

*Critique and Law: The Problematic Legacy of the Frankfurt School**

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It is not easy for a European, in Europe, to grasp all the important nuances and ramifications of the American Critical Legal Studies Movement. This is not merely a matter of having to rely on published materials, without easy access to the 'inside dope' of who said what and with what results at summer camp or conference. Much more importantly it is a matter of different intellectual traditions and traditions of legal and political practice. At the level of legal traditions, a British writer can rely on common strands which mark a real and important Anglo-American legal style and history. Yet the context (very varied though it may be) of American legal education - a context which informs the problems, practice and thinking of CLS in the United States so deeply - is very different from the context (cultural, political, professional) of legal education in Britain. This means that some of the specific practical targets of CLS in America may seem a little remote from British concerns. In particular, the sharp divide between the elite law schools and some other sectors of legal (and non-

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legal) *éducation*, which in its acute symbolisation of hierarchy (cf. Kennedy 1982) raises such agonised examination of the nature and possibility of law school radicalism, finds no exact parallel in British legal education.

Coupled with this, but underlining the differences, are contrasts in political culture and practice. In a European context where socialist practice and theory are an established everpresent component of political life and public debate and where socialist thought is an important part of the heritage of political thought, the justification for developing a type of critical thought and practice so centrally focussed (as CLS appears to be) on that particular slice of life represented by the law school and the lawyer's practice may seem less than obvious. The tendency in a European context may be to see the most important avenues of change and influence as quite outside these locales, and indeed to view them as very much less important foci for action than CLS appears to do. The temptation for an outsider is to see CLS as an attempt to offer a substitute for a much broader based (but perhaps presently almost non-existent) movement of social critique; a law school movement pretending to be a radical social movement. Phillip Johnson's hostile comment that critical legal writing "provides a way of sounding like a radical when you don't know how to be one" (Johnson 1984:249) needs to be answered. Equally, however, this in no way alters the fact that CLS has inspired and provided a unifying framework for profound and immensely beneficial changes in the style and scope of much contemporary legal scholarship. Further, it is of the greatest significance that, despite the differences between European and American context just referred to, there seems a developing convergence between the concerns of American CLS and those of the much more fragmentary, and certainly less extensive, literature of critical (or at least "anti-expository") legal scholarship which has expanded in Britain and other European countries over the past decade or so¹, despite relatively little direct cross-influence between European and American developments.

I have no doubt that the emergence of the CLS Movement is of profound present importance for legal scholarship. Whether it can permanently change the nature of legal education and scholarship, whether it can fundamentally change (or reciprocally influence) legal practice, and whether it

will have wider political importance are interrelated and presently unanswered questions. What interests me particularly at present is that these questions raise general issues about the nature, rationale and consequences of "critique" which are identical with ones faced by the Frankfurt School founders of European Critical Theory in the 1930's. The most fundamental questions about the epistemology, methods, politics and prospects of critical legal studies are essentially rooted in ones which the central theoreticians of the Frankfurt School faced and discussed at length. This paper seeks to offer a few tentative remarks on some of these general issues about the nature of "critique" but in a deliberately limited frame of reference bounded primarily by the writings of Max Horkheimer, the foremost theoretician of critique in the most active period of the Frankfurt School's existence. As such, the concerns of the paper are an offshoot of a long term continuing project of re-exploring the roots of legal theory in social theory.

Linking the concerns of Horkheimer with those of CLS is not an attempt to show there is nothing new under the sun² but to explore what to an outsider is a puzzling feature of CLS: its explicit adherence through its title and frequent citations of Horkheimer, Marcuse, Habermas etc. to the tradition of European Critical Theory (ECT) but its very limited explicit confrontation with the literature of ECT to deal with problems that literature poses about the ultimate foundations of critical theory and practice. Kennedy and Gabel's (1984) "Roll Over Beethoven" (whose form of presentation no doubt conforms to Kennedy's determination to puncture pomposity and play down abstractions as much as possible) is actually one of the few CLS papers I know which confronts squarely some of these central "foundation problems" - about the role and nature of theory as such, about the significance of general concepts in critical analysis, about the philosophy of praxis, about the relevance of utopian thought, about the fundamental aims of critique, about its epistemological foundations - in a way which shows just how difficult and important they are. Yet the fact that these issues have been faced before in ECT is not adverted to in that paper; let alone is there any mention of the solutions (if any) on offer in ECT literature.

Undoubtedly CLS does have a highly ambivalent attitude to social theory - regarding it simultaneously as (i) the ubiquitous

inspiration and context of critical legal studies and (ii) a reservoir of often unhelpful and even dangerous abstractions and generalisations which ignore or deny the diversity of contexts of critical practice and the "radical underdetermination" (Gordon 1984:100-1) of social conditions and legal forms. It seems to me that both views of theory are understandable and in part justifiable but that the ambivalence of their juxtaposition is ultimately stultifying to CLS and that the apparent contradiction between them needs to be removed. Much is often left unsaid in CLS literature about the exact theoretical foundations of the enterprise, or quite generalised allusions are made to large and often undifferentiated bodies of theory ("Marx", "Lukacs", "Habermas", "Foucault", "The Frankfurt School"). Consequently one is sometimes left with the impression that along with a (proper) rejection of over-broad empirical generalisations and historical laws in social theory, there is also a rejection of any need for a theory of critique. By such a theory I mean a fully elaborated collective view of what the epistemological and ontological foundations of critical legal studies are and what its methods, strategies and objectives should be. If, however, the consequence of this apparent lack of theoretical consensus is that CLS is a coalition united only in opposition to legal orthodoxy, it may be that for all its present vitality its long term future is uncertain. Like the Realist "coalition" in legal thought earlier in this century it may achieve vast success through its explicit organisation around experienced discontents of legal practice, education and scholarship, but be fated for eventual disintegration/absorption because of a lack of an explicit rigorous theoretical foundation from which to withstand the co-optative pressures of legal orthodoxy.

CLS's apparent ambivalence towards theory can, I think, be analysed into five distinct issues which recur in the literature and which can be seen as perhaps its most important theoretical uncertainties.

1) Can the relationship between "law" and "society" be grasped in general terms at all? Is there any place for general empirical social theory of law which seeks to explain or generalise about law as a social phenomenon? Once "the constitutive role of law in social relationships" is recognised so that law and society are "inextricably mixed" (Gordon

1984:106, 107) and once the need to understand law and legal practices in their specificity is accepted what place remains for general theory about law in society? Gordon's answer is that there are certainly "short- and medium-run stable regularities in social life, including regularities in the interpretation and application, in given contexts, of legal rules" but "none of these regularities are (sic) *necessary* consequences of the adoption of a given set of rules" (Gordon 1984:125). Though this clarifies a particular CLS viewpoint it doesn't make clear where the limits of social theory relevant to CLS lie or how far CLS depends on such theory. This is important because it raises a larger question of what kind of empirical research on law is useful to CLS (cf Trubek 1984). David Trubek is surely right to argue that what he calls the doctrinal-empirical dichotomy is false (ibid 587). Rejection of the dichotomy is implicit in asserting the constitutive role of law in social relationships. But equally, some clear stance on the nature of empirical research on law and the relationships it constitutes is necessary if we are to begin to understand how, to what extent, and under what constraints law constitutes these relationships.

2) Are prescriptions/descriptions of the "Good Society" - utopian conceptions of a desirable social order towards the promotion of which critique is aimed - necessary or valuable to CLS? A favourite object of attack by critics of CLS is the apparent vacuity and impenetrability of such portraits of the Good Society as are offered in unguarded or visionary moments by CLS writers. But equally the lack of concern apparently shown by CLS for specification of ultimate aims or objectives or desirable future states is an object of criticism as well. There seems to be a lack of unanimity among CLS writers themselves about the value of utopian prescriptions (cf. Kelman 1984:343-347). A related though less abstract problem is whether CLS is necessarily restricted to negative critique or whether critique can and should be aimed at positive, constructive ends (which can be defined in some operational manner) and, if so, what kind of ends.

3) Lying behind both of the above is an even more fundamental issue, addressed directly in the Gabel-Kennedy discussion (1984), of the value of any general concepts whatsoever. Kennedy expresses distrust of any concept or idea (including his own "fundamental contradiction", Gabel's

"unalienated relatedness" and the notion of "rights") which can impose (force) meaning on situations other than those in which it was formed. On the one hand is a determination that critique should be of and for the specific and concrete and avoid all trace of reifications. On the other is Gabel's understandable worry that if we take all this as seriously as Kennedy seems to suggest, we cannot really talk about anything at all.

4) How is CLS's agenda of inquiry - its specific choice of topics for research - to be determined and justified? As Kelman puts it: "Surely the objects of our studies of justificatory micropractices are not *utterly* random (at least, implicitly, I must have judged that the Model Penal Code's defenders were more socially significant than phrenologist) but we make little *systematic* attempt to locate precisely our objects of study, whether as opinion leaders who affect others, fair representatives of a (powerful or not) class, or spokespeople for an epoch" (Kelman 1984:337).

5) Finally, what is the basis of validity of CLS's central method "trashing" (or in ECT terms - immanent critique or ideology critique)? Closely related: what is the epistemology of CLS work? What, if anything, counts as "truth" here (cf Trubek 1984:599-600)? What is the basis of validity of the knowledge obtained? What sort of knowledge of law and society is it?

Notes from Horkheimer's Agenda for Critical Theory

In the rest of this paper I want to try to explore how far these issues about critical theory and practice are confronted and resolved in some of Horkheimer's writings which seem particularly relevant because of their general concern with the foundations of critical theory and practice.

1) What is the Relationship between Empirical Social Theory (and Empirical Research) and Critical Practice?

Horkheimer distinguishes critical theory from other forms of theory (which he terms traditional theory) (Horkheimer 1976). It is clear that much social theory (especially of a deterministic

or positivistic kind, and including the more deterministic varieties of Marxism) would fall within the category of traditional theory. In essence traditional theory is theory which seeks general or covering scientific laws. Transposed to the human or social sciences it fails to recognise the fundamental involvement of the subject (observer, researcher) with the object studied (society, social relations). Its emphasis on formulating systematically linked sets of propositions is a consequence of the assumption or assertion that ultimately the social world is a finished object awaiting comprehension. Theory, it is "traditionally" assumed, must stay close to the facts, relying on "the gathering of great masses of detail in relation to problem", so that it presents itself as "stored up knowledge" economically organised (Horkheimer 1976:206, 208). Equally, however, it tends towards a purely mathematical system of symbols (especially in natural science but increasingly in the social sciences too). Theory seeks prestige from the natural science model - gaining authority (and marketability!) from (i) its ostentatious reference to vast amounts of data collected by methods not unlike "industrial production techniques" (cf. Horkheimer 1976:208) and (ii) the impersonality and objectivity of mathematical models and formulations.

Critical Theory *does not deny the utility of traditional theory*, but asserts its radical incompleteness (Horkheimer 1976:224; Gebhardt 1978:372). The effect of traditional theory is to deny full recognition of the place of the active individual subject in the seemingly objective social world studied. The individual tends to appear passive; the social object appears active. The essence of critical theory is thus to see subject and object as not identical but inseparable. Thus the findings of traditional theory and the empirical researches which are claimed to underpin it have to be reinterpreted continuously. Because subject and object are inseparable there can be no objective standpoint; all viewpoints on social life are partial and limited, reflecting the subject's specific standpoint.

The interesting question is how such partial perspectives are to be overcome. The Hegelian solution is through final transcendence of the subject-object differentiation, subject and object becoming one; the incorporation of diverse perspectives in the unfolding of the universal, absolute Idea - a single perspective which eventually unites all people. "The closer our

knowledge comes to this limit, the closer it is to truth" (Held 1980:178). The problem of this idealism is that it asserts or assumes that the reconciliation of partial perspective into universal truth is achievable by some kind of unfolding transcendent reason, above historical contingency. While, for Horkheimer too, critique is to be undertaken in the name of and by the yardstick of "reason", Hegel's idealist critique must be relieved of its complacent tendencies by turning it into materialist critique since "in genuinely critical thought explanation signifies not only a logical process but a concrete historical one as well" (Horkheimer 1976:222).

What this involves is highly complex and often obscure but two aspects are important. The first is summed up in Horkheimer's dictum that the overcoming of partial perspectives "always occurs in the thought of particular historical men" (quoted in Held 1980:179): i.e reason cannot fly free of the historical conditions in which people reason. The second, best expressed (much later) by Marcuse, is that if reason is the basis of critique, critique must also drive "reason itself to recognise the extent to which it is still unreasonable, blind, the victim of unmastered forces" (Marcuse 1960:xiii). Clearly "reason" is being used in two senses here. The reason *of critique* is a reason which seeks to fulfill the interaction and interdependence of individual subject and social object - a reason which sees each individual as a moral person implicated in social life, and all social life as to be judged according to the moral demands of the autonomy and fulfilment of each individual subject. By contrast the reason *to be critiqued* is, as critical theory later elaborated, above all the instrumental, technological, positivistic and deterministic forms of reason which imprison the individual subject as a passive observer of "society" - the object which controls him or her.

Many problems remain with any such formulation but it seems clear to me that in such a view *all* types of existing empirical social theory (and the empirical studies of social phenomena which they organise or attempt to integrate) are relevant to the project of critique. To hold otherwise is to adopt an unnecessarily blinkered view and to debar critique (and CLS) from developing any knowledge beyond isolated studies, with no indication of how far (if at all) possibilities of generalising from them exist. Critical theory is, however, a special kind of theory, distinct from most social theory. Much

social theory falls into Horkheimer's category of traditional theory and serves, at best, as "raw material" (Gebhardt 1978:372) for critique. Without it, however, critique is hardly possible, lacking both the necessary basic material and perspectives with which to work.

My tentative view is that even this conception of the utility of social theory is too limited. Horkheimer's image of empirical social theory and its possibilities was undoubtedly coloured by his view of Marxist analysis as the highest achievement of such theory. As Horkheimer and the other major Frankfurt School theorists came to see the inadequacies and rigidities of orthodox Marxist theory it seems understandable that critical theory appeared to them as the only type of theory which could offer genuine enlightenment about social life. It refused to subscribe to scientific "laws of history" which experience shows history breaking all the time. It sought different methods which would distance it from the failed gods of social theory's orthodoxies. Suppose, however, that we do not assume that because social theory offers no wholly satisfactory perspective on social life it consists only of "failed gods". Social theory, in its widest sense, can be seen as made up of specific social theories in tension and conflict, each representing a particular partial (though more or less fully elaborated) perspective on social life. These perspectives are not likely to be reconciled in some Hegelian synthesis before the tribunal of transcendent Reason. What is really involved is a conflict between them, fought often bitterly with the weapons of history and experience. The vision of the reconciliation of these perspectives is the vision of *science*; of achieving knowledge that transcends partial perspectives - an aim which is perhaps ultimately unrealisable but certainly necessary. Acceptance of it denies relativism. We can work (struggle) towards what for want of a better term we must call "truth" even if we shall never attain it. Social theory is essential to this project.

From this standpoint critical theory is a *different* kind of theory altogether. Essentially, critique is the method by which knowledge proclaimed as "true" is revealed as partial and critical theory is a theory of method. Understood in this way critical theory is a very special kind of social theory or perhaps not social theory at all. Its task is to expound and justify the methods and rationale of critique. Since critique is a permanent

task - in my view a necessary responsibility of all serious scholars - critical theory is concerned with what may be relatively timeless matters, including moral and philosophical issues which concern the responsibilities of the individual to his/her society, and the moral worth of a social order judged against the possibilities of realising the autonomy and authenticity of individuals within it. By contrast empirical social theory, centrally concerned with the interpretation of continually changing social experience in history, must be in constant flux. Its perspectives are elaborated, challenged, undermined and reformulated in a constant process according to the judgments of experience.

2) *On Utopian Conceptions in Critical Practice.*

The second theoretical uncertainty raised earlier in relation to CLS concerns the place of utopian prescriptions or descriptions of the "Good Society". How far is it necessary for critique to be organised around explicit conceptions of what is desirable, of some ultimate aims to which critique is addressed in order to build a better future? My conception of critique as essentially method, and critical theory as a theory of method, suggests that critical practice as such cannot, and has no need to, specify particular social arrangements to be aimed at. In so far as critical theory offers prescriptions beyond the narrowly methodological these are likely to be moral prescriptions. As such they cannot be turned by logical deduction into the form of a specification of practical social arrangements. This can be done only by political calculation in specific historical circumstances.

Horkheimer, and most Frankfurt School writers, refused to elaborate any utopian vision of future society, of the possibilities of mankind, or of fundamental human nature. Horkheimer even related this refusal to the traditional Jewish prohibition on naming or describing God and paradise (Jay 1973:56). It seems to me that a refusal to predict or speculate about the future empirical possibility of particular social conditions is wholly consistent with the position that critical theory is essentially a moral theory and a theory of method. Such predictions could only come, if at all, from empirical social theory. It seems equally consistent with this position that critical theory should have a clearly elaborated moral

vision. The difficulties of working towards this are plainly considerable but it can be argued that it is the necessary unifying core of critical theory. ECT failed to develop such a consistent vision. Perhaps this was because the escape from Marxist determinism absorbed so much intellectual energy and because the experience of Fascism and the failure of working class movements was so profoundly demoralising and induced a pervasive pessimism in so much Frankfurt School writing. Whatever the causes, this failure may account for the fragmented and elusive character of so much of the positive content of ECT.

3) Concepts, Priorities and "Truth" in Critical Practice

The three remaining issues of theory raised earlier in relation to CLS can be discussed together in the context of Horkheimer's version of ECT. This is because most of the central ideas which are relevant have already been mentioned and the remaining aspects which are important here are all interconnected.

It is surely significant that Gabel's and Kennedy's (1984) discussion largely revolves around the utility and coherence of concepts (especially the "fundamental contradiction", "unalienated relatedness", rights) which are not concepts of empirical social theory (organising or conceptualising specific aspects of historical experience) but moral, "utopian" or transcendental (ahistorical) ideas. In other words they are the kind of concepts we should expect to find at the heart of critical theory on the basis of the arguments earlier stated in this paper. Much of the Kennedy-Gabel debate is thus about the utility of utopian prescriptions - the issue discussed in the previous section. Insofar as it goes beyond this it seems to me to raise the general questions of the kinds of knowledge which critical practice can create and rely upon, and the kind of principles which should guide the selection of priorities in critical work. Hence fundamental epistemological questions are hinted at. Thus our three remaining CLS theory issues are closely interrelated, centring on the question of what counts as knowledge (truth?) revealed or created through critique or presupposed by it. The answer to this question surely determines the form (e.g. the kind of concepts) in which such knowledge can be expressed and organised. It should also determine how priorities in critical practice are to be set since

the choice of priorities depends on (i) what is taken to be reliable pre-existing knowledge and (ii) the kinds of knowledge sought through critical practice.

For Horkheimer the reason of critique - the reason on which critique relies - cannot be isolated from practice itself. Theory and practice are inseparable (praxis) just as object and subject are. Since theory cannot be isolated from practice - action in particular historical conditions - it can never have an existence outside those conditions. There can thus never be a finished picture of reality; no uncovering of immutable truths. The truth of all knowledge is a truth to be judged in the light of the historical conditions in which that knowledge exists. Thus even ideas which obviously reflect the standpoint of interest groups or historical periods other than our own and which we unhesitatingly consider wrong may have much to teach us - a truth value for their time and for their adherents which is not destroyed but only reinterpreted in the light of other experience or interests. Critical theory's view that there are and can be no absolute truths - no ultimate reality - but that knowledge can nevertheless progress through the reinterpretation of partial "truth" in historical experience seems to me a fruitful one. One of the means of such progress, as Horkheimer and others demonstrated, was through "immanent critique" or ideology critique involving the critique of a phenomenon or a set of beliefs or ideas by testing the practices associated with them against the structure of truth claims made about them by participants in those practices. Such a strategy provides the implicit or explicit justification also of CLS's "trashing" strategies (cf. Kelman 1984).

Nevertheless the intellectual legacy of Marxism caused serious problems for this conception of knowledge in ECT. As Martin Jay puts it: "Critical Theory had a basically insubstantial concept of reason and truth, rooted in social conditions and yet outside them, connected with praxis yet keeping its distance from it" (Jay 1973:63). The problem was that the Marxist distinction between true and false consciousness was retained, which carries with it the question of which social groups can have privileged access to true consciousness. Again, in conformity with Marxist tradition, Horkheimer saw this consciousness carried in the practice of progressive social groups - ultimately the proletariat. The experience of the 1930's made it harder and harder to maintain such a view (cf.

Horkheimer 1976) and Horkheimer's ultimate position seems to be that the possibility of enlightenment exists in all mankind, and depends on the will to realise a rational society. All this seems a rather unnecessary detour, however, from the fundamental insight that truth cannot rise above the knowledge given in specific historical experience. The result of the detour is, however, apparently to affirm what is in my view an equally important position: that although interests mediate experience and hence fundamentally influence the acquisition of knowledge, there is no reason to assume that interests control knowledge, so that one can read off a person's world view from his or her interests.

If we take the view advanced in this paper that critical theory (unlike empirical social theory) is essentially a moral theory and a theory of method the problem of "truth" can be stated somewhat differently. While empirical social theory ultimately moves (should move) towards a vision of scientific truth (albeit such truth is ultimately unattainable) with its progress tested in historical experience, critique as method and critical theory as a theory of method are concerned only with methodological rigour and the maintenance of a moral vision. The method of immanent critique needs only the truth claims immanent in the objects (ideologies, practices) it studies. Beyond that, what critique is concerned with is not truth as such but moral insight and methodological appropriateness.

Conclusion

These ideas from critical theory are necessarily at a high level of abstraction and, in some respects, appear to inhabit a different world of discourse from much CLS writing with its appropriate and necessary emphasis on the concrete legal situation. Nevertheless, it seems to me that in their direct confrontation with questions about the nature of theory, the relationship between critical practice and social theory, and the problem of "truth" in relation to critical practice they deal with matters which are (and are recognised to be) fundamental to the enterprise of critical legal studies. Equally the uncertainties which remain in formulations such as Horkheimer's indicate that in various important respects these matters of theory are

not entirely settled by any means. If critical legal scholarship is to build the strength necessary to endure and grow such issues of theory deserve continuing attention.

Notes

1. For a sample of such material from Britain see Fryer et al 1981, Sugarman 1983, Cotterrell 1984, Twining 1986, Fitzpatrick and Hunt (forthcoming).
2. Robert Gordon (1984:102) has after all, disarmingly suggested we should accept as an insignificant fact that CLS's understanding of the nature of critique is unoriginal. Interestingly, however, in his person listing of intellectual antecedents he mentions no Frankfurt School figures.

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