elicited weaknesses and contradictions in their arguments. Far from being merely critical, there is often an additional creative aspect to this engagement: feminist legal theorists then say how they would improve the theory to make it applicable to women, as well as to men. For two of many examples, see Susan Moller Okin's reading of John Rawls in SM Okin, *Justice, Gender and the Family* (New York: Basic Books, 1991) or Carole Pateman's analysis of Thomas Hobbes in C Pateman, *The Sexual Contract* (Cambridge: Polity Press, 1988). Whilst this can lead to some abstract debates in feminist legal theory, the key concern remains that women's practical position be improved.

SUMMARY: RELATIONSHIP BETWEEN FEMINIST LEGAL THEORY AND PRACTICE IN LAW

- Feminist legal theory is not simply concerned with improving the law. Its reach is broader in terms of the subjects analysed. Jurisprudence and philosophy are drawn upon to problematise theoretical issues arising out of the relationship between women and law (e.g. what do terms like 'freedom' and 'equality' mean?).
- Feminist legal theory is also critical of the ways in which some legal and political philosophers have made sexist assumptions about women and so it considers how (and whether) this has affected their work.
- Sometimes women can be 'added in' to a theory, but often the theory depends upon their exclusion. Sometimes a philosopher treats women's position in a contradictory way so they cannot just be 'added in' to his theory without disrupting it.
- Feminist legal theory then goes beyond criticism of the work of traditional theorists to produce new theories that do not depend upon women's exclusion or contradictory treatment.

RELATIONSHIP BETWEEN FEMINIST LEGAL THEORY AND POLITICAL PHILOSOPHY

There are areas of overlap between different areas of political philosophy and feminist legal theory. For example, there are liberal, socialist, Marxist and anarchist feminists who have different views about law. Liberal feminists accept the main liberal ideals, such as the view that the State should not

impose any idea of what is good upon anyone; that citizens should have rights to live their life in their own way, providing that others are not harmed. However, they need to extend the 'harm principle' to include harm to women that occurs within the home. Liberal feminists support 'formal equality': basically, the view that men and women should be treated in the same way and have equality of opportunity. This can be contrasted with 'substantive equality', which refers to equality of outcome, which may involve giving additional help to someone who starts with a disadvantage.

In contrast to liberal feminists, socialist feminists believe that part of the problem for women in our society is that they live in a capitalist society in which workers (as well as women) are exploited. Socialist feminists want to see a change in the workplace as well as in the treatment of women. This involves an emphasis upon employment protection laws that have been won by trade unions, a preference for State-run over private-run enterprise, the welfare state and further protective measures against exploitation generally.

Similarly, Marxist feminists draw upon the work of Karl Marx to argue that workers are exploited because they have no choice but to work for 'capitalists', i.e. those people who own the means of production. They are forced to sell their ability to work as if it were a commodity. This means not only that they are exploited economically by being underpaid, but also that they do not have control over the way in which they work and lack the fulfilment that Marx thought that work should provide. This is still the case for women who are still engaged in more menial jobs than men, over which they have little control. For Marxist feminists, the main solution to subordination (of both female and male workers) is the communal ownership of the means of production. This is no longer a particularly popular position, although that in itself is not an argument against it.

Anarchist feminists are also a rare group who believe that the State is part of the problem for women and hence do not believe in law. Most feminist legal theorists recognise that changes in law may not solve women's problems, which derive from social attitudes to women, but think that law can be used as an instrument to try to change attitudes, for example, by the use of the Sex Discrimination Act 1975, the Equal Pay Act 1970.

More broadly, feminists have challenged the meaning of the term 'political'. Some contemporary continental philosophy – some of which has been broadly

termed 'postmodernism' or 'post-structuralism' – has been influential in feminist legal theory. This has included asking the question: how is the meaning of 'woman' defined by our use of language? These feminist legal theorists have pointed to problems involving 'essentialism' (i.e. the view that women have some fixed underlying defining characteristic in common). They stress both that the meaning of what it is to be a woman changes in different societies and the relationship between language and power.

SUMMARY: RELATIONSHIP BETWEEN FEMINIST LEGAL THEORY AND POLITICAL PHILOSOPHY

- There are many different types of feminists (and feminist legal theorist) depending upon other political beliefs, for example: liberal feminists, socialist feminists etc. They are all concerned with improving women's freedom and equality but have different views about how this can be achieved based upon a different analysis of society.
- More broadly, feminists have challenged the meaning of the term 'political' and of the relationship between language and power.

EXAMPLES OF FEMINIST LEGAL THEORISTS

This section will concentrate mainly on contemporary theorists, although it is useful to draw upon a historical example to indicate the breadth of 'feminist legal theory'. These writers have been chosen because they say something useful about women and law from a theoretical perspective. It should be noted that the term 'feminist legal theory' has become popular relatively recently but that many earlier writers could be classified in such terms. This is only a short selection of those who have contributed to the diverse thought that is feminist legal theory.

MARY WOLLSTONECRAFT (1759–1797)

Mary Wollstonecraft was an Englishwoman, writing at a time that had been influenced by the French Revolution of 1789 in which 'the rights of men' were proclaimed. She argued that such democratic views of the Enlightenment should also be applied to women. Wollstonecraft argued that women are just as rational as men and therefore should be allowed equal rights and

opportunities. In her most famous book, *A Vindication of the Rights of Woman* (1792), she was scathingly critical of Jean-Jacques Rousseau's argument that a woman's education should be aimed at just moulding her into a pleasing companion for men. Wollstonecraft argued in favour of women's education to allow women to develop their own ability to reason.

The following are contemporary feminist legal theorists, drawn from a wide selection of important thinkers.

JUDITH BUTLER

Judith Butler is extremely influential in feminist philosophy, 'queer theory' and feminist legal theory. She is a post-structuralist, i.e. she focuses on an analysis of language that traces the way in which power is implicated in the definition of what it is to be a 'woman'. Her arguments are sophisticated and complex as she draws from the work of contemporary continental philosophers, particularly Jacques Lacan and Michel Foucault, articulating them in an original way. Whereas feminists in the 1960s drew a distinction between sex (seen as natural) and gender (viewed as cultural), Butler argues that the way in which we discuss 'sex' within language is also cultural.

Although she is not a lawyer, Butler has also produced some remarkable legal case analysis. In *Excitable Speech* (1997) she illustrated the racism implicit in the language of some of the judiciary.

DRUCILLA CORNELL

In her books from *Imaginary Domain* (1995) onwards, Drucilla Cornell derives legal tests from a philosophical position based upon a radical reworking of the 18th-century philosopher, Immanuel Kant. She argues that both men and women should be free to do whatever they want unless it harms others. She expands upon Kant's view of 'harm' by substituting what she calls the 'degradation prohibition'. For Cornell, people ought to be prevented from degrading others by imposing their imaginary stereotypes upon them, for example by sexually harassing them. This involves treating someone as an object to be used and not a person. Sexual harassment harms people by undermining their self-image (or their image of themselves within the 'imaginary domain').

Cornell argues that judges and legislatures, whenever they make a legal decision or pass laws, should ask themselves the question: 'would free and

equal persons agree to this?' Women are not yet free and equal (and neither are many men) but they should be treated *as if* they were by the law. It is important to Cornell that women should be treated as *persons* in law, in contrast to Luce Irigaray, discussed below.

CAROL GILLIGAN

Carol Gilligan is a psychologist whose work has been enormously influential in both legal and political theory. She has argued that the view of morality as based upon the application of rules ignores the way in which most women actually employ moral reasoning. She argues that, whereas men may think in terms of abstract moral rules, women employ 'an ethics of care', which is focused upon the practical need to care for others in a given context. This arises, she argues, because of women's experiences, the way in which women are socialised to have a more caring role in society, which have been traditionally ignored in moral theory.

There have been calls to think about how law could give effect to such an 'ethics of care'. Dissenters have noted that the theory employs a familiar stereotype of men as rational and women as carers. What has changed is that Gilligan privileges the 'ethics of care', which is usually downgraded in comparison to abstract reasoning. Importantly, she makes the point that what were originally viewed as 'universal' assumptions in moral theory were actually reflections of the position of men.

LUCE IRIGARAY

Controversially, Luce Irigaray, a renowned contemporary feminist philosopher, has had some impact upon legal theory by her suggestion that law should treat women differently from men, advocating separate women's legal rights. Most feminist legal theorists would strongly disagree with Irigaray because of concern that this would lead back to lesser rights for women – a sort of sexual apartheid. As discussed above, Cornell argues that we should all be treated as persons with rights.

It should be noted that Irigaray is a philosopher rather than a legal theorist and is famous for her ground-breaking work in metaphysics. Her 'legal work' should be read in the context of her broader philosophy. Some writers have argued that she has made the claim for 'women's law' as a rhetorical gesture rather

than a genuine claim, see P Deutscher's article in J Richardson and R Sandland, *Feminist Perspectives on Law and Theory* (2000). Irigaray is noted for her detailed engagements with traditional philosophical texts in ways that illustrate the way in which 'woman' provides a 'blind spot' for philosophy.

NANCY FRASER

In her book, *Justice Interruptus: Rethinking Key Concepts of a Post-Socialist Age* (London: Routledge, 1997), Nancy Fraser has tried to illustrate different ways in which to think about oppression: broadly, economic exploitation (which covers class as well as women) and degrading images/stereotypes (which includes, for example, gay men as well as women). She writes broadly about the current political climate. For example, she has criticised the way that single mothers have been portrayed as 'dependent' upon the state, contrasting that with the unacknowledged 'dependency' of men upon women's unpaid labour within the home, which allows them to spend extra time at work.

CATHERINE MACKINNON

Catherine MacKinnon is a feminist lawyer and activist as well as being a law professor, noted for her 'radical feminism', which views the oppression of women as *the* central form of oppression. She was one of the first to define 'sexual harassment' and to campaign against it. In 1986, her legal arguments on sexual harassment were accepted by the US Supreme Court. In addition, MacKinnon (along with Andrea Dworkin) campaigned for legal reforms in the area of pornography. The Canadian Supreme Court has adopted, in part, her approaches to: equality (1989), hate speech (1991) and pornography (1992). She was co-counsel on *Kadic v Karadzic* (No. 93 Civ. 878 (PKL)), which she won in 2000. This was the claim of Bosnian women against mass rape by the Serbs and was the first case to recognise rape as a crime against humanity. She successfully pointed out that human rights law traditionally fails to recognise abuses that are specific to women.

MacKinnon argues that 'the law' views women in the same way that men view women, in terms of degrading stereotypes. She draws an analogy with Marxism to argue that, for women, 'sexuality' takes the role of 'work' (in Marxist theory) as that which is of central importance to 'who you are' and yet that which is most taken away (or alienated) from you. For MacKinnon, what it means to be a woman is to be constructed by men as that which is debased.

SUSAN MOLLER OKIN

Susan Moller Okin has produced ground-breaking work showing how certain contemporary legal and political theorists have produced work that becomes incoherent when the position of women is considered. She then makes positive suggestions about the way in which society could alter in order to become less unjust for women. For example, the contemporary legal and political theorist, John Rawls, has suggested that one way to justify laws would be to imagine which laws would be acceptable to a group of 'heads of household' who were unaware of what position they would have in society. His idea was that (in this thought experiment) everyone would have to choose laws that were fair to those who might be poor because they would be unsure whether or not they would be in that position. Okin pointed out that, whilst this focuses upon class inequality, it is blind to the position of women, who are supposedly subsumed within the views of these 'heads of household'. If they risked being treated as a woman would they keep the same laws? Rawls also assumes that the family is a just institution, which can train children in the meaning of fairness, but Okin illustrates how this is nonsense given the treatment of some women within families and the unequal distribution of money and status.

CAROLE PATEMAN

Carole Pateman is interested in the need to think about how to create a participatory democracy that allows all people (including women and workers, for example) to have more control over their everyday lives. In other words, for her a democracy is not just about voting for a government every few years but about being able to have an effective voice (rather than being told what to do) both at work and at home.

She analyses the meaning of 'consent' to a contract and how this is anomalous in the case of women. For example, at a time when women were not even viewed as 'persons' they were still viewed as being able to consent to the marriage contract, which then took away their rights. This raises theoretical questions about how many rights you should be able to consent to give up. Should you be able to agree to enter into a slavery contract? The reality is that women agreed to traditional marriage contracts for the same reason that workers agree to bad working conditions: because they have no other choice. When the context is considered the idea of entering into such contracts out of individual 'free will' is then exposed as nonsensical.

You should now be confident that you would be able to tick all the boxes on the checklist at the beginning of this chapter. To check your knowledge of Feminist legal theory why not visit the companion website and take the Multiple Choice Question test. Check your understanding of the terms and vocabulary used in this chapter with the flashcard glossary.

9

Critical legal studies

- What are critical legal studies?
- In what way do they differ from more traditional critiques of the law?
- The history of the CLS movement
- The claims and objectives of the American crits
- The decline of American CLS
- Freud's parallel between law and the law of the unconscious
- The Freudian myth of the origin of the law
- Lacan's inversion of the Freudian premise
- Foucault and the genealogical method
- Distinguish the genealogical method from classic historical analysis
- Structuralism/post-structuralism
- CLS and deconstruction

ORIGINS AND AIMS OF CRITICAL LEGAL STUDIES

WHAT ARE CRITICAL LEGAL STUDIES?

In the narrow sense, the term Critical Legal Studies refers to a movement which originated in the US in the 1970s as a response to an increasing political and legal conservatism. This movement is, for all intents and purposes, now defunct. The name, however, endures: in the broad sense, Critical Legal Studies, or CLS, encompass a plurality of different critical perspectives on law which have been flourishing for the past three decades. As the abbreviation CLS is often used to refer to the movement, so is the term 'crit' used to refer to its participants.

It is impossible to define the CLS movement in a definitive manner as CLS perspectives are ever expanding. They range from analysing legal symbolism and representations of law in literature to deconstructing the concepts of legal discourse and questioning the symptomatology of the law (is the law neutral, as it claims to be, or is it patriarchal, discriminatory, colonial, exclusionary, driven by anxiety etc?).

Yet all CLS perspectives share a wish to critique the traditional notions of legal objectivity and supposed neutrality of the law in order to reveal law as a murkier, much more morally ambivalent area than is usually acknowledged in classic legal discourse. The law can be shown, for example, to manipulate legal concepts in order retroactively to legitimate the expropriation of indigenous people, or to entrench racial or sexual stereotypes.

What, however, distinguishes CLS from more straightforwardly critical takes on law is that its many approaches import insights, concepts and methods devised by other disciplines such as aesthetics, literary criticism, psychoanalysis and philosophy into the critical study of the law.

- The shared idea is that there is another 'truth' to law than that of its apparent content, though the status of this other truth – hidden, repressed, absent, impossible, ambivalent – depends on the views of the author.
- The CLS movement was officially born in the US in 1977 at a conference at the University of Wisconsin-Madison, but its founding members were rooted in 1960s' activism, particularly the civil rights movement and anti-Vietnam War militantism.

- CLS proponents imported the ideas, theories, and philosophies of predominantly European thinkers (initially Marx and the Frankfurt School) into the field of law, thereby giving birth to the idea of a critical inquiry into what had hitherto been constructed as an objective, quasi-scientific field of study.
- The central object of CLS, if one is to be named, is to challenge the apparent objectivity of law and legal practice in order to expose the political choices embedded in legal discourse.
- The forms adopted by this challenge are many, depending essentially on which theory is being applied: CLS range from the straightforward, neo-Marxist denunciation of the function of the law in the reproduction and legitimation of the social *status quo* to the deconstruction of a legal concept (after Derrida) or the exposure of the repressed content of the law (after Freud).

The CLS movement includes several other movements: feminist legal theory, queer theory, critical race theory, postcolonial theory. It retains critical inquiry into the nature and functioning of law as its federating feature.

AMERICAN CLS

THE EMERGENCE OF CLS

In the US, classical jurisprudence, informed by a belief in and devotion to the grandeur of the law (cf Pierre Schlag, *Law and Critique* vol. 10–3), dominated law schools until the 1970s, with the liberal influence of the Warren Supreme Court acting as a punctual corrector of the conservatism of legal academics. In 1970 Duncan Kennedy, a student at Yale Law School, started expressing strong dissatisfaction with the smugness of legal academics, safely sheltered behind the 'objectivity' of the formal rule of law. Put otherwise, Duncan Kennedy questioned the apparent absence of politics from the legal discourse. Clearly, in the US the beginning of the crit movement was informed by a general distrust of authority fuelled by the Vietnam War, and so of the law.

The central claim of the early American crits was that the grand legal edifice, despite its self-representation as neutral, objective and abstract, was in fact deeply *political*, structurally *contingent*, fundamentally *contradictory* and *indeterminate* (the idea that law does not determine the outcome of legal

disputes but politics do), and that the law's main function was to entrench the social *status quo* further by conferring legitimacy upon it (*legitimation*). It is in this sense that the early crit movement was influenced by Marx's view of the world in terms of domination, exploitation and oppression.

The initial object of American CLS, particularly that of Duncan Kennedy, was twofold:

- to 'counteract the conservatizing effect of legal training' in legal education;
- to turn the law into an overt political terrain.

Prominent participants in the American CLS movement include Duncan Kennedy, Mark Tushnet and Roberto Unger.

THE DECLINE OF FIRST-GENERATION AMERICAN CLS

The early American crit movement came to a premature halt, partly due to the opposition of mainstream legal academics who feared for their own position (effectively, crits were not hired by law schools and so the movement stopped developing) and partly due to the movement's own conceptual shortcomings: the concepts of *legitimation*, *contradiction* and *indeterminacy* proposed by the early crits became the site of theoretical debates with the mainstream legal academy, which was unfortunate as these concepts referred to oppositional strategies and so were not theoretical building blocks for the creation of an alternative legal discourse. These debates resulted in the explosive potential of the concepts of early CLS being defused through appropriation by mainstream legal thought. Thus for example:

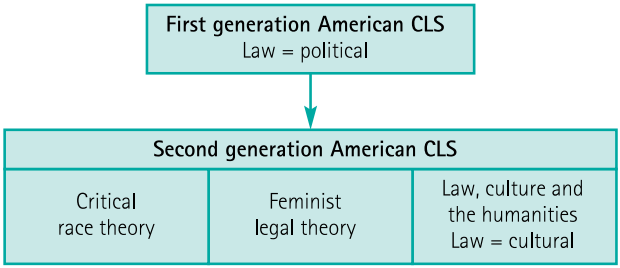
- The concepts of *contradiction* and *indeterminacy* led to *neo-pragmatism*: since the law is indeterminate and contradictory let us be practical about it and abandon grand theories.
- *Legitimation*: if everything is political then let us be aware of it and make the politics explicit. This led to the 'reason-giving', 'civic-republican', 'dialogic' strand of mainstream legal thought (cf P Schlag).

AMERICAN CLS TODAY

Though the American CLS movement in its original form more or less ended in the 1980s as a radical challenge to mainstream legal thought, its legacy in the

US is alive and well as feminist legal theory (fem-crit) and race critical theory (race-crit).

There is also a more general movement, heir to first-generation American CLS and represented in the Association for the Study of Law, Culture, and the Humanities. The ASLCH, which holds annual conferences in the US, is an association committed to interdisciplinary legal scholarship: legal history, legal theory and jurisprudence, law and cultural studies, law and literature, law and the performing arts, and legal hermeneutics are all represented. The Association's remit is to contextualise – and so problematise – law by exploring its relation with culture, politics and society. For example, in *Law in the Liberal Arts* (2004) Austin Sarat argues that the traditional location of legal education in law schools offering vocational training produces an impoverishment of students' – and so lawyers' – grasp of the law's place in culture and society.



ENGLISH CLS

Much as in the US, Marx was the immediate background to CLS in the UK until the early 1980s. At that time:

- the rise of individualism and its corollary, the decline of faith in collectivism, led to a weakening of the Marxist framework's influence;
- theoretical challenges to the Marxist concepts of ideology, historical materialism and so on led to a dissatisfaction with the conceptual tools introduced by the German political economist a century previously.

The disaffection with a thought structured in terms of historical forces and material conditions led Britcrits to turn to a number of theories in which the

subject – or its problematisation – was, in one way or another, central: the new influences of Britcrits were to be psychoanalysis (Freud and Lacan), genealogy (Nietzsche, Foucault) and post-structuralism (Derrida).

PSYCHOANALYSIS

SIGMUND FREUD (1856–1939)

Freud, who 'discovered' the unconscious in the late 19th century by noticing that physical symptoms had psychical significations and so could be lifted through the 'talking cure', was the inventor of the psychoanalytic technique. One of Freud's early examples is that of a patient who suffers from hydrophobia and recalls, during the treatment, having been disgusted when she saw a dog drink out of a cup at a time of great personal stress.

The bulk of Freud's work is dedicated to the elaboration of clinical concepts designed to alleviate psychical suffering without resorting to the hold of consciousness onto the subject. However, a significant portion of his work also develops the clinical insights of psychoanalysis in order to elucidate a number of puzzling, and recurrent, phenomena of civilisation such as religious guilt, love of authority and so on (essentially *Totem and Taboo*, *Moses and Monotheism*, *Group Psychology* and *Civilisation and its Discontents*). In these works Freud's central thesis is that religion is individual neuroses brought to the power of 'a neurosis of humanity'. Freud started with the observation that similar affects can be found in the unconscious and in the religious scriptures of the Judaeo-Christian tradition:

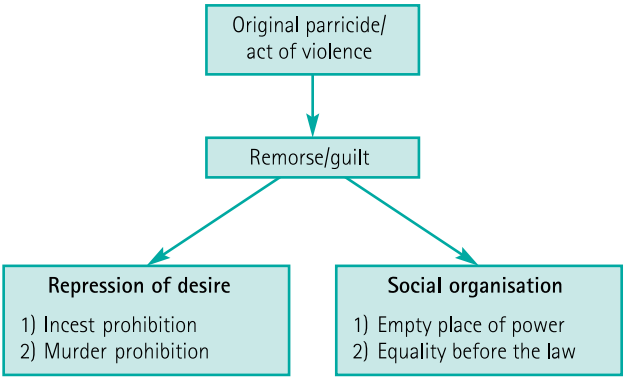
- love for figures of authority;
- certain prohibitions (*a minima*, incest and parricide);
- a sense of culpability concerning prohibited desires;
- the possibility of redemption through renunciation of these desires.

In order to account for the parallelism between religion and the unconscious, Freud posits, *ex post facto*, the universal – and mythical – origin of civilisation, and so of the unconscious.

The origin of law

In *Totem and Taboo* the story unfolds as follows: in ancient times a man, known as the 'father of the primal horde', kept all the women of the tribe to

himself and so expelled all his male descendants. One day the sons grew sick of the situation and united to kill and then eat the father to appropriate his potency. Belatedly seized by remorse, they erected a totem to the father (henceforth symbolising the empty place of the lawgiver) and instituted the incest prohibition so that they would not benefit from their crime by enjoying the women of the tribe. This prefigures the social contract: the sons agreed to leave the place of power empty and so to be *equal before the law*. From that point on, repression (of desire), guilt (with regard to the original sin), love of authority (the totem) and law-abiding as redemptive pathway, the structuring parameters of the neurotic unconscious in Freudian times, all find themselves accounted for through a myth which also functions as that of the origin of the law (in his later work *Moses and Monotheism* Freud retraces these structural elements through the scriptures of the Judaeo-Christian religions).



So for Freud, civilisation originates in violence, which gives rise to guilt. In order to alleviate this guilt and to avoid the repetition of such violence, individuals unite and decide to lay strict guidelines for the social organisation of desire on the one hand and to empty the place of power on the other, so that all are equal before the law (again, to avoid anger and so further violence). The Freudian myth has been used by postcolonial theory to argue that violence against indigenous peoples is the violent, repressed origin of colonial legal systems (see the work of P Fitzpatrick).

Freud concludes that the discourses of civilisation, and primarily of law, function as the *superego of culture* (i.e. the law tells you not to give in to impulses such as killing anyone who annoys you, or sleeping with whomever you fancy). Building on this hypothesis, a number of thinkers have argued that law, the superego of culture, represses the singular desires of its subjects and that these repressed desires can be revealed using the method devised by Freud to uncover the repressed content of the unconscious.

Jacques Lacan (1901–81)

French psychiatrist Jacques Lacan, who was involved in the surrealist movement and attended the famous lectures given by Alexandre Kojève on Hegel's *Phenomenology of Spirit* with Claude Lévi-Strauss and Georges Bataille, initiated a return to Freud in the early 1950s that incorporated the many influences he had been exposed to in his formative years: Hegelian and Heideggerian philosophy, Merleau-Ponty's phenomenology, Saussurian linguistics, structural anthropology etc. Out of the mythical psychoanalysis invented by Freud, Lacan created a (post)structuralist form of psychoanalysis in which 'the unconscious is structured like a language' and the incest prohibition is merely a contingent, cultural rendition of the natural impossibility for man to exist without law. In Lacan's early work in particular:

- law, or the symbolic order, is not what deprives the subject of the truth of his desire but, on the contrary, is a necessity for the subject, who needs the support of symbolic networks in order to structure its psychical reality;
- the Oedipus complex is merely one of the ways in which the invariant structure of the subject, uncovered by Freud as marked by an empty place and a prohibition, can be accounted for.

One of the key insights of Lacanian psychoanalysis for CLS is the convincing argument that psychical reality is always framed by the subject's own fantasy: in other words there is no such thing as reality, there are only fantasmatic realities constructed through subjective interpretative processes. As such for Lacan, though action is of course vital, true resistance starts with the subject resisting their own interpretative process in order to be able to separate themselves from their fantasy. The difficulty of applying Lacan's insights to law is self-evident: most of the work of resistance should take place in analysis and it is only subsequently that resistance can be displaced onto the political scene.

CLS applications of psychoanalysis

Psychoanalytic inquiry into the possibility of deciphering the repressed content of the law with the help of the Freudian theory of the superego was developed by French legal academic Pierre Legendre in his seminal – though untranslated – *L'amour du censeur* (1974) and in the UK by Peter Goodrich (1995). The key idea is that legal subjects come to love authority figures through a complex mechanism of displacement: I give up some of my sexual desires by abiding by certain laws; this repressed libidinal energy is then desexualised and displaced onto authority figures. This is why we accept and even enjoy the law.

As to Lacan, in his numerous works, Slovenian philosopher Slavoj Žižek borrows many concepts from Lacanian psychoanalysis to interpret political events, introducing, for instance, the concepts of fantasy and enjoyment in the realm of politics. For example in *Tarrying with the Negative* (1993), Žižek presents a psychoanalytically informed account of racism in terms of what is perceived as the other's theft of the national enjoyment. Thus a common racist complaint is that 'immigrants steal our women and our work'. Žižek interprets this as a version of the frequent fantasy that the other is always having more fun than I am and so steals my enjoyment.

GENEALOGY

Michel Foucault (1926–84)

Another extremely important thought for CLS is that of Michel Foucault, who devised the genealogical method. This method is a mixture of history and philosophy applied to the human sciences.

The subject

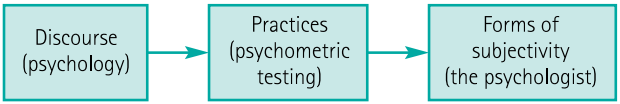
After studying at the *Ecole Normale Supérieure* in Paris, Foucault dedicated his life and work to opposing the two main currents of thought that prevailed at the time: Marxist thought and phenomenology. Foucault's critique focused on conceptions of the subject:

- for Marxism the subject is objectively constituted by his material conditions;
- for phenomenology the subject is an empty, a-historical locus cognising the present.

Starting with this double rejection of the thought of his time, Foucault set out to demonstrate that the subject was neither the mere product of its conditions nor an abstract, eternal transcendence freely cognising real phenomena.

Foucault's own view is that the 'subject' does not exist as a closed entity but that it would be more accurate to speak of the forms of subjectivity which are attendant to modes of discourse.

To give a simple example: in the 19th century psychology was invented as a science of man: man became an object of knowledge for man. Psychology is a *discourse*, which comes with certain *practices* such as psychometric testing, and the psychologist, i.e. the one that speaks the discourse of psychology and carries out the psychometric tests, operates with a *form of subjectivity* that is attendant to psychology as discourse and its practices. Put simply, the psychologist constructs his reality (or the way he understands the world) in the terms of the discourse he uses professionally. So the psychologist is neither simply the product of the world into which he is born (for he plays a part in implementing, interpreting, expanding, developing the discourse within which he operates) nor an a-historical subject standing outside of discourse (for his very mode of apprehending phenomena, other beings, is structured by the categories of his discourse so that it is no longer possible for him to see things otherwise than in the terms of his discourse).



For Foucault the appropriate field of inquiry is constituted by all three domains taken together. You cannot just study a discourse, or practices, as if they were objective. You also have to interrogate the forms of subjectivity attendant to a discipline.

Genealogies

Starting from this very strong epistemological claim, Foucault proceeds to write histories, which he calls genealogies, of certain discourse (e.g. human sciences: *The Archaeology of Knowledge*), institutions (e.g. the prison in *Discipline and Punish*) and practices (e.g. confession, psychoanalysis in *The Will to Knowledge*).

- Foucault carries out philosophically inspired histories of the human sciences (medicine, psychology and criminology are singled out as sciences that take man as object of knowledge).
- One of Foucault's key inspirations is Nietzschean philosophy, which expresses dissatisfaction with the idea of truth as absolute.
- For Foucault, 'truth' is always contingent, constructed, made to look objective and so 'true'.
- The point is to show how something that appears to be absolutely true and so unquestionable ('all criminals should go to prison' and 'all madmen to asylums') is in fact recent and contingent. For example imprisonment as punishment only began in the 19th century and yet it is seen as the only way to deal with crime.
- In order to show that what appears to be true is in fact historically constructed, Foucault writes genealogies: historical analyses of the micro-processes of power that eventually produced what appears as truth today.
- Hence, Foucault's work aims to produce histories of the present: how did the present come about? For example, why is the prison so important today when it had never been in the history of mankind?

Genealogies and politics

A corollary of Foucault's momentous challenge of objectivity of discourse is the exposure of the voluntary subjection of people to the discourses and practices of power. The political purpose of Foucault's genealogies, if there were to be one, would be to open a space for non-naive forms of resistances, i.e. forms of resistances that take account of the degree to which those that resist are part of the discourse that they oppose. According to Foucault, failure to do so only makes power stronger.

For example, if a law is in place but never implemented, and as a form of resistance you transgress that law, then the law is applied, legal precedents are produced, and the law you thought you were resisting is now stronger than before your transgression.

Foucault's method, which is to concentrate on micro-processes of power (for example, the minute details of prison/factory life) rather than on grand analyses of power as a whole, has been massively taken up in the UK, particularly in

governmentality studies, social studies, social control theory and risk theory (cf N Rose, D Garland).

POST-STRUCTURALISM AND DECONSTRUCTION

Lastly, post-structuralism, and particularly the deconstructive method, have exerted significant influence on CLS over the past 20 years.

- Post-structuralism is a philosophical movement which situates language as the object of its inquiry, seeking to show, put simply, that there is always more to a text than what it appears to say.
- Deconstruction seeks to reveal the hidden, repressed or unconscious contents of an author's writing.
- The deconstructive method is that of a close reading; it works by re-introducing the plurality of meanings of a key term to show that what appears to be a simple, descriptive statement or application of a law in fact conceals certain political choices made by the author.
- If it is possible to do so, post-structuralist thinkers argue, it is because language is by definition incomplete. In other words, for a text to make sense we need to refer to a *supplement*: the context of the text, the person of the author, the context of the reader.

Jacques Derrida (1930–2004)

Derrida is, without contest, the more important and controversial philosopher of the post-structuralist movement; and the 'inventor' of the deconstructive method which he first put to work in a series of texts reading the work of Saussure, Lévi-Strauss, Freud, Marx, Lacan and others (cf *Writing and Difference, Dissemination*).

STRUCTURALISM AND POST-STRUCTURALISM

Post-structuralism is so called because it came about as a critique of the structuralist movement. The structuralist movement started with Ferdinand de Saussure's structural linguistics and was developed essentially by anthropologist Claude Lévi-Strauss (cf *Structural Anthropology*, 1958) and then by Roland

Barthes as a method of literary criticism. Foucault and Lacan are also sometimes associated with the structuralist movement though they both rapidly moved away from structuralism, having nonetheless taken account of the importance of structures and language: this allowed them to move beyond the classical notion of the subject as *agency*, *intentionality* and *unity of consciousness*.

The main idea of structuralism is that the elements of a given structure only make sense in relation to each other. So for Saussure the linguist a word or signifier only makes sense in relation to other words; for Lévi-Strauss the anthropologist the rituals and symbols of a tribe only make sense when taken in relation to one another; and for Barthes the same logic applies to the reading of a novel or poem. Structuralists themselves were quick to see that if the elements of a structure only made sense in relation to each other then there lacked a point of fixed sense from which to initiate the process of interconnected meaning-making, and soon enough theoretical devices or *supplements*, as Derrida would later call them, such as the floating signifier (Lévi-Strauss) or *potlatch* (Marcel Mauss), were introduced to remedy the impasse of structuralist theory.

POST-STRUCTURALISM

The key idea of post-structuralist thought is that it is impossible by definition to represent the whole of 'reality' in language – this is why it criticises the *metaphysics of presence*, or, put simply, the idea that we could represent ourselves to ourselves accurately and exhaustively in language, an idea that had organised Western philosophy since Plato. So when we read a text or hear a speech there is always something *in excess* of what is being said and this is what gives sense to the text/speech: this is the *supplement* which the structuralists had been looking for.

DECONSTRUCTION AND CLS

A basic application of the method of deconstruction could take the form of revealing that a given legal term, with an apparently neutral and unambiguous meaning, in fact conceals a number of other meanings that are hidden or repressed and yet nonetheless inhabit a given decision. The deconstruction of a legal concept aims to reveal the latent ambivalence of a decision of law.

For example, the criminal defence of insanity (or M'Naghten Rules): some clinically insane criminals stand trial and serve a full sentence because their insanity does not preclude them from being aware that what they are doing is wrong. That is because the apparently neutral concept of insanity at law in fact already contains the implicit decision to punish the insane in the same way as the sane provided there is an awareness of wrongdoing. In this sense, perverts and psychopaths who know that what they are doing is wrong are considered to be sane for the purposes of the law, though they may well end up serving their sentences in hospitals such as Broadmoor. By revealing the hidden plurality of meanings ascribable to the notion of insanity the deconstructive work will shatter the fiction of the law's neutrality.

THE PHILOSOPHICAL BEYOND OF DECONSTRUCTION

Beyond the relatively simple deconstruction of instantiated legal concepts (i.e. legal terms employed by the courts), some of the work carried out by crits has more philosophical ambition. For example, the relation of law to justice, sovereignty and violence is the subject of a very important text delivered by Derrida in the US in 1989, entitled 'Force of Law: "The Mystical Foundation of Authority"' (*Cardozo Law Review* 11: 1990). In this text, Derrida draws on his work on language to deconstruct law – or rather, to argue that if law is always deconstructible it is because justice lies beyond it: and so deconstruction takes place *in the name of justice*. Justice is infinite, whereas law is finite: in other words, the legal response made to the Other who is before the law (the legal subject) ineluctably falls short of justice, which is an *infinite going out to the other* and so impossible. Indeed, since every subject is *singular*, and since law is *universal*, it follows that law cannot do justice to singularity. Because justice is impossible, this impossibility remains lodged at the heart of the legal decision. It haunts it and so deconstructs the law from within: for the law operates according to a logic of calculation, and not out of infinite responsiveness to singularity. Though classically we see law as just for treating everyone in the same way, for Derrida law always falls short of justice *for the same reason*. This does not mean we should not have law, but that law should not be mistaken for justice (see also D Cornell, *The Philosophy of the Limit*, 1992; M Davies, *De-limiting the Law*, 1996).

You should now be confident that you would be able to tick all the boxes on the checklist at the beginning of this chapter. To check your knowledge of Critical legal studies why not visit the companion website and take the Multiple Choice Question test. Check your understanding of the terms and vocabulary used in this chapter with the flashcard glossary.

10

Putting it into practice . . .

Now that you've mastered the basics, you will want to put it all into practice. The Routledge Questions and Answers series provides an ideal opportunity for you to apply your understanding and knowledge of the law and to hone your essay-writing technique.

We've included one exam-style essay question, reproduced from the Routledge Questions and Answers series to give you some essential exam practice. The Q & A includes an answer plan and a fully worked model answer to help you recognise what examiners might look for in your answer.

QUESTION 1

'For those who study jurisprudence today, it is nothing but a troubling mass of conflicting ideas': Arnold.

Why, then, study the subject?

Answer plan

The question is an invitation to argue on the positive features of jurisprudence in reply to Arnold's dismissive comment. A discussion of those features is required, together with comment on reasons for the contemporary (but not unwelcome) conflict of ideas. A skeleton plan might take the following form:

> Introduction – acknowledgement of conflict of ideas in jurisprudence – positive features of a study of the subject – why criticisms have arisen – conclusion on the role jurisprudence has to play.

ANSWER

It is necessary, initially, to comment briefly on Arnold's statement by noting what seems to be a highly subjective and not uncommon reaction to the undoubted ferment of opinions, principles and ideologies characterising contemporary jurisprudence. It may be that the emergence of a jurisprudential tradition of questioning everything, of accepting no 'self-evident' principles, of 'debunking' ideas which have held sway for decades, and 'deconstructing' hallowed theories, creates an impression of a nihilism triumphant. Arnold's use of pejorative terms, such as 'troubling', 'conflicting', may indicate a lack of awareness of the value of a continuous probing of 'received knowledge'. So it is in other contemporary disciplines: consider physics (in which the recent appearance of 'string theory' demands a rethinking of traditional concepts),

economics (in which not only traditional theories but the very reasoning processes that produced them are under attack) and linguistics (in which the works of the 'founding fathers', such as Chomsky, are under intensive criticism). And so it is in jurisprudence where, for example, the American Critical Legal Studies movement is engaged in a radical reappraisal of the objectives and methodology of legal studies, and the 'Law-Economics' movement perceives some aspects of economic theory as of direct relevance to jurisprudential analysis. The continuous flux in the evolution and enunciation of legal theories must, by its nature, give rise to conflict, which observers, such as Arnold, find 'troubling'. The alternative to a conflict of ideas can be a lack of vitality or a sterility which vitiates intellectual progress in jurisprudence.

One must be aware, however, that a study of jurisprudence is not considered an essential component of the education and training programmes of large numbers of lawyers. Concentration by some jurists on highly abstract theorising, to the exclusion of the severely practical concerns of the law, may have contributed to suspicion of the subject and a rejection of its pretensions. Posner's condemnation of much recent jurisprudence as 'much too solemn and self-important' and of its votaries as writing 'too marmoreal, hieratic, and censorious a prose' is worthy of note.

Much of the true value of jurisprudence resides elsewhere than in the day-to-day practical applications of the law. It is claimed that its study provides a discipline of thought which seeks not to ignore the realities of legal practice, but rather to give added dimension to an understanding of those realities. Jurisprudence offers an overall view of the law, a unified and systematic picture, in which the nature of legal institutions and theories becomes more comprehensible. Austin viewed jurisprudence as providing a 'map' of the law which presents it as 'a system or organic whole'.

Some legal scholars and students have found a major attraction of jurisprudence to be its intrinsic interest, which emerges from the importance of the perennial questions with which it deals. 'What are human rights?', 'Are there any absolute values in the law?', 'What is justice?'. These problems exemplify matters which have been raised over the centuries by philosophers and jurists. Not only the content of legislation and the administration of legal institutions, but the basis of society itself, have been affected by attempts to answer questions of this nature. They are of abiding human interest.

The intellectual discipline required for a study of this area of thought must be of a high order. Intensive, systematic analysis, the ability to exercise one's critical faculties, and to engage in a continuous questioning of one's own basic assumptions – all can be heightened by a study of jurisprudence. The intellectual skills required to see into the essence of current arguments which turn, for example, on 'the right to silence', 'the value of the jury', 'the presumption of innocence', can be sharpened by a consideration of legal theorising.

The study of jurisprudence should enlarge one's perception of the patterns of fact and thought from which today's legal structures have emerged. Specifically, awareness of the evolution of legal thought provides a key to an understanding of *change* as a basic phenomenon of the law. It is the continuous shifting of views and the transformation of social institutions which tend to be reflected in jurisprudence – and which give rise to the deep conflicts which trouble many observers, such as Arnold. The ability to perceive a process of change beneath the apparently static processes of the law can be intensified by jurisprudential analysis. It is of interest to note the recognition of change which emerged in the decision of the House of Lords in *Page v Smith* [1995] and in which could be discerned a modification of views concerning nervous shock and tort – an area in which there has been much jurisprudential speculation and debate. The War Crimes Act 1991 was preceded by wide-ranging debates which turned on important aspects of legal theory, involving changing social attitudes towards crime, punishment, and retribution. A shift of emphasis in the role of forseeability and intent in assault, which has formed the basis of much recent jurisprudential debate, was evident in the decision of the House of Lords in *R v Savage* [1991]. Perception of the law as an aspect of a changing social environment and attitudes characterises much contemporary juristic thinking, particularly evident in cases involving 'the right to life': see, for example, the decision of the Court of Appeal in *Re A (Children)* [2000], in which the court was asked to pronounce on the lawfulness of the surgical separation of conjoined twins.

Additionally, awareness of change and its reflection in legal theory, may enable jurists to note, and perhaps warn against, the invisible, unacknowledged, yet extremely potent influence of 'defunct scribblers' who continue to affect the thoughts and the activities of those 'practical persons' who have 'no time for theorising'. Jurists and philosophers have pointed out the significance of the paradox that those who affect to reject theory are, effectively, embracing it.

The statement, 'I don't need any legal theory to tell me that violence can be met effectively only by a law which sanctions counter-violence', is, in fact, the expression of a basic, complex theory. The belief, 'You haven't to be a theoretician to know that the law has no place in family relationships', implies acceptance, consciously or unconsciously, of a profound analysis of functions of law. A study of the growth and social context of legal theory makes clear the relationship of theory and practice, the one modifying the other.

The very wide range of contemporary jurisprudence has enlarged its relevance and interest. The days when legal theory was equated with an implied rejection of the significance of 'problems of the real world' have gone. The figure of the jurist as a recluse, uninterested in law in action, is now seen as mere caricature. Modern jurists include many who demonstrate a profound concern for social justice and communal harmony – this is obvious in the writings of contemporary American legal theoreticians. Dworkin, for example, argues cogently that the real purpose of the law can be found in the aim of ensuring that a community acts towards *all* its members in a 'coherent, principled fashion'. Rawls proposes acceptance of a public conception of justice which must constitute the fundamental character of any well-ordered human association. Nozick lays stress on the importance of using principles of justice so as to clarify problems inherent in the holding and transferring of society's resources. It may be that a pattern of concern has now emerged in which the responsibilities of the law, its theoreticians and practitioners, are clearly emphasised, a pattern which is in clear contrast to the implications of Arnold's perception of a 'chaotic' jurisprudence.

Where jurists survey the established socio-legal order, their jurisprudential analysis is often of significance for students of the law who are a part of that order, and whose perceptions of law as an instrument of social policy are thereby challenged. One type of perception relates generally to the relationship between jurisprudence and other disciplines. Because modern jurisprudence ranges very widely over society and because it builds some of its theoretical framework on material derived from contact with other disciplines, students are brought to an awareness of the interdependence of *all* social studies and to acceptance of the complex nature of their own place within the social framework – a positive step which belies the negative nature of Arnold's comment.

The role of the lawyer within our society – and it is that to which many law students aspire – is the subject of continuing analysis by jurists, with the result that the very rationale of the legal profession in the Western world has become a matter of debate and can no longer be taken for granted – a valuable event in itself. Thus, Luban has investigated facets of the role of the lawyer as 'partisan advocate' – a creature of the common law adversarial system. He believes that the standard view of the role of the lawyer, based on principles of 'partnership and non-accountability' in some respects, may no longer be acceptable to society save in a highly qualified form. He calls for a more intensive debate on professional ethics as they relate to the individual conscience and socio-legal institutions and suggests that the lawyer acts as a 'broker of the conspiracy at the centre of the legal system' – a conspiracy between citizens and legal institutions, each acting within defined areas so as to maximise power. Jurisprudential analysis of this nature is thought provoking and valuable.

Perhaps the most important product of a study of jurisprudence emerges in an enhanced ability to discern the shape of legal things to come, albeit in shadowy and inchoate form. The attitudes of today's legal theoreticians in relation to matters such as *mens rea*, causation, the concept of economic loss in tort, the basis of property rights, and the nature of parental responsibility, might mark tomorrow's ideologies and legal structures. A study of the modes of thought of contemporary jurists contemplating 'the destination of the law' cannot but be advantageous to those who have an interest in the future of society and the law.

None of these comments should be taken, however, as denying the existence of trivial, often worthless, theorising in the name of jurisprudence. Feinberg's objections to 'portentous and hoary figures from the past' being paraded, each with an odd vocabulary, and a host of dogmatic assertions, to the confusion of students, are not to be ignored. These objections may add weight to Arnold's complaint. But interest in the past for its own sake has little appeal to lawyers or students. *'Jurisprudence for its own sake'* is now almost a meaningless slogan. Jurisprudence has changed its objectives and its methodology. The search for justice in human relationships, the search for certainty in the law and the continuous probing of the role of the State in the recognition, promulgation, and enforcement of human rights are rarely absent from legal theorising. The result is a challenging of entrenched positions and narrow certainties, and a questioning of the hitherto unquestionable. This is, indeed, a sign of 'conflict'; but it is also a sign of vitality.

When Stone wrote of the science of jurisprudence as 'the lawyer's extraversion . . . the light derived from present knowledge in disciplines other than the law', he acknowledged the structures of legal theory as being linked totally with other studies, thus proclaiming the relevance of jurisprudence to life in general and everyday law in particular.

In that sense, a study of jurisprudence can be valuable in that it ensures perceptions of the law in the setting of a comprehensible, changing world. At times, these perceptions will appear, in Arnold's words, as 'a troubling mass of conflicting ideas', chaotic and often contradictory. But this is not necessarily a negative or undesirable state of affairs, for it is in the attempted resolution of apparent contradictions that the study of jurisprudence can be advanced.

Notes

Valuable material concerning this question may be found in Freeman's edition of Lloyd, *Introduction to Jurisprudence*, Chapter 1; Dias, *Jurisprudence*, Chapter 1; and Posner, *The Problems of Jurisprudence*. Luban's *Lawyers and Justice* is stimulating; D'Amato's *Jurisprudence, a Descriptive and Normative Analysis of Law* contains introductory chapters of unusual interest. Lord Goff's 'The search for principle', in *Proceedings of the British Academy* (1983), contains interesting critical observations concerning jurisprudence.

ROUTLEDGE LAWCARDS

are your complete, up-to-date pocket-sized guides to key examinable areas of the undergraduate law curriculum and the CPE/GDL.

New editions of all titles in the series are publishing in February 2010.

Commercial Law 2010-2011
Company Law 2010-2011
Constitutional & Administrative Law 2010-2011
Contract Law 2010-2011
Criminal Law 2010-2011
Employment Law 2010-2011
English Legal System 2010-2011
European Union Law 2010-2011
Evidence 2010-2011
Family Law 2010-2011
Human Rights Law 2010-2011
Intellectual Property Law 2010-2011
Jurisprudence 2010-2011
Land Law 2010-2011
Tort Law 2010-2011
Equity & Trusts 2010-2011

For a full listing, visit:
www.routledgelaw.com/revisionaids.asp

Routledge
Taylor & Francis Group

ROUTLEDGE Q&A SERIES

Each Routledge Q&A contains 50 questions on topics commonly found on exam papers, with comprehensive suggested answers. The titles are written by lecturers who are also examiners, so the student gains an important insight into exactly what examiners are looking for in an answer. This makes them excellent revision and practice guides.

Titles in the series include:

Business Law
Civil Liberties & Human Rights
Company Law
Commercial Law
Constitutional & Administrative Law
Contract Law
Criminal Law
Employment Law
English Legal System
Equity & Trusts
European Union Law
Evidence
Family Law
Intellectual Property Law
Jurisprudence
Land Law
Torts

For a full listing, visit:
www.routledgelaw.com/revisionaids.asp

Routledge
Taylor & Francis Group