

# REVISITING THE INDETERMINACY THESIS OF CRITICAL LEGAL STUDIES

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*Vagueness is an ineradicable feature of our everyday language, and its pervasiveness in the law is the most commonly invoked reason for thinking that the law is indeterminate. Though we seem to have a firm intuitive grasp of what it means to describe, for example, compensation as "fair" or a form of behavior as "harassment," we are hard-pressed to decide in borderline cases whether a certain amount is truly fair or a particular act genuinely constitutes harassment.<sup>1</sup>*

## ABSTRACT

*While the mainstream liberal legal scholarship maintains a formalistic approach that view the judge as one who objectively and impersonally decides cases by logically deducing the correct resolution from a definite and consistent body of legal rules, critical legal studies (CLS) characterizes this formalist image of the judge as a myth and proclaims that law is radically indeterminate to such an extent that authoritative legal norms permit multiple outcomes in adjudication. In CLS understanding, the texts of law therefore have no definite meaning apart from the contexts and one single interpretation of the texts is as good as any other. The present paper critically appraises this indeterminacy thesis of CLS to argue that this thesis can be used as a powerful denial of rhetorical claims made by mainstream legal literature since judicial decisions are not necessarily a mechanical and neutral act, sometimes they are also the result of moral/political choice of the judge concerned. The paper also argues that once we quantitatively test indeterminacy thesis in a given jurisdiction, it helps us understand how the legal system or any particular area of law within that system works there. Any picture of radical indeterminacy, once discovered therein, can even belittle the very foundation of the system.*

## I. INTRODUCTION

Although it is said to be a direct descendant of American legal realism,<sup>2</sup> the critical legal studies (CLS) movement,<sup>3</sup> beginning its journey in 1977, went far

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<sup>1</sup> Kutz, C. L., "Just Disagreement: Indeterminacy and Rationality in the Rule of Law", 103(4) (1994) *Yale Law Journal*, pp. 997-1030, at p. 1004.

<sup>2</sup> Tushnet, M., "Critical Legal Studies: An Introduction to its Origins and Underpinnings", 36(4) (1986) *Journal of Legal Education*, pp. 505-17, at p. 505. For

beyond the premises of American realism and provoked more debates and generated more opposition from the orthodox legal scholars.<sup>4</sup> With Duncan Kennedy, David Trubek, Mark Tushnet, Mark Kelman, Karl Klare, Morton Horowitz, Peter Gabel, and Roberto Unger as the founding and central

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historical connection between legal realism and CLS, see White, E., “From Realism to Critical Legal Studies: A Truncated Intellectual History”, 40(2) (1986) *Southwestern Law Journal*; pp. 819-44; Binder, G., (2010) “Critical Legal Studies”, in Patterson, D. (ed.), *A Companion to Philosophy of Law and Legal Theory*, West Sussex: Blackwell Publishing, pp. 267-78; Boyle, J., “The Politics of Reason: Critical Legal Studies Theory and Local Social Thought”, 133(4) (1985) *University of Pennsylvania Law Review*, pp. 685-780; Russell S. J., “The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy”, 18(1) (1986) *Ottawa Law Review*, pp. 1-24. However, Standen claims that CLS, in its philosophy and methodology, stands not as an extension of legal realism but as its antithesis. See Standen, J. A. “Critical Legal Studies as an Anti-Positivist Phenomenon”, 72(5) (1986) *Virginia Law Review*, pp. 983-98.

<sup>3</sup> For basic concepts and assertions of CLS, see Freeman, A. D. ‘Truth and Mystification in Legal Scholarship’, 90(5) (1981) *Yale Law Journal*, pp. 1229-37; Davis, M. H., “Critical Jurisprudence: An Essay on the Legal Theory of Robert Burt’s Taking Care of Strangers”, 3 (1981) *Wisconsin Law Review*, pp. 419-53; W.J. Samuels, W. J., and Schmid, A.A., *Law and Economics: An Institutional Perspective*, Boston (1981); Forester, J. “A Critical Empirical Framework for the Analysis of Public Policy”, 3(1/2) (1982) *New Political Science*, pp. 33-61; Singer, J. W. “The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld”, 6 (1982) *Wisconsin Law Review*, pp. 975-1060; Simon, W. H. “Legality, Bureaucracy, and Class in the Welfare System”, 92(7) (1983) *Yale Law Journal*, pp. 1198-269; Rhode, D. L. ‘Equal Rights in Retrospect’, 1(1) (1983) *Law and Inequality*, pp. 1-72; Hyde, A. “The Concept of Legitimation in the Sociology of Law”, (2) 1983 *Wisconsin Law Review*, pp. 379-426; Unger, R. M. “The Critical Legal Studies Movement”, 96(3) (1983) *Harvard Law Review*, pp. 561-675; Anthony Chase “Left on Rights: An Introduction”, 62(8) (1984) *Texas Law Review*, pp. 1541-62; Kairys, D. “Law and Politics”, 52(2) (1984) *George Washington Law Review*, pp. 243-62; Hutchinson, A. C. and Monahan, P. J. “Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought”, 36(1/2) (1984) *Stanford Law Review*, pp. 199-245; Kairys, D. (ed.), *The Politics of Law: A Progressive Critique*, New York, 1998; Kelman, M. *A Guide to Critical Legal Studies*, Harvard, (1990); Forester, J. *Critical Theory, Public Policy, and Planning Practice: Toward a Critical Pragmatism*, New York, (1993); Marquez, J. “Law of Equality before Equality was Law”, 49(4) (1999) *Syracuse Law Review*, pp. 1137-90. For a bibliography of CLS, see Kennedy, D. and Klare, K. E. “A Bibliography of Critical Legal Studies”, 94(2) (1984) *Yale Law Journal*, pp. 461-90.

<sup>4</sup> For origin and development of CLS, see Schlegel, J. H. “Notes Towards an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies”, 36(1-2) (1984) *Stanford Law Review*, pp. 391-411. Also see Tushnet, M. ‘Critical Legal Studies: A Political History’, 100(5) (1991) *Yale Law Journal*, pp. 1515-44, at p. 1523-37.

members of this movement,<sup>5</sup> the CLS school of thought, even in its early years, posed a threat for the orthodox liberal legal scholarship.<sup>6</sup>

The CLS movement arguably “enjoyed a period of organizational momentum” until 1994.<sup>7</sup> But this movement, once characterized as “the most influential progressive movement in legal studies”,<sup>8</sup> is now said to have already lost its ways.<sup>9</sup> It is therefore generally shared by many scholars that CLS movement has gone into deep decline.<sup>10</sup> This however does not necessarily mean that all the ideas associated with CLS deserve to be archived now.<sup>11</sup> The present paper therefore apprises one of the central tenets of CLS - law is radically indeterminate to such an extent that authoritative legal norms permit multiple outcomes in adjudication.<sup>12</sup>

## II. CLS VIEWS ON LEGAL INDETERMINACY

Liberalism offers itself as “a government of laws, and not of men” and believes that “the courts are the means by which the values of liberty, autonomy, and rights-based equality can be preserved when impinged by the political system”.<sup>13</sup> The crits<sup>14</sup> however attack “these ideas as apologias for the status quo and argued that these ideas were complicit in masking the deep

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<sup>5</sup> Blalock, C. “Neoliberalism and the Crisis of Legal Theory”, 77(4) (2014) *Law and Contemporary Problems*, pp. 71-103, at p. 72.

<sup>6</sup> Faced with the challenges of CLS, critics asserted that CLS movement “distort the purposes of law and threaten its very existence”. See Fiss, O. M. “The Death of the Law?”, 72(1) (1986) *Cornell Law Review*, pp. 1-16, at p. 1.

<sup>7</sup> Hackney, J. R. *Legal Intellectuals in Conversation: Reflections on the Construction of Contemporary American Legal Theory*, New York and London, 2012, at p. 9.

<sup>8</sup> Hunt, A. “The Big Fear: Law Confronts Postmodernism”, 35(3) (1990) *McGill Law Journal*, pp. 507-40, at p. 508.

<sup>9</sup> According to Blalock, “schools of thought and theoretical movements that once appeared vibrant no longer do”. See *supra* note 5, at p. 82

<sup>10</sup> In his textbook on jurisprudence, Brian Bix discusses about CLS in the past tense. See Bix, B. *Jurisprudence: Theory and Context*, Sweet & Maxwell, 2009, pp. 231-5.

<sup>11</sup> However, one critic comments that “CLS no longer seems to possess a voice comprehensible to anyone outside its own small circle”. See Neacsu, E. D. “CLS Stands for Critical Legal Studies, If Anyone Remembers”, 8 (1999) *Journal of Law and Policy*, pp. 415-53, at p. 416.

<sup>12</sup> Fischl, R. M. “Some Realism About Critical Legal Studies”, 41(3) (1987) *University of Miami Law Review*, pp. 505-32, at p. 513. Also see O’Brien, S. M. “Fisch vs. CLS: A Defense of Critical Legal Theory”, 23(1) (1992) *Journal of Social Philosophy*, pp. 64-73.

<sup>13</sup> *supra* note 5, at 74.

<sup>14</sup> The label “crits” is applied commonly to CLS scholars. See Gordon, R. W. “Law and Ideology”, 3(1) (1988) *Tikkun*, pp. 14-18 and 83-87, at p. 14.