with more general criticisms that do not offer any real engagement with cls1. For example, in another response to Paul Brest's concerns, Phillip Johnson stated that

> [t]he first thing that strikes me about your letter is its pure liberalism, so incongruous coming from a prominent member of a movement dedicated to exposing the mystification and reification of liberal legalism. Your letter expressly or impliedly incorporates a variety of concepts that I thought critical legal scholars had consigned to the trash can-academic freedom, rights, the marketplace of ideas that produces professional competence and moral development as if by an invisible hand, and especially the vision of the university as a neutral palace of learning which allows no orthodoxy to interfere with the pursuit of truth. Are you not at least a little embarrassed to invoke these long-since-deconstructed concepts on behalf of CLS[1].[25]

Johnson's response shifts the focus from the subject, Carrington's 'Of Law and the River' and moves to an argument about cls1 issues with liberalism. In Johnson's context they are related, but the choice to begin the argument in this way deflects any real engagement with the issues the Crits raised with Carrington's article. This thesis proposes that this level of broad and dismissive engagement is embedded within liberal critiques of cls1. A similar approach, albeit with a better depth of analysis can be seen in the critiques given by Arthur Austin in his 1999-2000 article 'The Top Ten Politically Correct Law Review Articles'.[26] The list is compiled

[23] Ibid 19.
[24] Ibid 13.
[25] Ibid 18.
[26] Arthur Austin, 'The Top Ten Politically Correct Law Review Articles' [1999] 27 *Florida State University Law Review*, 233.

from articles which Austin believes demonstrate 'Law Political Correctness' or LPC,[27] something he sees as an approach and symptom of three connected sources: 'Critical Race theorists composed of Blacks and females, feminists, plus the remnants of the Critical Legal Studies movement [cls1]'.[28] In contrast to Carrington's 'Of Law and the River', Austin provides a more detailed level of engagement. However, this engagement is still at a surface level that doesn't try to interact with the substance of his subject, as much as ridicule it. The analysis Austin gives is hyperbolic, but based in fact:

> The control of scholarship is a critical avenue to the ultimate subversion of the Liberal establishment. The strategy is to scorch the earth: attack the assumed certainty of linearity with deconstruction, and replace the doctrinal model with the narrative genre-storytelling, allegory, and parable.[29]

Aside from scorching the earth (Blackstone survived cls1)[30] and giving definitive replacements,[31] Austin's assessment aligns with some elements of cls1.[32] Within the top ten list Austin selects 'Roll Over Beethoven' as his cls1 choice, which adds little to the analysis already provided in Chapter Four of this thesis. As such Austin's analysis of Mary Joe Frug's 'A Postmodern Feminist Legal Manifesto (An Unfinished Draft)', will be assessed.[33] In a categorical sense, Frug's article would sit more comfortably within the broad Critical Legal Studies limb,[34] however, she was also an active member of cls1.[35] Within the selection of articles Austin has chosen, Frug is the most applicable cls1 candidate, after Peter Gabel and Duncan Kennedy.

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[27] Ibid 234.
[28] Ibid 234-235.
[29] Ibid 236.
[30] See, eg, Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 *Buffalo Law Review* 205.
[31] See Richard Michael Fischl, 'The Question That Killed Critical Legal Studies' (1992) 17(4) *Law & Social Inquiry* 779.
[32] See below Part II, 2 Critical Critiques.
[33] Austin, 'The Top Ten', above n 26, 237-238; Mary Joe Frug, 'A Postmodern Feminist Legal Manifesto (An Unfinished Draft)' (1992) 105(5) *Harvard Law Review* 1045.
[34] See Chapter One, Part II The Critical Legal Studies Family Tree.
[35] See, Mary Joe Frug, 'Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook', (1985) 34 *American University Law Review* 1065.

In keeping with his anti-PC stance, Austin's tone is offensively crude, notably when he outlines the debate around the decision to posthumously publish Frug's paper after her murder. The debate gives context, but the way in which it is approached sets the tone for the paper as a whole:

> She was stabbed to death near her home in an exclusive section of Cambridge, inflicted with five wounds in her chest and groin. The murderer has not been apprehended and rumors over motive continue to circulate, including the belief by some of her ardent supporters that she was targeted by a patriarchal conspiracy.[36]

Highlighting where and how she was killed, i.e. that she lived in an 'exclusive' neighbourhood and that she was stabbed in 'her chest and groin' adds no value to the critique but infers a sexualisation of her death and her position within the legal elite.[37] There is an implication that Frug either deserved to die due to her politics, or that women are murdered and it's nothing to do with the patriarchy; both are unpleasant positions to take and neither adds to the critique of Frug's writing. Austin continues by citing '[a] colleague of Frug said: 'They engaged in a necrophiliac gang bang upon the living body of her work"', in response to the *Harvard Law Review*'s decision to publish 'A Postmodern Feminist Legal Manifesto (An Unfinished Draft)'.[38] Of itself this quote objectively adds context; however, Austin begins the very next sentence by calling Frug's Manifesto 'a terrorist exercise in self-flagellation'.[39]

This theme of dismissing rather than engaging with the text continues in response to Frug's argument that the female body 'cringes from the culture of oppression created by a system that uses linguistic ploys to render the female rapeable',[40] Austin replies that this result is the thinking of a concussed LPC, before admonishing Frug for citing Madonna and using

[36] Austin, 'The Top Ten', above n 26, 238.
[37] Ibid.
[38] Ibid.
[39] Ibid 239.
[40] Ibid.

both "fuck" and "cunt" in her assessment.[41] Finding both words too confrontational to repeat, Austin refuses to engage with them and instead says 'the F word and the C word'.[42] It is in this assessment that the liberal distaste for critical approaches to law are exemplified. Throughout the critique, Austin's approach sexualises and de-humanises Frug; the violence to which she was subjected is paired with her assessment of systemic violence, which is then ridiculed. The sexualisation implied in Austin's account of her death the stabbing in 'her chest and groin',[43] and that Frug's article is 'self-flagellation',[44] are both deemed fine by the author, but "cunt" and "fuck" are deemed too vulgar to repeat.

B. *Critical Critiques*

In both Carrington and Austin's critiques of cls1 and broader Critical Legal Studies, the authors demonstrate an inability to engage with the ideas or substance of the works. The authors are seemingly unable to grasp or deliberately miss the points they want to refute. Cornel West makes an argument to the latter, stating that liberals such as 'Richard Posner, Robert Bork, and others view critical legal studies [cls1] as calling into question the very ends of Western civilization and the ends of traditional legal education. Thus, they conclude it ought to be pushed outside the academy completely'.[45] Under the guise of "critique" it is possible that the liberal interactions with cls1 are deliberately weak so as to delegitimise it. Whatever the reasons might be, these weak critiques demonstrate a lack of cogent or engaged analysis which gives no insight into the actual issues that faced cls1. The weakness of these liberal critiques is seen clearly when compared to cls2 critiques of cls1. For example, in his critique of cls1, cls2

[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Cornel West, 'Reassessing The Critical Legal Studies Movement' (1988) 34 *Loyola Law Review* 265, 271 nn 15: 'Richard Posner, Robert Bork, and others view critical legal studies [cls1] as calling into question the very ends of Western civilization and the ends of traditional legal education. Thus, they conclude it ought to be pushed outside the academy completely'.

author Peter Goodrich offers a far more astute and damning assessment in regard to the theory and politics that underpinned cls1:

> Aside from an early and now dated Marxist sociology of law which has been largely abandoned and which was itself imported, the defining feature of the critics was arguably that of a naive and somewhat bowdlerised translation of continental social theory into an American legal idiom. One consequence of such a characteristic of the literature was the limited audience which such a product or positivity was likely to have in the legal academy itself. Its success was its failure, its external visibility was its strongest form of internal secession, its text was its context.[46]

In this brief excerpt, Goodrich moves past the simple critiques given by liberals on whether nihilism will destroy legal training colleges,[47] or rebutting the idea that law draws from and influences power and structural hierarchies.[48] Instead, Goodrich gets to the heart of cls2 critiques of cls1: its Americanised nature and reduced theoretical basis. Thematically this joint issue can be seen in Goodrich's opening line and the reference to a sociology of law which harks back to the failed attempt by Roscoe Pound to move past Langdellianism.[49] By referencing this, Goodrich is also critiquing the Crits who built upon Pound's approach with Marx before abandoning it, affirming Alan Freeman's insight that cls1 scholars had a fear of being associated with Marxism.[50] Goodrich then moves to identifying the repetition of this failure through the limited understanding and application of contemporary social theory by the Crits.

The impact of Goodrich's critique also garnered different responses from the Crits than those given to the liberal critics, such as the responses to Carrington, above. The dialogue between Gordon and Carrington, for example, stands in contrast to Goodrich's retelling of his

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[46] Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (Routledge, 1996) 192.
[47] Martin, above n 15, 16.
[48] See generally, Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (New York University Press, 2004).
[49] See Chapter One, Part III The cls1 Eulogy – 2 The cls1 Location.
[50] Alan D Freeman, 'Truth And Mystification In Legal Scholarship' (1981) 90(5) *The Yale Law Journal* 1229.

interaction with Duncan Kennedy after presenting the statement above at a conference. Discussing their personal interactions over the years in his book review of Kennedy's *Critique of Adjudication (fin de siècle)*, Goodrich states: 'I met him [Kennedy] next at a critical networks conference in Boston in 1992. He did not attend my presentation but did discuss it with me and pronounce that my criticisms of U.S. critical legal studies ("cls[1]") were too strident and too loud'.[51] The reaction to Goodrich's critique continued with Kennedy's 'Roll Over Beethoven' co-author, and Goodrich's co-panellist at the conference, Peter Gabel, being 'upset' by the criticism of Kennedy and cls1.[52]

Amongst the retellings of these interactions, Goodrich inadvertently touches on why his cls2 critique is more developed than the liberal critiques of cls1:

> I also should admit, and in equally positive tones, that I have read *Critique* as part of a theoretical trajectory that began with what I believe to be a brilliant book about the politics of law school: *Legal Education as Training for Hierarchy*. Indeed, I have taught that text for many years. I have read it repeatedly with students, with colleagues, with intensity, with love.[53]

A statement that's sentiment can be contrasted with a line from Carrington's 'Of Law and the River':

[51] Peter Goodrich, 'Duncan Kennedy As I Imagine Him: The Man, The Work, His Scholarship, And The Polity' (2001) 22 *Cardozo Law Review* 971, 976; See Tor Krever, Carl Lisberger and Max Utzschneider, 'Law on the Left: A Conversation with Duncan Kennedy' (2015) 10(1) *Unbound* 1, 32. Kennedy remembers the event within this article, discussing the conservative judge, Richard Posner's review, but not mentioning Goodrich by name. 'It [*Critique of Adjudication*] was received by complete overwhelming silence, except that within the community of Critical Legal Studies there was an amazing event organised by Michael Fischl and Pierre Schlag. This was a symposium at the University of Miami, an astonishingly elaborate, serious response by some people to whom I was close and others to whom I wasn't. It was an intra-movement event, although by that time the movement had ceased to exist as a movement'.

[52] Goodrich, 'Duncan Kennedy As I Imagine Him', above n 51, 976 nn 12.

[53] Ibid 978.

> The nihilist teacher threatens to rob his or her students of the courage to act on such professional judgment as they may have acquired. Teaching cynicism may, and perhaps probably does, result in the learning of the skills of corruption: bribery and intimidation.[54]

Whilst Goodrich might disagree with Kennedy's brand of cls1, his critique is derived from a place of genuine engagement rather than mere ideological stance.[55] This act of genuine engagement allows a critique that takes seriously its subject, in turn affording a more useful analysis. Goodrich's interaction with cls1 and Kennedy specifically, provides a clear contrast to the liberal critic. However, the categorisation of Goodrich's work under the cls2 limb, does create some distance between the Critical Legal Studies he engages with (cls1) and the Critical Legal Studies he practices (cls2); this distance shapes his focus. Goodrich offers invaluable insights into cls1, however, even when they are based on his own interactions with Gabel and Kennedy,[56] there is an almost flâneur type distance with cls1 itself. In the initial critique above, the excerpt is taken from his article 'Sleeping with the Enemy: An Essay on the Politics of Critical Legal Studies in America'. Thematically this paper demonstrates a focus in Goodrich's work of the outsider looking in, notably seen again in his 2001 paper 'Europe in America: Grammatology, Legal Studies, and the Politics of Transmission'.[57] Goodrich's interactions are more valuable than those of the liberal critics, but the distance between cls1 and cls2 shapes the author's focus and approach.

A similar distance can be seen in other "critical" critiques, for example Catharine MacKinnon in the broad Critical Legal Studies category of Feminist Legal Theory. Specifically, in Mackinnon's 1989 article 'Feminism in Legal Education', the author voices concern over areas lacking in cls1:

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[54] Carrington, above n 9, 27.
[55] See generally Mary Heath 'On critical thinking' (2012) 4 *The International Journal of Narrative Therapy and Community Work* 11, 12.
[56] Goodrich, 'Duncan Kennedy As I Imagine Him', above n 51, 978.
[57] Peter Goodrich, 'Europe In America: Grammatology, Legal Studies, And The Politics Of Transmission' (2001) 101(8) *Columbia Law Review* 2033; See similar themes in Goodrich's tribute to Penny Pether: Peter Goodrich, 'Mos americanus: or common law in partibus infidelium' (2015) 21 *Villanova Law Review* 521.

> Feminism also criticizes existing intellectual approaches to explaining law. Feminists have exposed objectivity as a figleaf for misogyny. The legal realists' famous aphorism - that you can tell more about what a judge will decide based on what he had for breakfast than on legal doctrine – leaves out who cooked the breakfast and who served it, far less what he did last night in bed. Critical legal studies [cls1], while taking more cognizance of women's claims, is not unproblematic. Often the theories inhabit a legal world of looseness and motion that does not exist for women. Women's treatment, to put it another way, is all too determinate. Nor is male power a determinant in the system as it is viewed by much of critical legal studies. It is, rather, a constraint that one occasionally encounters in a system which is otherwise determined or is in random intellectual motion.[58]

MacKinnon then continues with a theory as to why cls1 might have escaped more stringent critique: 'I must confess some suspicion that one of the reasons critical legal studies is not more sharply criticized is that none of its members, to my knowledge, is on the bench. Few mix in practice at all'.[59] MacKinnon engages with cls1 materials, specifically the claim of law being indeterminate,[60] but this only forms part of a bigger argument on legal education and the identification of a determinate hierarchy for women. Again, this critique is comparatively more engaged than the liberal critiques, but the balance between the author's position on the *Critical Legal Studies Family Tree* and their focus on cls1 is weighted towards their personal position. Whilst this statement might seem redundant, there are degrees that inform their approach, i.e. a Feminist Legal Theory approach to cls1, rather than a Feminist Legal Theory approach to education which touches on cls1. MacKinnon is aware of this difference and does address this limitation in her footnotes, citing two articles from the 1987 *Harvard Civil Rights – Civil Liberties Law Review* as suggested critiques of cls1 to read.[61]

The two articles MacKinnon identifies are arguably some of the strongest critiques of cls1 from future Critical Race Scholars, the articles preceding the mantle of Critical Race

[58] Catharine MacKinnon, 'Feminism In Legal Education' (1989) 7 *Legal Education Review* 85, 92.
[59] Ibid 92-93.
[60] See Chapter One, Part II The Critical Legal Studies Family Tree.
[61] MacKinnon, above n 58, 92 nn 18; Goodrich, *Law in the Courts of Love*, above n 46, 203 nn 72. Goodrich mentions Williams' later work *The Alchemy of Race and Rights* in passing, with regard to autobiography and the way critical legal work is moving forward.

Theory.[62] The articles MacKinnon cited were Mari Matsuda's 'Looking to the Bottom: Critical Legal Studies and Reparations' ('Looking to the Bottom') and Patricia Williams' 'Alchemical Notes'.[63] Whilst both pieces are defiantly critiquing from a personal position related to the authors' identity and experiences, they both offer broad solutions to the problems they perceive. Both papers were published in the *Harvard Civil Rights – Civil Liberties Law Review* and were 'originally presented as part of a panel discussion on the minority critique of CLS[1]. These pieces reflect both the promise and the frustration which CLS[1] holds for minority scholarship and politics'.[64] The nature of the articles, their time within the cls1 timeline,[65] and their impact, offers an engaged and focused critique of cls1.

The panel discussion which Matsuda and Williams were part of happened on January 7th 1987, at the 10th annual Critical Legal Studies Conference (CCLS); the theme of the conference was "Sounds of Silence: Racism and Legal Scholarship". In the December 1986 CCLS Newsletter, Richard Abel addressed the impending conference and its theme on behalf of the CCLS planning committee:

> If CLS[1] conferences in the past had devoted relatively little attention to feminism, they have devoted even less to racism. We decided to begin the meeting with lectures and discussions among non-lawyers on race in contemporary America. Then a number of minority law teachers will present a critique of CLS[1] scholarship (and silences) on race. The second full day of the meeting will offer workshops that attempt to raise questions about race in the context of our research and teaching about law that deal with two central issues that confront all of us within the law school environment: the racism that minority law teachers confront (especially in the classroom); and the disadvantages that minority law students encounter in standardized tests - - for admission to law school, at the end of courses, and for entry to the bar.[66]

[62] See below.
[63] Matsuda, above n 3; Williams, 'Alchemical Notes', above n 4.
[64] José A Bracamonte, 'Minority Critiques of the Critical Legal Studies Movement' [1987] 22 *Harvard Civil Rights-Civil Liberties Law Review* 297, 297.
[65] See Chapter Four, Part I – cls1 timeline diagram.
[66] Richard Abel, 'Los Angeles National CLS Conference, January 6-8 1987', *Newsletter of the Conference on Critical Legal Studies* (Buffalo New York, December 1986) 1-2.

Abel's explanation appears self-reflective for cls1 as a whole; he acknowledges the issues faced by paying little attention to feminism, and that this conference was there to support minority scholars and people of colour who might feel similarly ostracised from cls1.[67] However, in spite of the cls1 intentions, this conference appears to have been a tipping point for this relationship. As Alfredo Mirandé recalls in 2000: 'the [1987 cls1] Conference intensified the schism between CLS[1] and people of color who had not been invited to participate in the planning of the Conference'.[68] Mirandé's reflective statement echoes José A Bracamonte's conclusion to the 1987 edition of the *Harvard Civil Rights – Civil Liberties Law Review*:

> What the Critical Legal Studies movement currently has to offer therefore only partially fits the articulated historical needs of minorities. The reality of our existence and needs must find a more developed and nuanced treatment in critical scholarship and practice. By imposing an ideological paradigm without accommodating our personal, social and political needs, CLS[1] adherents seek to impose leadership without a genuine understanding of the minority community.[69]

The after-effect of the conference led to the development of Critical Race Theory in 1989. [70] However, at the time of the conference and publication of the *Harvard Civil Rights – Civil Liberties Law Review*, Matsuda and Williams were writing on, and to some extent within, cls1. Fellow Critical Race Theorist, Kimberlé Crenshaw outlines this unique position for minority scholars:

> In the mid-1980s, CLS[1] was the place to be for progressive, left wing, and other non-conformist law folks. CLS[1] conferences were a mix of heavy theory, whimsical aspiration, dramatic performances,

[67] The title "minority scholar" will be used from herein in accordance with the CCLS and the publications that came from this. This title is also used to differentiate the authors from the not yet formed Critical Race Scholar/Theorist title.
[68] Alfredo Mirandé, '"Revenge of the Nerds," or Postmodern "Colored Folk"? Critical Race Theory and the Chronicles of Rodrigo' (2000) 4(1) *Harvard Latino Law Review* 153, 153.
[69] Bracamonte, above n 64, 299.
[70] See, Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43(5) *Connecticut Law Review* 1253, 1297: 'the conference was a precursor to the eventual emergence of the CRT workshop both substantively and institutionally'.

> and other remnants of 1960s counter-culturalism. For a range of left-leaning people of colour in the legal academy looking for an ideological home, CLS[1] was attractive.[71]

Reminiscent of Laura Kalman's identification of Harvard Law School as a 'home' for Duncan Kennedy, Morton Horwitz, and Roberto Unger,[72] Crenshaw identifies cls1 as offering similar hope to minority scholars. However, the similarity continues with this thesis' earlier critique of Kalman's "home" for cls1 at Harvard,[73] with minority scholars not feeling the common associations that a home should bring for them. As Abel's entry in the *Newsletter of the Conference on Critical Legal Studies* outlines, there were tensions before the conference, which as Bracamonte and Mirandé identified, were not quelled by the CCLS theme and focus. As such, the position that Matsuda and Williams write from provides a unique insight into cls1, from those looking for an ideological home and critiquing with the aim of improvement, rather than denigration or analytical distance. However, in this goal of improvement, there are issues which sit at odds with cls1, notably on the topic of "rights" and in Matsuda's article specifically, the prescriptive nature of outcomes she would like to see. To analyse these critiques of cls1 Matsuda will be addressed first, before moving to Williams.

1. *Mari Matsuda – Looking to the Bottom: Critical Legal Studies and Reparations*

From the title alone, the goal of improvement through critique can be seen in Matsuda's article, 'Looking to the Bottom: Critical Legal Studies and Reparations' ('Looking to the Bottom'). The loaded terms outline the location of Matsuda as a minority scholar, and the need for cls1 to make reparations with those, like her, who are at the bottom. What will be addressed in this analysis is the balance between Matsuda's critiques of cls1 generally, and her specific critique

[71] Ibid 1288.
[72] Laura Kalman, *Yale Law School and the Sixties: Revolt and Reverberations* (The University of North Carolina Press, 2005) 7.
[73] See Chapter One, Part III The cls1 Eulogy, B The cls1 Location.

of cls1's interaction with rights.[74] This thesis holds that Matsuda's use of rights does not engage enough with the existing cls1 critiques of rights to successfully challenge their position. While Matsuda presents a compelling case for understanding and developing rights, the benefit of the article is the more general critique she provides on cls1.

Drawing on Antonio Gramsci, Matsuda outlines an overarching issue with cls1's engagement with those "at the bottom":

> The imagination of the academic philosopher cannot recreate the experience of life on the bottom. Instead we must look to what Gramsci called "organic intellectuals," grass roots philosophers who are uniquely able to relate theory to the concrete experience of oppression.[75]

Here Matsuda addresses a broad area of critique that other cls1 critics had made,[76] but instead of leaving her critique as an irreparable flaw in the 'elitism' of cls1,[77] the author develops it, stating that 'a consciousness-raising dialogue between critical legal scholars [cls1] and people of color provides an important methodological response to those critiques'.[78] To further affirm Matsuda's level of engagement, the critique she offers can be contrasted against a similar liberal critique:

[74] On the topic of rights in cls1 see generally Mark Tushnet, 'An Essay on Rights' (1983-1984) 62 *Texas Law Review* 1363, 1382: 'The language of rights attempts to describe how people can defend the interests they have by virtue of their humanity against efforts by others to suppress those interests or to live indifferent to the suffering caused by failing to recognize the interests of others … I could not sensibly deny the importance of experiences of independence and solidarity. They are central parts of our humanity. But the reification critique claims that treating those experiences as instances of abstract rights mischaracterizes them'. See also Mark Tushnet 'The Critique of Rights' (1994) 47(1) *Southern Methodist Law Review* 23. However, while Matsuda refers to Tushnet in her article, she does not refer specifically to 'An Essay on Rights'. Matsuda does, however, cite Peter Gabel and Duncan Kennedy's 'Roll Over Beethoven', which makes similar claims to Tushnet on the topic of rights. As such 'Roll Over Beethoven' will be used to critique Matsuda's interaction with cls1 and rights.
[75] Matsuda, above n 3, 325.
[76] Arthur D Austin, *The Empire Strikes Back: Outsiders and the Struggle over Legal Education* (New York University Press, 1998). Gordon, 'Law Review And The Modern Mind', above n 2.
[77] Matsuda, above n 3, 345.
[78] Ibid 326.

> Crits argue that the law is hypocritical, and they deconstruct it to expose the hidden values it refuses to acknowledge. Then, after taking us into the wilderness and leaving us there, they zoom off in their BMWs and Jaguars to continue their class struggle against hierarchy and privilege.[79]

In his critique of cls1, liberal James Gordon, highlights the same issues with elitism in cls1, but offers no engagement or potential ways to work through this. Conversely, throughout the article Matsuda offers a pragmatic approach with her focus on how cls1 could fix itself. As the title implies the reparations needed can be gained by looking to the bottom and engaging with minority scholars. Matsuda takes cls1 to task on the 'standard' critiques levelled at it and how meaningful interaction with minority scholars would allow a progression past this:[80]

> The standard critique of critical legal scholarship paints the movement as non-programmatic, over-idealized, inaccessible, cynical, anti-rational, and nihilistic. This critique is made artfully from and inartfully from without the movement. CLS[1] theorists acknowledge the validity of at least parts of the critique, and strive for a transcendence that, as yet, remains illusory … A bottom-up perspective would both inform the CLS[1] movement and help it transcend the standard critique. Reference to this alternative intellectual tradition would help move CLS beyond trashing into the next stage of reconstruction.[81]

In Matsuda's proposed method, the expansion of cls1 to not only acknowledge but engage and repair its relationship with minority scholars, would achieve a transcendence and what the author believes would be the next logical step for cls1. Matsuda proposes 'reconstruction', drawing reference to trashing, and creating an antonym for deconstruction.[82] Matsuda alludes to the need for reconstruction in her introduction when praising cls1 for their ability to deconstruct, likening them to termites within trees of law, before identifying that no one is engaging with the sawdust discarded when they're done.[83] The author provides a clearer

[79] Gordon, 'Law Review And The Modern Mind', above n 2, 269.
[80] Matsuda, above n 3, 330.
[81] Ibid 330-331.
[82] See Introduction.
[83] Matsuda, above n 3, 330.

definition later in the article when highlighting the lack of positive development and instead the 'emphasis of CLS[1] literature on detailed deconstruction of existing legal concepts, rather than on reconstruction of new concepts and strategies';[84] Matsuda continues that 'critical legal scholars stumble in depicting Utopia'.[85] The author's approach benefits from being seen in two distinct ways. First as highlighting the need for cls1 to engage with minority scholars and second as offering a prescriptive outcome including a 'message of hope and inspiration' that will come from this.[86] Whilst the former part of Matsuda's approach is compatible with the existing cls1, the latter and its "reconstruction" sits at odds with the existing cls1 literature.[87]

The incompatibility in Matsuda's approach can be seen in Peter Gabel and Duncan Kennedy's 'Roll Over Beethoven'.[88] Whilst Matsuda makes reference to 'Roll Over Beethoven' in her introductory footnotes, it is first as part of the general dump of cls1 works which critique rights, and then later with reference to its exclusive language barriers.[89] In another footnote Matsuda does includes a quote from Peter in 'Roll Over Beethoven', which touches on the cls1 critique of rights,[90] but lacks any engagement with the resolution he and Duncan reach several pages later.[91] For example, Peter states that '[t]hey [rights] don't exist. They have no existence. They are shared, imaginary attributes that the group attributes to its members that don't in fact exist. It's a hallucination'.[92] When questioned by Duncan as to "why" people believe the hallucination, Peter responds, '[b]ecause in the pain of our isolation we become attached to the utopian content in legal imagery. This is why I think it's dream-like'.[93]

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[84] Ibid 345.
[85] Ibid; see, eg, Kennedy, *Hierarchy*, above n 48, 136. Kennedy presents a cls1 Utopian proposal; see generally Samuel Moyn, *The Last Utopia* (The Belknap Press, 2010).
[86] Matsuda, above n 3, 249.
[87] *Contra* Roberto Mangabeira Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso, 2015). However, see this thesis' focus on the approach taken by Duncan Kennedy and not Unger.

[88] Peter Gabel and Duncan Kennedy, 'Roll Over Beethoven' (1984) 36(1/2) *Stanford Law Review* 1.
[89] Matsuda, above n 3, 330 nn 30, 342.
[90] Matsuda, above n 3, 331 nn 31.
[91] Gabel and Kennedy, 'Roll Over Beethoven', above n 88, 36.
[92] Ibid 34.
[93] Ibid 36; See Tushnet, 'The Critique of Rights', above n 74, 26-27 on the issue of rights and isolation.

Before concluding this section of 'Roll Over Beethoven', Peter responds to Duncan's question of whether there's any point in trying to get people their rights.[94] Peter's response is nuanced, arguing that this question is too simple, stating:

> every time you bring a case and win a right, that right is integrated within an ideological framework that has as its ultimate aim the maintenance of collective passivity. *That doesn't mean you don't bring the case – it means you keep your eye on power and not on rights*.[95]

There is a clear impasse here with how the Crits and minority scholars view and interact with rights. Although Matsuda engages broadly with the benefits of rights and their historical use for good,[96] she overlooks the key point relating to passivity and individuality, which disrupts her method of reconstruction and "good" rights. This does not mean that Matsuda doesn't engage with the negative aspects of rights, but that even when faced with these truths she, like fellow minority scholar Derrick Bell, believes these structures can work towards a just end.[97] The paper's theme of interacting with minority scholars,[98] those at the bottom, however, is a clear and evident critique that cls1 should have heeded. Unfortunately, its conflation with Matsuda's focus on rights, detracts from her insights analysing issues of race, specifically the post-World War II treatment of Asian Americans.[99] Instead, Matsuda's reconstruction Utopia, presents as conforming to the hallucination outlined in 'Roll Over Beethoven'.[100]

[94] Gabel and Kennedy, 'Roll Over Beethoven', above n 88, 36.
[95] Ibid (my emphasis).
[96] Matsuda, above n 3, 338.
[97] Ibid 192, citing Derrick A Bell, *Race, Racism, and American Law* (Little Brown and Company, 1981).
[98] Matsuda, above n 3, 349.
[99] Ibid 373-388.
[100] Gabel and Kennedy, 'Roll Over Beethoven', above n 88, 34.

2. *Patricia J Williams – Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*

'Looking to the Bottom' demonstrates some clear critiques of cls1, rejecting a continued area of cls1 focus: rights. While 'Looking to the Bottom' offers challenges in its desire for a utopia, it does so without engaging deeply with the specific cls1 reasons for their critique of rights. And to some extent this theme continues in Patricia Williams' 'Alchemical Notes'. Positioning her argument differently to Matsuda, Williams highlights similar issues within cls1, but uses allegorical stories and her own personal history to anchor the analysis. The crossover in themes between 'Looking to the Bottom' and 'Alchemical Notes' is such that read together the pair complement each other, strengthening the individual calls for a bottom-up reassessment of cls1. By itself, the power of Williams' reflective style leads to an effective structural analysis of cls1, specifically through the allegorical story 'The Brass Ring and the Deep Blue Sea'.[101] The story begins the article and touches on the cls1 history, positioning it in relation to both law and society more broadly.[102] It is through this allegorical story that Williams outlines image of cls1's relationship with law, non-law, and ignorance of those outside of law, which will be used by this thesis to map cls1 works as the *Geography of cls1*. However, before this, Williams' 'Alchemical Notes' will be briefly addressed.

Thematically Williams addresses several important ideas in 'Alchemical Notes'. Similarly to 'Looking to the Bottom', 'Alchemical Notes' is primarily about rights. As Williams outlines, it is 'an attempt to detail my discomfort with that part of CLS[1] which rejects rights-based theory, particularly that part of the debate and critique which applies to the black struggle for civil rights'.[103] It is also about grass-roots membership and the need to look to the bottom.[104] Williams spends more time up-front identifying the benefit of the cls1 position

[101] Williams, 'Alchemical Notes', above n 4, 401-402.
[102] Ibid.
[103] Ibid 404.
[104] Ibid 402.

on rights, but clearly arguing why this is not always applicable or viable for people of colour.[105] Williams discusses her experiences as a young lawyer in Los Angeles,[106] her reflections on finding an apartment in New York at the same time as Peter Gabel,[107] and her historical position as both a lawyer and the great-great-granddaughter of a woman sold into slavery to a lawyer.[108] In the latter reflection, Williams addresses very real and positive aspects of rights: 'this failure of rights discourse, much noted in CLS[1] scholarship, does not necessarily mean that informal systems will lead to better outcomes. Some structures are the direct products of people and social forces who wanted them that way'.[109] The result of this powerful rhetoric is a stance that can challenge the rights critique by Gabel and Kennedy,[110] through a tangible and personal perspective that was not as evident in Matsuda's argument.[111]

'Alchemical Notes', also lays the foundation for Williams' titular concept of alchemy.[112] The term, which Williams uses again in her 1991 book *The Alchemy of Race and Rights*,[113] is initially a way for the author to convey the multiplicity of influences and factors that make up an individual; an idea of intersectionality before Crenshaw coined the term several years later.[114] The term isn't fully developed until Williams' book, but her description of it there provides retrospective insight into the way the author approached the issue of rights in 'Alchemical Notes':

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[105] Ibid 404-405.
[106] Ibid 402-403.
[107] Ibid 406.
[108] Ibid 420.
[109] Ibid 423.
[110] The "critical" nature of this narrative approach has been challenged, see especially Anne M Coughlin, 'Regulating the Self: Autobiographical Performances in Outsider Scholarship' (1995) 81(5) *Virginia Law Review* 1229, 1259. Coughlin argues that the narrative approach conforms rather than rebels: 'the storytellers' opposition to law concludes by reaffirming the core values of our legal system'.
[111] *Contra* issues of Japanese American internment, but these were not addressed in the same way.
[112] Williams, 'Alchemical Notes', above n 4, 406.
[113] Patricia J Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991).
[114] See Kimberlé Crenshaw, 'Demarginalizing The Intersection Of Race And Sex: A Black Feminist Critique Of Antidiscrimination Doctrine, Feminist Theory And Antiracist Politics' (1989) 1989(1) *University of Chicago Legal Forum* 139.

> As I write, my editor at Harvard University Press is waging something of a struggle with the people at the Library of Congress about how this book is to be categorized for cataloguing purposes. The librarians think "Afro-Americans – Civil Rights" and "Law Teachers" would be nice. I told my editor to hold out for "Autobiography," "Fiction," "Gender Studies," and "Medieval Medicine." This battle seems appropriate enough, since for me the book is not exclusively about race or law but also about boundary. While being black has been the most powerful social attribution in my life, it is only one of a number of governing narratives or presiding fictions by which I am constantly reconfiguring myself in the world. Gender is another, along with ecology, pacifism, my peculiar brand of colloquial English, and Roxbury, Massachusetts. The complexity of role identification, the politics of sexuality, the infections of professionalized discourse – all describe and impose boundary in my life, even as they confound one another in unfolding spirals of confrontation, deflection, and dream. [115]

The lengthy statement by Williams on categorisation gets to the heart of the not-fully formed use of alchemy in 'Alchemical Notes'. The author's alchemical approach affects her interaction with topics including cls1 and rights, while also providing an example of the sheer number of intersecting aspects or "alchemical elements" that position and develop a perspective, most of which are subsequently discarded for one dominant title. Aside from this concept of alchemy, 'Alchemical Notes' and *The Alchemy of Race and Rights*, also share a connection through 'The Brass Ring and the Deep Blue Sea', which prefaces the book and begins the article. This thesis proposes that not only is 'The Brass Ring and the Deep Blue Sea' a valid and in-depth critique of cls1, but that in creating this allegorical world Williams has provided the tools to imagine a scale for cls1 works. This chapter will first give an overview of 'The Brass Ring and the Deep Blue Sea', before demonstrating the *Geography of cls1*.

In 'Alchemical Notes' 'The Brass Ring and the Deep Blue Sea' begins the article, with no introduction, aside from a subtitle: 'A Bit of CLS[1] Mythodology'.[116] The play on words foreshadowing the story's themes of clarifying cls1 myths and methodology. 'The Brass Ring and the Deep Blue Sea' is in two parts, part 'A The Meta-Story' and part 'B The Story',[117] with

[115] Williams, *Alchemy of Race and Rights*, above n 113, 258.
[116] Williams, 'Alchemical Notes', above n 4, 401.
[117] Ibid 401-402.

each part offering a different perspective of the same event. 'The Brass Ring and the Deep Blue Sea' appears in 'Alchemical Notes' exactly as it is been presented below:[118]

A. The Meta-Story

Once upon a time, there was a society of priests who built a Celestial City whose gates were secured by Word-Combination locks. The priests were masters of the Word, and, within the City, ascending levels of power and treasure became accessible to those who could learn ascendingly intricate levels of Word Magic. At the very top level, the priests became gods; and because they then had nothing left to seek, they engaged in games with which to pass the long hours of eternity. In particular, they liked to ride their strong, sure-footed steeds, around and around the perimeter of heaven: now jumping word-hurdles, now playing polo with the concepts of the moon and of the stars, now reaching up to touch that pinnacle, that fragment, that splinter of Refined Understanding which was called Superstanding, the brass ring of their merry-go-round.

In time, some of the priests-turned-gods tired of this sport, denounced it as meaningless. They donned the garb of pilgrims, seekers once more, and passed beyond the gates of the Celestial City. In this recursive passage, they acquired the knowledge of Undoing Words.

Beyond the walls of the City lay a Deep Blue Sea. The priests built themselves small boats and set sail, determined to explore the uncharted courses, the open vistas of this new and undefined domain. They wandered for many years in this manner, until at last they reached a place that was half-a-circumference away from the Celestial City. From

[118] The Brass Ring and the Deep Blue Sea is italicised in the original text.

this point, the City appeared as a mere shimmering illusion; and the priests knew that at last they had reached a place which was Beyond the Power of Words. They let down their anchors, the plumb lines of their reality, and experienced godhood once more.

B. The Story

Under the Celestial City, dying mortals called out their rage and suffering, battered by a steady rain of sharp hooves whose thundering, sound-drowning path described the wheel of their misfortune.

At the bottom of the Deep Blue Sea, drowning mortals reached silently and desperately for drifting anchors dangling from short chains far, far overhead, which they thought were life-lines meant for them.[119]

The title of the story cuts together two distinct images of aspiration and helplessness. First through the brass ring, an American colloquialism about striving for a goal, based on a challenge added to early carousel rides, where punters won if they reached and touched the brass ring.[120] With this image Williams presents the idea of succeeding within law, but constantly having to aspire further, or being unable to use law and to drown in the Deep Blue Sea. This image of constantly spinning and repetitively circling a prize, is then paired with an allusion to the phrase "Between the Devil and the Deep Blue Sea". Combining these Williams creates a unique idiom about law, which can be summed up as "to sink or spin" highlighting the unappealing nature of both locations. The two stories told under this title are relatively

[119] Williams, 'Alchemical Notes', above n 4, 401-402.

[120] Most references for the origins of this phrase are located online via user generated sites, such as Wikipedia. Some sources are given at World Wide Words, see: *Brass ring* (8 May 2004) World Wide Words < http://www.worldwidewords.org/qa/qa-bra4.htm >. There is a consistency in academic and peer-reviewed papers that use this phrase, generally it represents an aspirational goal or direction for one to take, however, no clear definition is given within papers using this term. The image of the carousel is prevalent in Williams' 'The Brass Ring and the Deep Blue Sea'.

short, demonstrating a perspective of how law and its interaction with cls1 can be understood from two different locations. Both stories take place within the same allegorical world, a literal reading of the title, where the brass ring is situated within a Celestial City, itself sitting atop the Deep Blue Sea.

The Celestial City is representative of the heavenly and sacred nature of law while the Deep Blue Sea represents a place for the layman. Williams creates this allegory to demonstrate the different worlds that those within and those outside of law occupy. The hierarchy between these groups is visually structured with those at the bottom being trampled by the effects of law but still reaching for it; those within the Celestial City are seemingly unaware or not concerned with those deep below. The Celestial City itself was built by priests who were masters of the 'Word' and 'Word Magic',[121] with Williams imagining the institution of law as a walled city. Her priests are lawyers and legal theorists, and their Word and Word Magic are the law. There is a depth to Williams' insight around this idea, not only that law is fortified and exclusive, but that those within it speak a different language. She continues the idea of fortification with the idea of Word-Combination locks that keep the gates sealed;[122] reiterating the necessity of a specific linguistic base to access the institution of law. This deterrent can also be read further, first that one needs the correct words to enter the City, but also the correct voice, ensuring that the "wrong" type don't have access.

Once inside the City's walls, Williams discusses the notion that priests can ascend within the City, moving to the status of Gods, rather than mere men of the cloth. These Gods move beyond the solemn nature of law and begin to play games. The Gods use other related concepts, represented by Williams as moons and stars, as play things, used to engage in Polo matches within the Celestial City. The games Williams describes invoke imagery of a celestial elite, but their meaning goes further than this, applying closely to the concept and relationship

[121] Williams, 'Alchemical Notes', above n 4, 401.
[122] Ibid 401.

of "Law and" jurisprudential movements. These movements are different to cls1, representing sensible and appropriate combinations like Law and Economics,[123] or Law and Society.[124] After outlining this tier of Priests-turned-Gods, Williams identifies a sub-group within them who don the garbs of pilgrims and leave the Celestial City: the Crits.

Williams describes the Crits leaving the City and in doing so finding something new, the 'Undoing Words'.[125] The connection to the various cls1 ideas of deconstruction, demystification, or Trashing can be seen in their discovery of the Undoing Words.[126] However, Williams argues that the power of the Undoing Words only lasts so long and so the Crits sail from the Celestial City across the Deep Blue Sea in search of new methods. Williams describes how as the Crits move farther from the City their power wanes and they decide to settle in a place she names 'Beyond the Power of Words'.[127] For Williams the status and journey of the Crits is clear. They did not come from the Deep Blue Sea, but were part of Celestial City, part of law. Their real power came when they challenged the hierarchy and left the City, discovering the Undoing Words, the ability to demystify law. However, similar to the concerns voiced by Gabel and Kennedy about cls1 being co-opted,[128] the power or even the novelty of demystification was seen to lose its impact. As the Crits moved further from their critiques on law, their relevance and impact slowed, and by 1995 had stopped.

'The Brass Ring and the Deep Blue Sea', is the foundation of 'Alchemical Notes', underpinning Williams' critique and offering the Crits a new location to renew their critical edge: at the bottom of the Deep Blue Sea. Williams highlights the issue with the direction of cls1 in Part B, of 'The Brass Ring and the Deep Blue Sea'. Again, reiterating the argument

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[123] See Chapter One, Part III The cls1 Eulogy, C The Rivals: cls1, Liberalism, and Law and Economics.
[124] See generally Susan S Silbey and Austin Sarat, 'Critical Traditions in Law and Society Research' (1987) 21(1) *Law and Society Review* 165, 173. This paper is a call-to-arms for Law and Society to engage more critically, positioning it (at least in 1986) as non-critical or "safe".
[125] Williams, 'Alchemical Notes', above n 4, 401.
[126] See Introduction.
[127] Williams, 'Alchemical Notes', above n 4, 401.
[128] Gabel and Kennedy, 'Roll Over Beethoven', above n 88, 4-5.

Matsuda put forth, Williams identifies the disconnection between where cls1 should be going and instead where it has gone. Despite this plea for a directional change from Williams and other minority scholars at the 1987 CCLS, the different opinions on rights led to an impasse and eventually the creation of Critical Race Theory in 1989.[129] Crenshaw outlines the direct impact of minority scholarship presented at the conference as instrumental in the development of Critical Race Theory:

> The conference was an important transitional moment. It moved to center stage a variety of debates about race both within CLS[1] and also within the academy more broadly. The conference clarified that an emergent collective existed that occupied a unique intersection, a space both within and between CLS[1] and liberal race discourses. We were of course aligned with CLS[1] in terms of its overall orientation toward the institutionalized reproduction of hierarchy. Yet it was in the moments of contestation over the racial contours of this commitment that efforts to further refine the race turn in CLS[1] became a viable intellectual project.[130]

As part of this challenge 'The Brass Ring and the Deep Blue Sea' can be understood as a foundational underpinning of this movement, with Derrick Bell referring to an earlier draft of the article when identifying himself and Williams as part of the 'outsider[s] in the academy'.[131] 'The Brass Ring and the Deep Blue Sea' is a story outlining why Critical Race Theory broke away from cls1, leaving one group of outsiders for another. This thesis' proposed use of 'The Brass Ring and the Deep Blue Sea', is not designed to detract from its historical status, but to repurpose the geography Williams created as a way to demystify cls1.

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[129] See, eg, Crenshaw, 'Twenty Years of Critical Race Theory', above n 70, 1263; David M Trubek, 'Foundational Events, Foundational Myths, and the Creation of Critical Race Theory, or How To Get Along with a Little Help from Your Friends' (2011) 43(5) *Connecticut Law Review* 1503.

[130] Crenshaw, 'Twenty Years of Critical Race Theory', above n 70, 1297.

[131] Derrick Bell, 'Strangers In Academic Paradise: Law Teachers Of Color In Still White Schools' (1985) 20 *University of San Francisco Law Review* 385, 392-393; Andrew W Haines, 'The Critical Legal Studies Movement and Racism: Useful Analytics and Guides for Social Action or an Irrelevant Modern Legal Scepticism and Solipsism?' (1987) 13(4) *William Mitchell Law Review* 685, 685-690.

V. THE GEOGRAPHY OF CLS1

The final part of this chapter proposes the repurposing of 'The Brass Ring and the Deep Blue Sea' as a way to demystify cls1. In a similar approach to the *Critical Legal Studies Family Tree* and the passive-haunting of cls3, this final act of demystification is based on the categorisation and relation between individual works. The purpose of this cls1 demystification is to present a way to categorise cls1 works without creating value judgements about "good" or "bad" pieces. Given the deliberate non-doctrinal and non-prescriptive approach of cls1, individual works should be engaged with as either effective or not-effective for the particular purpose they are being used for. For example, Duncan Kennedy's *Legal Education and the Reproduction of Hierarchy: A Polemic against the System*,[132] is a more appropriate and useful text to critique the pedagogical and structural hegemony of a law school than 'Roll Over Beethoven'.[133] In this example the application of the texts is excruciatingly clear, however, given the wide-berth and countless texts considered as cls1, this is not always the case.

The use of a singular title be it Critical Legal Studies, or this thesis' choice of "cls1" implies that the works under the title relate or engage similarly with certain topics or each other. Whilst this might be true of other jurisprudential approaches,[134] cls1 deliberately eschewed this implication. For example, in 'A Bibliography of Critical Legal Studies', the authors clearly identify the wide-ranging topics, authors, and the non-exhaustive nature of the bibliography and cls1 more broadly:

> Critical Legal Studies [cls1] embraces disciplines other than law, and … many Critical Legal Studies [cls1] articles cut across traditional legal categories … [w]e have made no attempt to define what CLS[1] is. The CLS[1] movement has been generally concerned with the relationship of legal scholarship and practice to the struggle to create a more humane, egalitarian, and democratic society. CLS[1] scholarship has been influenced by a variety of currents in contemporary radical social theory, but does not reflect

[132] Kennedy, *Hierarchy*, above n 48.
[133] Gabel and Kennedy, 'Roll Over Beethoven', above n 88.
[134] See Silbey and Sarat , above n 124.

> any agreed upon set of political tenets or methodological approaches. Quite the contrary, there is sharp division within the CLS[1] movement on such matters. CLS[1] has sought to encourage the widest possible range of approaches and debate within a broad framework of a commitment to democratic and egalitarian values and a belief that scholars, students, and lawyers alike have some contribution to make in the creation of a more just society.[135]

The articles and books within the bibliography demonstrate this breadth, ranging, for example, from Anthony Chase's 'Aspects of Extraterritorial Criminal Jurisdiction in Anglo-American Practice'[136] to William Clune III and Patrick Hyde's 'Final Offer Interest Arbitration in Wisconsin: Legislative History, Participant Attitudes, Future Trends'.[137] While this diversity exemplifies the potential and reach of cls1, it simultaneously mystifies the relationship between these works, their relationship to law, and their relationship to non-law. While this mystification is compounded by the death of cls1, it was a critique levelled while it was still alive. In her identification and responses to "standard" critiques of cls1,[138] Mari Matsuda engages directly with this issue:

> Subjects such as the public-private distinction, the relative autonomy of law, or the reductionist critique of Marxism are summed up and thrown out in a few lines, as if to an exclusive audience of insiders. The articles cite and build upon each other, culminating in Roberto Unger's piece in the Harvard Law Review. Unger does not cite to anyone. He does not have to, because anyone who can understand the article is necessarily familiar with its antecedents.[139]

Although it is not labelled as such, Matsuda's articulation of this standard critique is that cls1 is mystified, relying on an assumed knowledge that excluded those without this base.[140] Whilst

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[135] Duncan Kennedy and Karl E Klare, 'Bibliography Of Critical Legal Studies' (1984) 94(461) *The Yale Law Journal* 461, 461-462.
[136] Anthony Chase, 'Aspects of Extraterritorial Criminal Jurisdiction in Anglo-American Practice' (1977) 11(3) *The International Lawyer* 555.
[137] William Clune III and Patrick Hyde, 'Final Offer Interest Arbitration in Wisconsin: Legislative History, Participant Attitudes, Future Trends' (1981) 64(3) *Marquette Law Review* 455.
[138] Matsuda, above n 3, 342.
[139] Ibid.
[140] Cls1 is not alone with this predicament see, eg, Karl Marx and Friedrich Engels, *Correspondence 1846-1895: A Selection with Commentary and Notes* (Dona Torr trans, Lawrence and Wishart, 1936) 510-511. In a letter from Friedrich Engels to Franz Mehring, July 14 1893, this same issue is addressed: 'We all, that is to say, laid and were bound to lay the main

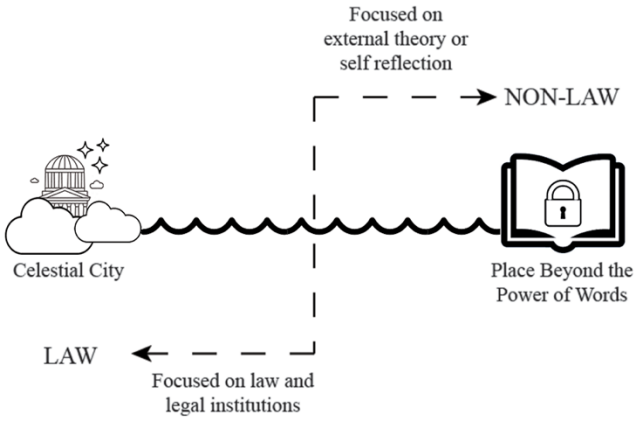
Matsuda's proposed solution is to engage more with those at the bottom and consciously read more minority and feminist writing,[141] this is a solution for the continuation of cls1, rather than a way to posthumously demystify it. Instead, to address its posthumous demystification, this thesis offers the *Geography of cls1* as a way to help clarify the works through a scale, acting as a visual decipher for cls1. However, unlike the earlier proposed demystifications, the *Geography of cls1* is deliberately less prescriptive and offered as a tool to determine the individual usefulness of a work within certain parameters. This thesis proposes that this tool is a step towards avoiding the constricted and regressive nature of cls3, by engaging and building meaningfully off cls1 texts for contemporary issues in law and legal theory.

To create the *Geography of cls1*, this thesis draws from the geography presented in Williams' allegorical story, 'The Brass Ring and the Deep Blue Sea', repurposed as a two-point scale between the Celestial City (law) and Beyond the Power of Words (non-law), with cls1 works being plotted in relation to either point. Following Williams' argument, the diagram is linear, deliberately not engaging with those at the bottom.

emphasis at first on the derivation of political, juridical and other ideological notions ... [b]ut in so doing we neglected the formal side – the way in which these notions come about – for the sake of content. This has given our adversaries a welcome opportunity for misunderstandings'. This letter demonstrates a realisation, rather than an option to rectify the issue, coming 10-years after Marx's death.

[141] Matsuda, above n 3, 343-344.

Figure 1. Geography of cls1



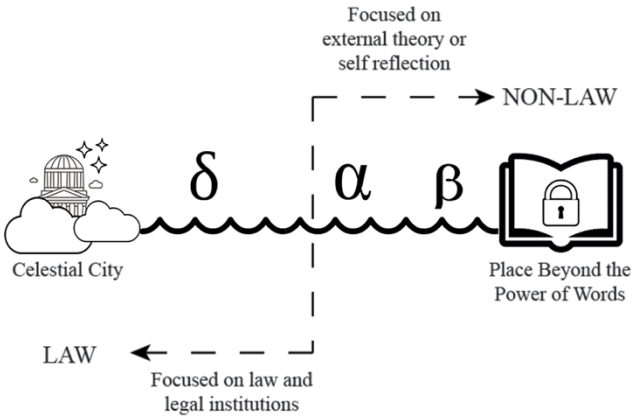
Following Williams' narrative, the works positioned closer to the Celestial City are those concerned with aspects of law: legal education, legislation, cases, and judicial decisions. Those cls1 works positioned closer to Beyond the Power of Words engage more dominantly with non-law: social theories, introspective accounts of Critical Legal Studies, or aspects outside direct engagement with law. The proposed benefit of such a scale is the visualised clarification of dominant methods or subjects in cls1, making no value judgement on the pieces themselves. This act of categorisation allows threads to be connected and themes to be drawn from sometimes seemingly disparate works, utilising the complex and mystified collection of cls1.

For example, 'Roll Over Beethoven' (represented by alpha)[142] would sit slightly off centre towards Beyond the Power of Words. The article engages with legal issues, including a discourse on rights,[143] however, its dominant cls1 approach to cls1 places it further away from the Celestial City. Similarly, despite Williams' argument against the direction of cls1, 'Alchemical Notes' (represented by beta) would be positioned much closer to Beyond the

[142] Greek letters used to differentiate the papers, any other individual marker would be fine.
[143] Gabel and Kennedy, 'Roll Over Beethoven', above n 88, 26-36.

Power of Words. The article's assessment of cls1 and personal account of rights takes a non-law approach to a legal subject, and while its aim is to ultimately benefit those at the bottom of the Deep Blue Sea, the article engages primarily with cls1. In contrast, Kennedy's *Legal Education and the Reproduction of Hierarchy* (represented by delta) would sit closer to the Celestial City. Kennedy's 'little red book'[144] is a direct response to the Celestial City, critiquing law schools and the hierarchies they perpetuate within law more broadly.[145] The use of social theory, specifically the idea of hierarchies is itself repurposed to be primarily focused on law.[146] Placing these three examples on the scale provides an even distribution, but not much of a connection between the works themselves.

Figure 2. Geography of cls1: Example



[144] E Dana Neacsu, 'CLS Stands For Critical Legal Studies, If Anyone Remembers' (1999-2000) 8(2) *Journal of Law and Policy* 415, 417.
[145] Kennedy, *Hierarchy*, above n 48.
[146] Ibid.

This example demonstrates that although these three works are "cls1", their combination is unlikely to yield a coherent argument to a current issue in law or legal theory. The use of the *Geography of cls1* is as a tool to order and relate cls1 works to law, non-law, and one another. This scale does not remove the need to read and position the works individually but offers a visual representation of the relationships between the works and these two poles. This thesis posits that this minor demystification helps to distinguish the applicability, use, and understanding of individual cls1 works, aiding the demystification of cls1, and in turn Critical Legal Studies more broadly.

VI. Chapter Summary

Cls1 faced a raft of criticism and critique, spanning surface level interactions to deep and engaged solutions to perceived problems. By addressing selected liberal, cls2, and broad Critical Legal Studies critiques of cls1, this chapter has demonstrated these various levels of interaction. Arguably, it was the pre-Critical Race Theorists, Mari Matsuda and Patricia Williams who most stringently critiqued cls1 at the 1987 Conference on Critical Legal Studies. The real focus of their papers, the impasse both theorists reached in terms of rights, aided the creation of Critical Race Theory in 1989. However, the general engagement, specifically seen in Williams' allegorical story 'The Brass Ring and the Deep Blue Sea', offered a unique perspective on cls1.

The repurposing of Williams' geography in 'The Brass Ring and the Deep Blue Sea', is the final act of demystification this thesis provides, and is relatively specific in comparison to the demystifications outlined in the *Critical Legal Studies Family Tree* or the passive-haunting of cls3. However, it is proposed that this *Geography of cls1* underpins the earlier critique of cls3 as constricted and regressive, presenting a way in which to apply and relate the vast cls1 texts to contemporary issues in law and legal theory. At its most basic level the

Geography of cls1 proposes a way of visually relating cls1 works to law, non-law, and one another. The *Geography of cls1* aids the grouping of relevant texts and challenges the way in which this "dead" area is thought of and (re)used.

Conclusion

Demystifying Critical Legal Studies

"It's Justice," said the painter at last. "Ah, now I recognize it," said K., "here's the bandage over the eyes and these are the scales. But aren't these wings on the ankles and isn't the figure running?" "Yes," said the painter, "I was commissioned to paint it like that. Actually it is Justice and the goddess of Victory in one." "That's hardly a good combination," said K. with a smile. "Justice has to be motionless or the scales will waver and there's no possibility of a correct judgment."

Franz Kafka – The Trial

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I. Argument Summary

This thesis demonstrated the demystification of Critical Legal Studies beginning with two broad claims. First that Critical Legal Studies offers a way to demystify law, and second, that Critical Legal Studies is itself mystified. To address these claims this thesis identified four core issues: the position of Critical Legal Studies in the law school, the multifaceted nature of the term "Critical Legal Studies", two different US-based Critical Legal Studies, and the inability to reconcile the breadth of original Critical Legal Studies works. This thesis proposes that each of these issues adds to the current mystified status of Critical Legal Studies and that addressing them aids its demystification.

This thesis responds to the identified issues with a series of unique engagements. In relation to the position of Critical Legal Studies within the law school, this thesis proposed the framework of a legal-subculture. Framing Critical Legal Studies as a legal-subculture gave understanding to the Crits as opposed to law school hierarchies, while working within these same structures. The position of a legal-subculture was used to differentiate the association Critical Legal Studies has with the 1960s counterculture, presenting their work as influenced by this movement, rather than a counterculture itself. The legal-subculture also clarified the relationship Critical Legal Studies had with the dominant legal culture, using the structure of a moral panic to frame the responses to Critical Legal Studies from those in the dominant legal culture.

In response to the varied approaches titled "Critical Legal Studies", this thesis proposed the *Critical Legal Studies Family Tree*. By building on the geographic segmentation presented by Costas Douzinas and Adam Gearey, and Margaret Davies' broad/narrow divide, the *Family Tree* presents a visual mapping of the various Critical Legal Studies. Addressing the death of the narrow US-based Critical Legal Studies "cls1", led to the identification of the posthumous cls3. Significant focus was placed on this death and what it meant for Critical

Legal Studies, especially its current mystified status. By addressing the history of cls1 at Harvard Law School and its rivalry with Law and Economics, it was argued that cls1 died and what continued under its name was regressive and constricted.

A critical review of accessible materials that defined "Critical Legal Studies" demonstrated that the death of cls1 does not feature in its common history. This thesis argued that the result of overlooking this event compounded the current state of mystification. This relationship was unpacked by arguing that cls1 passively-haunts cls3. The proposed "passive-haunting" was framed by differentiating Jacques Derrida's method of 'hauntology'[1] and the impact of factors surrounding the creation of this term; notably, Francis Fukuyama's "end of history" thesis.[2] The passive-haunting, however is one specific to the relationship between cls1 and cls3, created by this thesis to understand cls3's constricted and regressive nature. Building on Duncan Kennedy's statement that cls1 was as "dead as a doornail" a literary interpretation was presented through Charles Dicken's *A Christmas Carol*.[3] Focusing on the period between death and the return of a ghost as a passive-haunting. This thesis argued that the lack of engagement by cls1 scholars after the cls1-death, ensured cls3 continued in its passively-haunted state.

To demonstrate the difference between cls1 and the passively-haunted cls3, Chapter Four engaged in a comparative reading of Peter Gabel and Duncan Kennedy's 'Roll Over Beethoven'[4] – thematically paired with Jerry Anderson's 'Law School Enters the Matrix: Teaching Critical Legal Studies'[5] – to demonstrate the vast differences in potential readings

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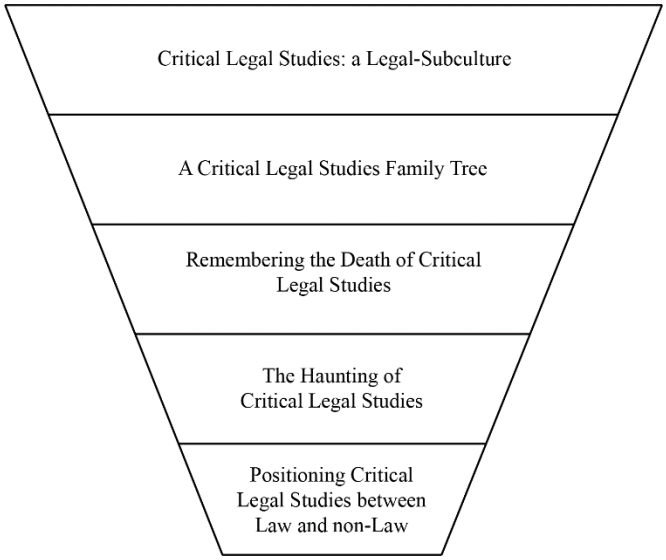
[1] Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International* (Peggy Kamuf trans, Routledge, 1994) [trans of: *Spectres de Marx* (first published 1993)].
[2] Francis Fukuyama, 'The End Of History?' (1989) 16 *The National Interest* 3; Francis Fukuyama, *The End of History and the Last Man* (The Free Press, 1992); Francis Fukuyama, 'The "End Of History" 20 Years Later' (2013) 30(4) *New Perspectives Quarterly* 31.

[3] Charles Dickens, *A Christmas Carol and Other Christmas Writings* (Penguin Classics, 2003).
[4] Peter Gabel and Duncan Kennedy, 'Roll Over Beethoven' (1984) 36(1/2) *Stanford Law Review* 1.
[5] Jerry L Anderson, 'Law School Enters The Matrix: Teaching Critical Legal Studies' (2004) 54(2) *Journal of Legal Education* 201.

and depth of analysis. Having presented a demystification of cls3, this thesis then engaged directly with cls1 and the critiques it had received. Within the critiques of cls1, it was argued that only other Critical Legal Studies offered engaged critiques that could be used to identify issues in cls1, rather than merely a general dislike or distrust from liberal and conservative perspectives. Focusing on Patricia Williams' 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights'[6] this thesis created a scale to position cls1 works based on their relationship to law and non-law. It was proposed that this scale allowed the (re)use of cls1 works on contemporary legal issues, by finding and positioning their approach without value judgements on the author, their institution, or publication. This final act of demystification concluded the thesis.

Figure 1. Demystification Overview



[6] Patricia J Williams, 'Alchemical Notes: Reconstructing Ideals From Deconstructed Rights' [1987] 22 *Harvard Civil Rights – Civil Liberties Law Review* 401.

II. Future Research

This thesis approached Critical Legal Studies as a whole, highlighting distinct issues that affected and led to its mystification. While this approach ensured a broad range of analyses, it also exposed areas to be explored, which fell outside the scope of this thesis. A brief list of these subjects and approaches will be discussed. Starting with the choice to focus broadly on the works of Duncan Kennedy. This choice was due to Kennedy's foundational position in cls1, his breadth and depth of works, as well as his own and others' commentary on him. However, the same approach taken in this thesis could have been applied to Roberto Unger, Morton Horwitz, and Robert Gordon. These early-Crits also demonstrated individual bodies of work which can been traced through the history of Critical Legal Studies, each illuminating different elements touched on in the thesis, rather than providing a significantly different timeline. There is also a plausible "what if" scenario with regards to Mari Matsuda and Patricia Williams, i.e. if the Crits had heeded their warnings in 1987. This hypothetical expansion of cls1 rather than the creation of Critical Race Theory, could theoretically have kept cls1 alive, albeit with a different core focus.

The choice to frame Critical Legal Studies, and cls1 specifically as a legal-subculture, was chosen with reference and differentiation to minor jurisprudence. However, there is scope to develop the application of a minor jurisprudence to Critical Legal Studies as a whole (both broad and narrow sides of the *Family Tree*), specifically using the articles presented at the 2016 symposium.[7] Similarly, the application of Jacques Derrida's hauntology to cls1 would offer different insights to the passive-haunting.[8] In both instances, however, these approaches would be better applied after the groundwork undertaken in this thesis.

[7] Christopher Tomlins, 'Law As …IV: Minor Jurisprudence in Historical Key. An Introduction' (2017) 17 *Law Text Culture* 1.
[8] Derrida, above n 1.

Two modes of historical analysis identified in this thesis could be expanded on in future research. First, the creation of the *Critical Legal Studies Family Tree* focused on the narrow US-based cls1 and cls3. However, there are good grounds to use this genealogy as a way to explore the relationships and influences of the various Critical Legal Studies on one another, addressing their histories in the same way this thesis investigated cls1 and cls3. Second, the framework presented in Chapter Two which critically analysed content on Critical Legal Studies, could be expanded and applied to existing categories of books on jurisprudence, or a greater number of law dictionaries and sources online.

This thesis argues that the majority of these areas were deliberately not included because they will benefit by coming after this demystification of Critical Legal Studies, using it as a foundation for future critique. There are also several different areas which can build directly from the work undertaken in this thesis. Primarily, having identified and argued that Critical Legal Studies is mystified, there is a conscious break from this mystification. As such, this thesis does not identify as, or conform to cls3. Instead, the research presented in this thesis offers a foundation for future work that acknowledges the history of the narrow US-based Critical Legal Studies as including both cls1 and cls3. In turn this acknowledgment allows a progression past the constricted and regressive cls3 works, placing cls3 as an historical mode of Critical Legal Studies. Whether or not this presents a new era of Critical Legal Studies is yet to be seen. However, this thesis proposes that its demystification aids the possibility of moving forward.

IV. CONCLUDING THOUGHTS

In a 1985 article addressing a new wave of cls1 scholars, Duncan Kennedy mused on what this influx and change could mean for cls1:

> If an intellectual movement lasts and grows, there will be oldtimers and youngsters, and tensions between them. The oldtimers created the movement. They feel proprietary. In one way, they would just as soon that no one else join it, now that it is a secure, club-like arrangement with a niche in the consciousness of the outside world; on the other hand, it's flattering to be sought out by others. When the others are properly respectful, we oldtimers tend to interpret them as correctly recognizing that we are the best. When they are uppity, we question their motives for crashing our party.[9]

Some 35-years after Kennedy's musings, Critical Legal Studies still has similar barriers in place, what Williams may have called Word-Locks,[10] and what this thesis proposed were the signs of a legal-subculture. The acts of investigation and demystification that underpin this thesis had Kennedy's dichotomy in mind, walking a very fine line between 'uppity' and 'flattery'. While certainly not a disinterested piece, this thesis proposes it has undertaken a considered investigation into a legal phenomenon, that created a space (albeit imperfectly) for critical engagement within law schools and law more generally. Whether uppity or respectful, this thesis has presented ways to re-consider and re-engage with an important mode of critical jurisprudence.

In the introductory chapter, this thesis stated that its aim was to engage thoughtfully but critically with the often misunderstood and marginalised Critical Legal Studies. With initial observations arguing that Critical Legal Studies was often seen as too amorphous and disparate to provide useful tools for contemporary legal analysis. However, instead of shying away from these descriptions, this thesis has outlined ways where these factors strengthen a Critical Legal

[9] Duncan Kennedy, 'Psycho-Social CLS: A Comment On The Cardozo Symposium' (1984-1985) 6 *Cardozo Law Review* 1013, 1016.
[10] Williams, above n 6.

Studies approach. The approach taken by this thesis was not definitive or doctrinal, but instead presented a series of rational arguments, each offering a perspective on demystifying Critical Legal Studies.

This thesis was written in response to the mystified nature of Critical Legal Studies. Not only how it was mystified, or ways it could be demystified, but in response to the inaccessibility of its tools and insights. For more than a decade, Critical Legal Studies presented a continuing, viable, left-wing mode of legal-critique. It shaped and influenced critical legal thinking around the world, highlighting ideological and structural issues in parliaments, courts, and law schools. While cls1 declined in the early-1990s, the hegemonic issues it critiqued did not. The demystification of Critical Legal Studies presented in this thesis is a way to (re)engage with this significant body of work, providing critical tools to critique contemporary structures of law.

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