ANXIETY AND AFFIRMATION: CRITICAL LEGAL STUDIES AND THE CRITICAL "TRADITION(S)"

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INTRODUCTION

What is dead, and what remains vital in critical legal thought?

"Teaching from the Left" offers an opportunity to think about the present state of Critical Legal Studies (CLS). This essay seeks to rewrite the standard account of CLS and to present a tradition of critical legal thinking that is very much alive.

The standard history presents CLS as beginning when a group of American scholars "split" from the more orthodox branches of legal scholarship which had, among other things, all too often failed to take issues of race and gender into account. These scholars then specialized their theories and split again into either feminist or critical race theorists, rendering CLS somewhat redundant, merely a stage through which legal scholars passed.

However, once one looks outside of the American context, one realizes that this is a very partial account. CLS never went away. From the perspectives of scholars in Australia, Britain, and South Africa, CLS remains a popular front that has always held together (perhaps not always happily) a variety of intellectual positions as it works through its constitutive anxieties.

It is indeed this constitutive anxiety that allows one to make a tentative claim to the "coherence" of a critical position. What underlies the peculiar longevity of CLS is an anxiety towards its own constitution, which in certain senses, carried forward from the anxieties of realist scholars towards their place in legal history. For CLS, however, it becomes ambivalence about the very idea of tradition itself. The tradition cannot become a dead weight of the past that restricts vision, or stifles an epiphany or satori where the pattern can be glimpsed. The movement of CLS away from its American beginnings may be something of a transformation of CLS into a tradition of critical thought, but anxiety remains: in Australian, British, and South African[1] forms of critical legal thought, anxiety is

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1. It has not been possible in this essay to describe the work of South African CLS scholars. For an engagement with the future of CLS in South Africa, see generally JOHAN WILLEM GOUS VAN DER WALT, LAW AND SACRIFICE: TOWARDS A POST-APARTHEID THEORY OF LAW (2005); Karin van Marle, *The Literary Imagination, Recollective Imagination and Justice*, 14 SA PUBLIEKREG

the imprimatur of an authentic thinking that constitutes itself around the need to start again, to think afresh, and to disturb its own axioms.

Critical legal thought is the recovery of the impulse of CLS, and its elaboration in different contexts and peculiar material circumstances. This Article thus proposes a distinction between critical legal studies, and critical legal thought. Critical legal studies marks a starting point, an intervention in conventional legal scholarship. CLS did not leap fully formed into the world, like Monkey from his egg. Its own beginnings can be found in the radicalization and redefinition of a prior critical tradition. Critical legal thought develops beyond its American origins. Although the definition of critical legal thought remains problematic, this essay could be read as notes towards an initial understanding. Critical legal thought shares a constitutive anxiety with critical legal studies and a concern with re-inventing law through radical critique. Indeed, the different intellectual pedigrees help explain why American and European scholars have such different ideas concerning the importance of history and continuity within CLS scholarship. The European trajectory traces the beginnings of CLS to Marxist theories of law. The Americans return to the Realist adventure in legal theory,[2] and see it as a break with the past, an opening of new paths.

This essay will sketch a genealogy of critical legal thought and trace the trajectories of its development. After an engagement with the beginnings of CLS, we will turn to examine its transformations into "Brit Crit" and "Oz Crit" before returning to some more general observations about the constitutive anxiety of critical legal thought.

IN AMERICA WHEN THE SUN GOES DOWN: A BRIEF HISTORY OF CLS

We can briefly examine the American starting point of CLS through reference to two key legal scholars in American Realism: Felix Cohen and Roscoe Pound.

For Cohen and Pound, the common law is to be judged from the perspective of the "now," by trying to understand its place in history. Pound's starting point is a nuanced approach to the supposed central achievement of nineteenth century jurisprudence: the separation of law and morals. The narrowness of this partition, although not without its benefits, allows for the "abdication of all juristic function in improving the law."[3] Reflecting the dominant *laissez faire* model of economics, law became a way of assuring freedom from restraints upon capitalist economic activities: law showed no interest in regulating the more rapacious and socially harmful activities of big business.

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137 (2000); Karin van Marle, *Law's Time, Particularity and Slowness*, 19 S. AFR. J. HUM. RTS. 239 (2003).

2. *But see* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 2 (1995) (describing American jurisprudential history as a repeated vacillation between formalism and realism).

3. Roscoe Pound, *The End of Law as Developed in Juristic Thought*, 30 HARV. L. REV. 201, 203 (1917).

Pound identified judicial activism as a central theme which positivistic jurisprudence had failed to address, arguing that all positivistic "schools" failed to realize the value of relationship and reciprocity. He traced this failure to the influence of Kant's "metaphysical jurisprudence," with its emphasis on formal freedom and individual will. However, this shortcoming of legal positivism could also be found in Bentham's utilitarianism and in the controlling ideas behind Roman law (at least as recovered and made influential by the school of historical jurisprudence). These schools and philosophers failed to identify the true genius of the common law. Whether one looks at the law of fiduciary obligations, of landlord and tenant, or of the Constitution, one finds that the law does not operate with the controlling concepts of individualism, but with mutual obligations—rights and duties created by legal relationships.[4]

This account of the law presupposes certain crucial themes and strategies. Before engaging these concerns, let us have a brief look at the work of Felix Cohen. Cohen's assertion that "[t]he good life is the final and indispensable standard of legal criticism"[5] is particularly resonant. Although the good life remains unknowable, it is necessary to affirm a moral vision. This affirmation is itself an ethical obligation. Its success can be judged by the extent to which it can "bring light to the foundations of our thinking."[6] The moral affirmation allows the development of a "critical attitude" which can weigh up the claims powerful social interests make on the law.

Ethics as evaluation and criticism cannot be squared with a blind adherence to rules or a fetishizing of logic as the sole guide for judicial reasoning. Although a decision necessarily contains the material that allows the rule to be correctly posited, Cohen argues that a legal decision can be read in a variety of ways.[7] Ultimately, a rule derived from the facts is a product of the interpreter's choice.[8] Thus, in a striking metaphor, "[l]ogic provides the springboard but it does not guarantee the success of any particular dive."[9] Alternatively, the decision can be considered a "dough" that can be kneaded into the desired shape.[10] The success of the "dive," the shape of the "dough," will be determined by the ethical vision that is brought to bear on the case. This approach rejects the possibility of a final "right" answer. There can be no definitive answers to the ethical questions life presents to law. Should a rich and a poor woman accused of theft be treated in the same way, when the former does it for the excitement of the act while the latter to feed her children? Should a rich plaintiff

4. *Id.* at 216–17.

5. Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 206 (1931) (citations omitted).

6. *Id.* at 207.

7. *Id.* at 216.

8. *Id.*

9. *Id.*

10. *Id.*

be treated in the same way as a poor plaintiff? The law must admit that it uses ethical criteria in resolving these questions.

Although the liberal economic doctrines of the nineteenth century have distorted the law, the genius of the common law can still be recovered. The common law contains within it resources that can be revived and utilized by those who define themselves differently from the dominant jurisprudential traditions and approach law with a set of political challenges and radical projects. This re-awakening of the law operates at both the doctrinal and philosophical levels. The most important obligation is to keep asking the questions necessary; to keep making the urgent demands, that are necessary; to separate and demarcate the present from the past. Thus, in their different ways, Pound and Cohen can be seen as forerunners of the school of thought that would later be dubbed Critical Legal Studies.

The work of Duncan Kennedy will be taken as representative of CLS. His work shows a continuation of the Realist concern with traditional legal theory and its reinvention. What is perhaps distinctive about Kennedy's contribution is his creative endeavour to articulate his own position: an anxious attempt to locate himself in the tradition. Our own location in history forces a confrontation with this "fundamental contradiction."[11] We must make ethical and political choices from within this profound dilemma, this anxious moment of reflection and imagination.

The tension between tradition and the individual talent also underlies the problems presented in Kennedy's *Freedom and Constraint in Adjudication*.[12] Although Kennedy is primarily concerned with developing what could be described as a critical phenomenology of judgment, his work appears to be informed by the wider anxiety of influence. He focuses on a conflict between "the law" and the author's existentialist decisions about how he wants cases to be decided. This existentialist position presents the world and law as that which resists desire. Kennedy argues that "we experience law . . . as a medium in which one pursues a project, rather than as something that tells us what we have to do."[13]

This approach takes Cohen's insight much further. For Cohen, the "ethical," or in the instant case, the "political," is a project—something to work towards, a passage that takes the interpreter through the law.[14] In Kennedy's approach, rules are not inductively derived from cases; instead, they are "verbal formulae" that drift in and out of consciousness, or become illuminated in

11. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 211–13 (1979) (discussing the fundamental contradiction inherent in the commonly-held belief among American legal scholars that "the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it").

12. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

13. *Id.* at 526.

14. *See id.* at 548–49 (discussing the "how-I-want-to-come-out" pole of the duality).

different ways when an issue presents itself.[15]

Viewed from the position of a more conventional jurisprudence, this exercise is unacceptable. The judge's job is to apply the rules without prejudice. The point, of course, is to show that this is not a realistic model. Although interpretation is constrained in some ways, it is also open to the personal desires of the judge. More precisely, the gray area of rules can be manipulated to influence the way in which the dispute is perceived, and hence resolved.[16] But Kennedy warns us not to underestimate the anxious, overwhelming weight of tradition. Accepting the court- and judge-centered work of American academics, he hails the generations of judges who have contributed to the collective wisdom of the common law.[17] Indeed, the influence of the judges is so pervasive that their voice appears as one's own. In this sense, a problem that was initially defined as a contrast between internal and external perspectives must be redefined. The tradition is already present *to the extent that one can talk at all.* If the individual can make these feelings present to consciousness, she may be able to distance herself from the tradition—but this is not a reliable strategy. Hope lies in the fact that tradition itself is a multiplicity of voices, some of which have been silenced, suppressed, or forgotten.

Generalizing Kennedy's insights, we could think of CLS as a movement in search of its own identity. In the dialogue with Peter Gabel,[18] for instance, the trouble with CLS is seen as an obligation to define itself and to have a "slogan." These marks of identification are limitations, even betrayals, of CLS's essential insights. CLS should perhaps not define itself at all: it should not even *have* an institutional history. But Gabel's concern can also be understood as a sign of the defining individualism of American CLS and its pervasive "anxiety of influence."[19] The authentic is marked by the extent to which it is not trapped or restricted by the past. This pervasive "anxiety of influence" is marked by the extent to which the movement must acknowledge its antecedents, but not become trapped or restricted by the past.

Critique demands that one always start again. Perhaps this is the "question that killed American Critical Legal Studies."[20] However, this approach is linked with a more fundamental dilemma: how can we create a critical body of thought that is not compromised by its own position and links with wider movements for social justice? Being "in and against" the tradition is a good start, but thought

15. *See id.* at 530 (discussing how the treatment of rules as autonomous entities independent of cases corresponds to the way in which legal rules are experienced in real life).

16. *See id.* at 523.

17. *Id.* at 550.

18. Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984).

19. *See generally* HAROLD BLOOM, THE ANXIETY OF INFLUENCE: A THEORY OF POETRY (2d ed. 1997) (arguing that all modern literary texts are a response to those that precede them).

20. Richard Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779 (1992) (reviewing MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987)).

must not settle into a series of rehearsed questions and fall into the inauthenticity that CLS set itself against.

The rise of feminist critical legal studies illustrates this anxiety as both a continuation and interruption of CLS. Drucilla Cornell's work is exemplary. Cornell has reworked the celebrated critical legal theory of indeterminacy from a feminist perspective. Her notion of recollective imagination is rooted in the refusal of the ideal schema or the totalizing account.[21] One's life is always one's own. It "is" to the extent that it is immersed in one's unique personal experiences. In its original development, the thesis stated that legal norms and rules are without foundation and their linguistic openness and inescapable conflict means that no universally acceptable "right answers" exist. For Cornell, this thesis must be understood in a more precise way. The argument is not that claims to identity or to the foundations of knowledge are illusory. Rather, the thesis must be reformulated to argue that the questions one can ask of an institution do not emerge from a transcendental or external viewpoint but come from within our own context. But no theory can render up the truth of context, because no given reality can find its truth in an account of its totality. Something in the real resists reduction to the ideal, and a key aspect of this something is its future-directedness, its orientation towards what is yet to be achieved, rather than what has already been realized. The real is fissured by and addresses its incomplete possibility.[22]

Cornell thus returns to the question of an unrefined and authentic life, rearticulating the existential thematic that runs throughout critical legal studies. CLS is refigured and forced to start again with a new agenda for critical thought. At the same time, there is an anxiety of belonging that expresses itself through a critique of the critical mainstream, and urges the creation of a new intellectual community. This body of ideas represents both a continuation and a break with CLS. The phenomenology of judgment that dominated the first wave of CLS becomes reconfigured around a much broader economy and a more plural encapsulation of the critical task, which now looks towards the gendered body. The location of bodies in their personal and impersonal histories comes to the fore and links critical thought with psychoanalysis, aesthetics and queer theory. British Legal Critique carries forward this same anxiety, and continues to rethink its essential terms.

21. DRUCILLA CORNELL, TRANSFORMATIONS, RECOLLECTIVE IMAGINATION, AND SEXUAL DIFFERENCE (1993).

22. *Cf.* DRUCILLA CORNELL, BETWEEN WOMEN AND GENERATIONS: LEGACIES OF DIGNITY 26 (2002) (discussing author's perception of herself in relation to her history, being influenced both directly and indirectly by the experiences of her mother and grandmother).

"BRIT CRIT"[23] OR THE CRITICAL LEGAL CONFERENCE

A longer chapter would attempt to articulate more thoroughly the links between American CLS, and the Critical Legal Conference (CLC) or Brit Crit.[24] Given the demands of this chapter, we will characterize this relationship as one of dis/continuity. Brit Crit can be read as a continuation of a certain disturbance within jurisprudence and a concern with the pervasiveness of the anxiety of influence. The Brits have to define themselves against a jurisprudential orthodoxy, but also against the American critical legal tradition[25] and determine a sense of intellectual coherence within the movement itself.

What are the peculiar anxieties of Brit Crits? From the beginning, CLC recognized its roots in a feeling of "dissatisfaction"[26] with the many injustices perpetrated by law as well as with the orthodox legal tradition that either explained away or ignored law's failures. This explicit fusion of political and theoretical agendas meant that British CLC never had the coherence of American CLS. One observer accurately described CLC as a "movement consist[ing] of a plurality of approaches and strategies to get at the power in the law."[27]

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23. There is a problem with "Brit Crit." Many of the scholars associated with this position are not British. Although some may have long association with British bad habits, others are resolutely non-British, or even anti-British. A promising area of study may attempt to define the bizarre heteroglot nature of this grouping. For example, as of the date of writing, one might be able to identify Americans, African-Americans, Asian-Americans, Latino/as, Irish, Asians, Canadians, African-Caribbeans, South Africans, Slovenians, Scots, Greeks, Finns, English, Australians, French, Indians, Pakistanis and Sri Lankans—if, indeed, one accepted these terms of nationality as useful or relevant in the first place. "British" ultimately signifies nothing more than a bastardy, a mixing together: brown beer, curry, dark summers and rain.

24. *See* Tim Murphy, *Britcrits: Subversion and Submission, Past, Present and Future*, 10 LAW & CRITIQUE 237, 245–76 (1999). It would be possible to depict the various positions as organized around certain central ideas. There are alignments around versions of feminism; groups of scholars who borrow explicitly from Marxism or Critical Theory; a defined tendency to queer studies; and other groupings who lean towards continental philosophy and psychoanalysis. There are also people working with semiotics, social and political theory and post-colonialism. These tendencies should not be seen as an exhaustive description, nor as mutually exclusive. Perhaps they represent a nexus, a grid across which the movement both coheres and falls apart. It is a movement to the extent that certain people might identify themselves with the loose title, without then going on to define membership or a set of clear objectives.

25. To some extent the present chapter compresses the genealogy of British work. The first wave was primarily Marxist in its orientation and contemporary with the work discussed above. It produced some vital texts. The British Critical Legal Conference first met in 1984. Although not by any means exclusively Marxist, there was a sense in which Marxism was perhaps the most important reference source. There is sizeable literature generated by scholars directly or indirectly connected to the conference, and also more latterly produced. *See, e.g.*, ALAN NORRIE, CRIME, REASON, AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW (1993). *See also* DANGEROUS SUPPLEMENTS (Peter Fitzpatrick ed., 1990).

26. Alan Hunt, *The Critique of Law: What is 'Critical' about Critical Legal Theory?*, *in* CRITICAL LEGAL STUDIES 5, 5 (Peter Fitzpatrick & Alan Hunt eds., 1987).

27. Alan Thomson, *Foreword: Critical Approaches to Law—Who Needs Legal Theory?*, *in* THE CRITICAL LAWYERS' HANDBOOK 2, 3 (Ian Grigg-Spall & Paddy Ireland eds., 1992).

The political direction of CLC has led to a question of priorities. Should critique engage with particular areas of law and legal issues? Or should it instead attempt to produce a general theory? To some extent, this tension was resolved by Marxism, which could provide a link between specific struggles and interventions and a total theory of class power. Critical Marxism provided a palliative to Brit Crit's anxiety, offering a central, unifying insight.[28] Marxism offered an account for the fragmentation of society into "its economic and juridical forms of appearance" by reference to "definite social relations of production."[29]

CLC's anxiety was not ultimately salved by Marxism.[30] Indeed, a general mistrust of the models of classical social and critical thought came to mark critical legal writing. Feminism was a major force in the development of new forms of critique. It tended towards a reluctance to employ metatheories, preferring to use the term patriarchy descriptively rather than as indicator of a fixed entity,[31] often concerning itself with particular constructions of femininity.[32] Coupled with psychoanalysis, critical legal works began to focus on the role of language in constructing both subjects and social spaces. An analysis in terms of class was seen to lack precision, and could not map the complex conjugations between linguistic meaning and power relations.

With the advent of postmodernism, this type of critique reached its apotheosis. The anxiety of critique renewed itself in a desire to start again, to rethink the terms of critique to reinvent around a "new" problematic. Postmodernism in critical legal studies represents a return to the continental tradition. Instead of Sartrean existentialism, or Frankfurt School Marxism, however, the main philosophical tendencies are represented by the names of Nietzsche, Freud, Foucault, Derrida, Lacan and Levinas. As much as these names are important

28. However, the diverse nature of CLC meant that not all subscribed to Marxism. This can be seen in the writings of one of the most mercurial of scholars, Angus McDonald. McDonald's ideas lean toward anarchism and situationism. *See* Angus McDonald, *The New Beauty of a Sum of Possibilities*, 8 LAW & CRITIQUE 141 (1997). McDonald also leans toward experimentation in general. *See, e.g.*, Angus H. McDonald, 23 LIVERPOOL L. REV. 221 (2001). Angus McDonald, *Dicey Dissected: Dominant, Dormant, Displaced, in* FEMINIST PERSPECTIVES ON PUBLIC LAW 107 (Susan Millns & Noel Whitty eds., 1999) (a less experimental piece on sovereignty).

29. Robert Fine & Sol Picciotto, *On Marxist Critiques of Law, in* THE CRITICAL LAWYERS' HANDBOOK, *supra* note 27, at 16, 18 (providing an historical account of the origins and basic concepts within critical Marxism).

30. But this is not to present Marxism as a fallen form of criticism. Even from within legal theory that presents itself as explicitly Marxist, there was an attempt to redefine a theory of power. *See generally* BOB FINE, DEMOCRACY AND THE RULE OF LAW: LIBERAL IDEALS AND MARXIST CRITIQUES (1984) (challenging the belief that Marxism is either an extension or contradiction of liberalism, and positing a new link between the two). Fine's redefinition of Marxism, his movement away from the vulgar opposition between base and superstructure and the economic determinism it creates, creates a more flexible and sophisticated form of Marxism.

31. Anne Bottomley, *Feminism: Paradoxes of the Double Bind, in* THE CRITICAL LAWYERS' HANDBOOK, *supra* note 27, at 22, 27.

32. *See* Maria Drakopoulou, *Women's Resolutions of Lawes Reconsidered:* Epistemic *Shifts and the Emergence of the Feminist Legal Discourse*, 11 LAW & CRITIQUE 47, 51–57 (2000).

points of orientation or horizons of thought, no grand systematizing urge appears in the critical work influenced by them. If anything, these bodies of thought are used as different perspectives on social being and existence; their very real differences are not obscured by futile attempts to create an unproblematic unity.[33]

Perhaps, in a different way, this manifests a critical anxiety—an awareness that legal philosophy has not been rigorous enough. One of the great announcements that initiated the postmodern project was the announcement of the death of a kind of jurisprudence; there was no longer a need to answer the great question: What is law? Not only had the traditional debate stagnated into a "jaded pedagogy of theory"[34] or become bogged down into a kind of armed peace between various warring jurisprudential factions, more importantly, these great questions represented the end point of a particular mode of inquiry. The most pressing concern became how law was experienced in particular situations, and the focus for critical thinking became the troubled connections between the lived world and the forms of the law.

Legal studies shifted from a classical analytic scrutiny of the logic of legal structures, or the abstract categories of legal reasoning, to law's involvement with sexed and gendered bodies; with people of race, with memories and histories different from those licensed by the doctrines of case law and conventional legal philosophy. The political demand was to return to the "truths" of lived experience, to the emotions and the senses as they were taken up and disciplined by law. Responding to this demand, critical legal scholarship has increasingly looked to a much broader sense of how the subject is constituted as a product of power. Power is seen as "relational" and exercised in a diversity of social, economic and sexual relationships. This approach moves away from the Marxist

33. Nor should "postmodernism" be seen as a shared point of reference. Indeed, if anything, there is a tendency amongst CLC scholars to resist the very idea of names or schools—indeed, to resist the idea of CLS, and to affirm the freedom of a thought that determines its own rigor. This tendency manifests itself in different ways. For instance, Wolcher's work has a pronounced eclecticism. He borrows from Eastern philosophy, as well as Wittgenstein and the continental philosophical tradition. Risking distortion of a complex and developing body of work, Wolcher's approach can perhaps be indicated by his juxtaposition of a ninth-century Chinese Zen riddle with Levinas's thinking of the face. Wolcher is borrowing from Zen to suggest how a different perspective on justice may be possible. *See* Louis Wolcher, *Ethics, Justice and Suffering in the Thought of Levinas: The Problem of Passage*, 14 LAW & CRITIQUE 93 (2003). It is precisely this need to experiment, to look behind the certainties of both conventional and critical thought that links Wolcher's work with that of Minkkinen. However, Minkkinen frames his central question in a different way to Wolcher. He has argued that the very idea of CLS is somewhat imprecise. If there was such a thing, then it could only be understood if a philosophy of law had first been elaborated. Such philosophy would have to return to the very question of "correct" knowledge, a criteria that itself demands conjunction of philosophy and law, or a "'juridisation' of metaphysics." *See* PANU MINKKINEN, THINKING WITHOUT DESIRE: A FIRST PHILOSOPHY OF LAW 3 (1999). At the heart of the endeavor is a form of pre-philosophical "desire to see" or an endless desire for a truth that "remains non-appropriable." *Id.* A philosophy of law must engage with this contradiction. For both Minkkinen and Wolcher, jurisprudence is inseparable from an engagement with the thinking of thinking itself—a task that cannot be delimited or reduced.

34. PETER GOODRICH, LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS 1 (1990).

location of power in class. The various discourses that create knowledge of the social world effectively organize, define and deploy power.

Postmodern feminism[35] and Queer Theory intensified this analysis, privileging the body and discourses of sexuality as key areas where power defined people as objects of knowledge to be studied, classified and disciplined. For feminists, patriarchy is the principal organizing framework;[36] for Queer Theorists, the "genital order"[37] of heterosexuality.[38] Integral to both these approaches is the argument that power cannot simply be escaped or opposed. It is impossible to find the "outside" of power, since it inheres in every form of knowledge. However, it is possible to contest power: every application of power invites subversions and oppositions.[39] From this perspective, any mode of analysis that returns to sovereignty—a concept of power that "belongs" to some person/institution or is codified and controlled by constitutional arrangements—misses the sites where power is exercised in everyday life and also the sites of its subversion.

The end of jurisprudence means that we are in the position of starting again. The tradition is alive with possibilities. It can no longer be a question of carrying forward the old certainties, but rather reading anew: from the book to the text. We have already encountered this kind of claim in the American work considered above. Its construction, largely through existentialist thought, however, obscures its own thinking of its task, and of its wider relationship to the jurisprudential and philosophical traditions. In the words of Hirvonen, the world is now in "fragments,"[40] but we must acknowledge this as "a great gift."[41] If the grand narratives are dead, how can critical thought continue?

Two strategies can be seen as running through the postmodern position: a return to history and a demand for a revived ethics. The historical turn places emphasis on the history of English law, but not as the parochial study of an "insular jurisdiction." It is a profoundly European philosophy that allows the examination of the condition of England. If anything, the turn to English history

35. The term postmodern feminism obscures as much as it reveals. Ralph Sandland, *Feminist Theory and Law Beyond the Possibilities of the Present?*, *in* FEMINIST PERSPECTIVES ON LAW & THEORY 89 (Janice Richardson & Ralph Sandland eds., 2000).

36. *See* LESLIE J. MORAN, THE HOMOSEXUAL(ITY) OF LAW 12–13 (1996) (pointing out that the "homosexual of law is an image of a male genital body").

37. *Id.* at 167.

38. Queer Theory provides a critique of identity; thus, the bald statement in the text above is completely inadequate. The very term "queer" has to be understood as suggesting the disturbance, rather than settling the notions, of foundational identity. *See* Margaret Davies, *Taking the Inside Out: Sex and Gender in the Legal Subject*, *in* SEXING THE SUBJECT OF LAW 25, 45 (Ngaire Naffine & Rosemary J. Owens eds., 1997). *See generally* LEGAL QUEERIES, LESBIAN, GAY AND TRANSGENDER LEGAL STUDIES (Leslie J. Moran, Daniel Monk & Sarah Beresford eds., 1998).

39. *See* DAVINA COOPER, POWER IN STRUGGLE: FEMINISM, SEXUALITY AND THE STATE (1995). *See also* VICKI BELL, INTERROGATING INCEST: FEMINISM, FOUCAULT AND THE LAW (1993).

40. Ari Hirvonen, *After the Law*, *in* POLYCENTRICITY: THE MULTIPLE SCENES OF LAW 192, 192 (Ari Hirvonen ed., 1998).

41. *Id.*

is also a turn to the world. The demand for an ethics rises from the melancholy observation that justice has miscarried in the common law. But this cannot be the ethics of neo-Kantian philosophies of right or of utilitarian policy-makers. The exhaustion of the moral resources of modernity, acutely witnessed in law, creates the most pressing intellectual and political obligation: to imagine a new type of natural law, of which justice is both a current component and an essential future part. Uniting both the historical and the ethical approaches is an orientation to the close reading of legal texts and legal history. This reading traces the omissions, repressions and distortions, the signs of power and symptoms of the traumas created by the institution. Working between the texts themselves and the effects of these texts in the real world, critical theory explores the textual and institutional organization of the law.

Arguably, the anxieties of Brit Crit towards its constitution were approached through a return to history or, rather, an attempt to reclaim history from a critical perspective. In this sense, postmodernism is ironically marked by a return to the past, as a way of creating a place for itself. For Peter Goodrich, the present may be determined by the past, but present structures, institutions and ideologies cannot claim any greater legitimacy from this fact. Of central importance is the excluded, whose trace remains in the archives and the records and can be picked up today. To understand possibilities that were not realized, potentialities that did not actualize, one has to return to the past.

Goodrich's reading of Abraham Fraunce, a late fifteenth century scholar, conjures the possibility of returning to an approach rejected from the syllabus of the Inns of Court.[42] The institutional location of Goodrich's work makes it a critical resource within the common law. Fraunce's radical Aristotelianism sought to return the law to its customary roots; lawyers were abandoning these roots, severing the common law's connection with its history, and forgetting law's time and place.[43] This localism was not an isolated nationalism, but an attempt to resituate the common law within the common law of Europe, a call for the study of both English writers and those major European figures such as Ramus, Hotman, Cujas, and Bude.[44]

Fraunce's rediscovery can be linked to another aspect of the common law. Goodrich revels in the double meaning of the "post": in chronological terms, it announces the sense of the end time, of being "late" in relation to modernism.[45] But the post also carries the sense of the delivery of messages, of sending and receiving epistles and texts. These two meanings come together when one considers the postal rule in contract law: an offer is binding once it has entered the post.[46] Although a product of classical nineteenth century contract doctrine, the

42. *See* GOODRICH, *supra* note 34, at 15–16.
43. *Id.* at 23.
44. *Id.* at 25–26.
45. *See id.* at 152–53.
46. *See id.* at 149–50.

rule offers a paradigmatic instance of law's operation. Law's subjects are bound by texts that they haven't read.[47] More generally, the institution preexists the subject, who can only enter into the discourses that the institution allows by accepting its priorities.[48] The individual is always late when it comes to the law. Taking the place of any direct communication between parties, the postal rule suggests that the law is the necessary intermediary. Its language is the "relay" that allows messages to circulate and be understood.

If we can only speak because the law allows us to do so, does this not suggest the triumph of tradition over any possibility of critique? This would be a misreading of the possibilities that history offers. We can imagine the tradition as a river in which the debris of the past are borne along by different currents; or we can think of the past as a conversation in which many voices get drowned out. But the sensitive ear can choose to listen to different tones, murmurs and whispers. This is how to understood the central insight that wo/man's being is historical:

> Whether logocentric or Christocentric, historiography remains an act of fiction, of imaginative and rhetorical creation. That does not make history unreal. But it undermines the effort to transfer truth and meaning from the text or the author to the authority of history and tradition.[49]

We must reject the notion that history can be accessed through a central narrative, or that history reflects a predetermined pattern. We are forced to create our own histories out of the materials that become available, always with an eye and an ear to the fact that what appears to be the dominant or licensed view is only so because other voices have been erased—yet nothing is completely forgotten. Only from this perspective can our historical sense be actively engaged. We are always grappling with a dilemma, with a specific task that appears historically located. But we cannot rely on the principles, values, and essences that characterize historicism and reduce the different to the same. Otherwise, we risk remaining within the interpretations authorized by the tradition, and resolving every conflict according to the terms authority allows. The encounter with the strange should be preserved. The forgotten, the repressed, and the abnormal: these are the sources of authentic thought, and the discomfort of home.

These currents of scholarship are marked by the tensions that we have been describing above. As noted, the question of the possibility of a critical legal studies is a question of the institutions in which it takes place, the lines of filiation and alliance between scholars. Brit Crit raises the question of the possibility of authentic thought and action, of the moment when the tradition is defied

47. *See id.*

48. *See id.* at 150.

49. COSTAS DOUZINAS, RONNIE WARRINGTON & SHAUN MCVEIGH, POSTMODERN JURISPRUDENCE: THE LAW OF TEXT IN THE TEXTS OF LAW 46 (1991).

in the name of the present, in the name of the personal. There is a risk that this thematic could turn into a restricted mode of examination; there is always the problem that the search for what is personally authentic has the effect of denying other equally compelling values, particularly those of community and belonging, and becoming solipsistic. In their different ways, these modes of scholarship open up the question of the legal tradition itself. To what extent can it be read as offering alternative resources, of inviting its own reinvention?

This latest manifestation of Brit Crit repeats the critical question: how can the law be opened to those currents of thought that it resists; or, how can the law be made different from its present forms? At the same time, there is the sense of the difficulty of making the different tendencies of thought cohere, of any sense of a meaningful shared identity. However, perhaps it is not a question of leaving behind the anguish of thought. If anything, it is about intensifying still further. One can hope to understand the nature of the tradition, of transmission and reception, and move towards a more informed sense of what this can offer.

OZ CRIT, OR *MABO* AND THE ANXIETY OF INFLUENCE

Australian Critical Legal Studies, or Oz Crit, can be seen as perhaps the latest manifestation of the spirit of critical legal studies. As a way of understanding what is at stake in Oz Crit, it is worth elaborating one of the themes that has flowed through this chapter. The concern with the anxiety of influence is, in part, a mark of the problem of translation. Thus, with Oz Crit, we return to one of the founding scenes of postmodern CLS: the borrowings of continental thought by Anglo-American jurisprudence.[50] But, as we look at the work of the Oz Crits, we will see what it means to be reading such texts at the end of the European tradition.

The impulse of CLS is to start again; its dilemma, as we have seen, is just how to make this new beginning. Of course, this is to separate oneself from what has come before, and to argue that the interruption in the tradition demands a new approach:

> If you start with the assumption that the central case of law looks like British law seen through the eyes of a reasonable man, it is hardly surprising that the theoretical reduction of the central case reflects the characteristics of British law from this perspective, and not of Aboriginal law, or Islamic law, or the law of the Hopi Indians.[51]

We might suggest, then, that Oz Crit endeavours to create a jurisprudence fit for the peculiarities of its own history. In other words, Oz Crit reorients jurisprudence around the critical question: what do these texts of the law mean for us

50. *But see, e.g.*, MINKKINEN, *supra* note 33, at 1 (discussing author's own situation as a Finnish critic influenced by North American and British critical legal scholarship).

51. MARGARET DAVIES, DELIMITING THE LAW: 'POSTMODERNISM' AND THE POLITICS OF LAW 26 (1996).

now? In part, this means turning away from the white, Anglo-American tradition. The line that divides Oz Crit from both the critical and mainstream traditions is thus a question of its own being and location; how can an authentic Australian voice create itself? Oz Crit thus presents itself as an engagement with the law in Australia; an understanding inseparable from the nation's colonial and postcolonial position. The reference to Aboriginal law in the quotation above is telling. Perhaps the key issue around which Oz Crit composes and decomposes itself is this very question of the rights of the Aborigines; but this must be understood in the broadest of senses as a question of origin and identity.

If one accepts this as the problem confronted by Australian CLS, one can immediately sense its identity and difference within the critical traditions that we have been examining. When Manderson writes that " [l]aw is a cultural medium of expressive form,"[52] he is articulating one of the fundamental insights of Oz Crit: law has to be understood as profoundly rooted in a time and a space—defined in a sharp light, like that described in the outback poems of Les Murray. Whereas American CLS never particularly engaged with the problematic of race, Oz Crit is founded on this very issue. Whereas Brit Crit introduced a turn towards history and interpretation, Oz Crit concretised it through an application to the problem of a young nation. Oz Crit thus repeats the central gesture of CLS, but differently: it demands that we start again.

How do we think about history and the invention of a nation? The various myths of Australian nationhood tend to stress, in different ways, the escape from old Europe to a land of freedom, equality and personal liberty. Undercutting these myths is the fact that the land was stolen from its original inhabitants. The juxtaposition of these two key components of Australian nationhood played out quite clearly in *Mabo v State of Queensland II*,[53] the landmark ruling on Aboriginal land rights.

Before the arrival of the Europeans, the lands in question in *Mabo* (three islands constituting the Murray Islands, Mer, Dauar and Waier) were already occupied by the Meriam people. In 1879, they were annexed to the colony of Queensland,[54] although a few years later, the islands were reserved by proclamation for the native inhabitants;[55] and some years later still, in 1912, the islands were permanently reserved, being placed in trust in 1939.[56] The action against Queensland was for a declaration that the Meriam people had good title to the lands, and that the lands had never been "Crown lands."[57] On the screen of *Mabo*, the history of Australia plays itself out. The case reveals the conflict

52. DESMOND MANDERSON, SONGS WITHOUT MUSIC: AESTHETIC DIMENSIONS OF LAW AND JUSTICE 201 (2000).

53. Mabo v. Queensland II (1992) 175 C.L.R. 1.

54. *Id.* at 20–21.

55. *See id.* at 22.

56. *Id.* at 65.

57. *See id.* at 4–5.

between European law and the laws of the aboriginal peoples, between the premodern and the modern, and between different visions of law. Ultimately, the case was about a nation's very constitution.

Mabo can be read as a legal exemplification of the anxiety of influence. If the court itself was uneasy about defining the Australian essence of Australian law, critical commentators on the case have suffered from a critical anxiety: what way of writing, or thinking, can provide sufficient purchase on the anxiety that animates the spirits stirred by Mabo? We should begin by looking at the reasoning in the case itself.

One of the central themes in *Mabo* is the question of the authority of the court.[58] This query is bound up with the concept of Australian law and its relationship to the indigenous laws and customs it supplanted. The court had to affirm its own authority to develop the law of Australia and to deal with the problem of native title from the perspective of a modern democracy. At the same time, the court was a product of its history. It could not simply depart from the common law just because its jurisprudence was out of step with contemporary political reality:

> Australian law is not only the historical successor of, but is an organic development from, the law of England. Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies.[59]

The court's opinion pointed out that Australian law was both enabled by and distinct from the English common law tradition.[60] However, the court appeared to hide under English common law only where convenient, updating legal principles only to the extent that they did not "fracture . . . the skeleton of principle[s]" of English common law.[61]

The court's discussion of "terra nullius" highlights its anxiety of influence, and its balancing act of both accepting and rejecting parts of the common law. Terra nullius originally granted governments the power to gain sovereignty over *unoccupied* land,[62] but a problem arose when lands were already occupied by non-Westerners. In response, the common law expanded terra nullius to constitute a legal fiction. The *Mabo* court explains:

> Another justification for the application of the theory of terra nullius to inhabited territory . . . was that new territories could be claimed by occupation if the land were uncultivated, for Europeans had a right to

58. *See* Shaunnagh Dorsett & Shaun McVeigh, *Just So: "The Law Which Governs Australia is Australian Law,"* 13 LAW & CRITIQUE 289, 306–07 (2002).

59. *Mabo*, 175 C.L.R. at 29.

60. *Id.*

61. *See id.* at 30.

62. *See id.*

> bring lands into production if they were left uncultivated by the indigenous inhabitants.[63]

As a legal fiction the doctrine was not particularly disturbed by the fact that territory was, in reality, occupied. Indeed, application of this legal fiction allowed the law of England to become that of the newly inhabited territory.

However, the Australian court preserved its English common law roots while wiping out parts deemed unfit for modern Australian law. If Australians were a people defined by the common law, it would appear that the *Mabo* court has pulled off an incredible coup. The common law tradition has been appropriated, and, to some extent, redefined. If one wants to view *Mabo* as a "virtue[] of the common law,"[64] then perhaps its greatest success is the fragile resolution of the anxiety of influence via the successful identification of a people with a law: the common law is thus no longer merely "English," but is reimagined as authentically Australian. This is an historical inheritance, admittedly, but one that must be radically reshaped to successfully resolve Australian problems.

Terra nullius is perhaps an example of why critical thinking is based on the profound need to start again, to keep reopening the past. For terra nullius expresses the law's imminent power to take over and make a place be seen as "'desert uninhabited' country."[65] The critical task in the face of this judgement is to create a politics of memory. Clearly, the imposition of the law rested on the claim that those living in the territory were without law. Moreover, as far as the common law was concerned, this same doctrine brought the indigenous peoples into being. Critical work, then, demands a return to history, a questioning of the inheritance. As Dorsett and McVeigh observed, "The settlement of Australia has been conducted . . . as the transmission of an inheritance: an affiliation and an attachment to the order of law and of people and places."[66] Under *Mabo*, the people who are to be one under the law are folded into a common law history, are given an "origin" synonymous with the arrival of the common law.

Once again, the critic must challenge this artificial beginning. Thus, for Fitzpatrick, it is necessary to be skeptical of both the common law's claim to an origin in time immemorial, and to any constructions of history that place Australia safely and unproblematically into the fold of a common law that can adapt to history and a foreign clime. Common law is able to resolve the issue of native title by drawing into itself[67] those social relations that it can order, determine, and articulate in the best possible way. Behind this claim lies a far more difficult and subtle operation: *Mabo* effectively denies the reality of the

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63. *Id.* at 33.

64. Richard Bartlett, Mabo*: Another Triumph for the Common Law*, 15 SYDNEY L. REV. 178, 178 (1993).

65. *Mabo*, 175 C.L.R at 34.

66. Dorsett & McVeigh, *supra* note 58, at 289.

67. *See* Peter Fitzpatrick, *No Higher Duty:* Mabo *and the Failure of Legal Foundation*, 13 LAW & CRITIQUE 233, 239 (2002).

indigenous claim while simultaneously acknowledging it. This decision thus reveals an insight into the law as such. We "are all native now,"[68] to the extent that we are subjects of legal interpellation.

The critic should confront the construction of Australia that is linked to *Mabo*. This critical move is based on an acknowledgement of Aboriginal rights; or more precisely, a troubled thinking of how the past and the present can be reconciled. But perhaps it is already too late. For some, Australia appears as no more than a source of despair; its inability to sustain a culture of critique within its universities a symbol of its descent into the mundane and the barbarous.[69] The difficulty is the creation of a way of thinking, an analytical language, equal to the challenges posed by Australian politics. Some scholars have turned back to their Aboriginal heritage and dream of an Australian law that is not that of European sovereignty—a form of law that connects with memory and a belonging to the land.[70] Others have looked to the insights of the continental tradition, carrying the texts of old Europe to the new continent. Motha, for instance, views the issue as an ontological problem concerning the existence of community.[71] Offering Aboriginal rights cannot be seen as a "palliative" to the "exclusions" that founded the colonial nation,[72] merely replacing one sovereignty with another. The problem cannot be addressed until a new ontology of singularity opens the univocal way of thinking about sovereignty and the origin of Australia. As Motha describes it, "I am a *singular* being *among* a multiplicity of other singular beings."[73] Ultimately, critics may have to oppose sovereignty in order to achieve any viable sense of pluralistic community.

A somewhat different emphasis can be found in the work of Kerruish.[74] Addressing the ten year process announced in 1991 to engage with the structural disadvantages suffered by Aboriginals in Australian society, Kerruish writes that "reconciliation, as a policy . . . [is] something which cannot be embraced and cannot be spoken against."[75] The endeavour is to use a dialectical thinking that can create a form of political metaphysics, and can address contemporary political realities from a philosophical position. Ultimately, this is an uneasy, anxious, questioning mode of inquiry that is aware of its own problematic

68. *Id.* at 252.

69. *Cf.* Ian Duncanson, *Writing and Praxis: Law, History and the Postcolonial*, 7 LAW TEXT CULTURE 9, 9 (2003) (contending that liberal scholarship in Australia is being labeled as disloyal or trivial by the new conservative hegemony at Australian institutions).

70. *See, e.g.*, Irene Watson, *Buried Alive*, 13 LAW & CRITIQUE 253 (2002) (describing how the European legal notion of *terra nullius* buried Aboriginal culture, and how the author's return to her own culture offers a new way forward).

71. *See* Stewart Motha, *The Sovereign Event in a Nation's Law*, 13 LAW & CRITIQUE 311, 312 (2002).

72. *Id.* at 314.

73. *Id.* at 336.

74. *See generally* VALERIE KERRUISH, JURISPRUDENCE AS IDEOLOGY (1991).

75. Valerie Kerruish, *Reconciliation, Property and Rights, in* LETHE'S LAW: JUSTICE, LAW AND ETHICS IN RECONCILIATION 191, 194 (Emilios Christodoulidis & Scott Veitch eds., 2001).

constitution. Reconciliation, under this approach, may ultimately be phrased in the terms of Hegel's phenomenology: with a subject whose thought is rooted in a finitude, there must be thought from the position of the subject's *dasein* or historical location.

However, this must connect with another theme, another rupture. Any thinking of an institution is finite and necessarily articulated in its own terms. Thus, any claim to Aboriginal title or law must be made through the medium of the colonial common law. It appears unlikely, especially in the wake of the *Mabo* decision and the law's retreat from a notion of native title, that the ongoing violence of the original imposition of settler's law can move towards reconciliation. Tentatively, Kerruish suggests that "reconciliation is conceivable as a form of sublation[,] . . . as the thinking through a contradiction—indeed of particular *hard* contradictions, such as those between finite and infinite, or necessity and freedom."[76] This hesitancy is necessary. It is the mark of a reading that uncomfortably locates itself in legal theory but reaches towards a broader theory of the political world where terms like rights and property must be located, and their constructions contested.

ANXIETY, ITERABILITY, AND CRITICAL LEGAL THOUGHT

If anxiety is constitutive of critical legal thought, how might we think more generally about what might underlie the critical legal project?

Anxiety can be understood as "structured" by iterability. Iterability describes a sign or a mark that is both unique, and capable of repetition. We can elaborate this notion by thinking of law and criticism as modes of iteration; and re-appropriating critical anxiety from this perspective. Tradition and authenticity are not opposites, but mutually constituting. In the same way that the unique moment is temporal and capable of repetition, history is open to contingency: it is not so much a repetition of the same, as a fabric constantly torn and repaired. Indeed, anxiety is the profound realization of the contingency of history: things do not always turn out the same and nothing can be predicted. History could always be different. One needs to affirm iteration: history will always turn out differently and the moment of critique must re-appear and carry on re-appearing. To remain authentic is to sustain the anxiety of a thought that juggles the relationship of contingency and history. Any announcement of a terminal point betrays the insight of iteration as temporality. CLS is dead. Long live CLS.

The reader encounters the tradition. In taking up the text, one feels a great weight: the accumulated opinions, texts and commentaries that make up jurisprudence. This is the original moment, where one is either crushed by despair, or takes on the tradition, attempts to redefine it in her own terms. History arrives at the doorstep of the "now," and one's own history becomes involved. For critical legal thought, this is a question of a starting point: are you crushed

76. *Id.* at 199.

by the past, or are you strong enough? Can you summon the strength to start anew, anew, anew . . . ?