

## Article

# Trashing the Tables: The Critical Legal Studies Symposium of the *Stanford Law Review*, Then and Now

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**Abstract:** When the critical legal studies (CLS) movement emerged in the United States, many in the legal community were shocked by the movement's radical calls to remake legal education. But the movement also presented bold criticisms of quantitative legal scholarship and calculation in law that have proven remarkably prophetic. This article resuscitates the CLS movement's concerns over "scientific law" in one of the movement's most canonical works: the Critical Legal Studies Symposium issue of the *Stanford Law Review* in 1984. Along the way, this article explores the scope and limits of CLS admonitions regarding quantitative research and legal problem solving for the present day.

**Keywords:** critical legal studies; law and science; legal education; empiricism; progressivism

## 1. Introduction

"This is the aspect of CLS—its denigration of 'science', statistics, systematic empirical research, and the like—that I personally find most objectionable and most dangerous to the long-run health of our efforts as human beings to understand ourselves and the world we live in" (Clark 1985).

"There's a Critical part of becoming a radical that involves a desire to transform and overcome false ways of perceiving reality" (Gabel and Kennedy 1984).

Although the critical legal studies (CLS) movement faded as an organized academic movement well before the turn of the twenty-first century, interest in the movement and the work of individual "Crit" movement members has been growing in recent years. New progressive academic movements, such as the Law and Political Economy Project, are returning to CLS for political insights and intellectual inspiration. Critical race theory has become the talk of the town, with politicians, journalists, and everyday Americans evincing a newfound interest—and, in some cases, grave concern—for theory and theorists that have profound connections to and scholarly beginnings in the CLS movement. Add atop of this list the better-late-than-never festschrifts, published histories, and exhortations that have centered on CLS over the past decade, and it becomes hard to deny the presence of a CLS renaissance in the United States.<sup>1</sup>

This renaissance might be surprising to some legal observers who carry memories of the bitter fights waged over legal education during the 1980s. When CLS emerged in the American legal academy, the movement was able to galvanize large numbers of progressive law students and law professors into action. However, there were many legal professionals, university donors, and government officials who were shocked by the movement's radical calls to reconstruct law schools and feared the Crits' ideas to revolutionize legal education. Aided by the Reagan administration and the newly minted Federalist Society, the "Critics of the Crits" vigorously attacked the CLS movement, engaging in strident assaults both within

<sup>1</sup> For strong examples, see (Adler 2018; Baumgardner 2021; Unger 2015; *Critical Legal Studies: Intellectual History and the History of the Present* 2020; Kennedy and Blalock 2022; Gerson 2017).



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the academy and across more public venues. These attacks played a key role in weakening the CLS movement towards the end of the 1980s. Although most of the movement's leading lights have retired from teaching and/or passed away, their cardinal ideas continue to resonate in the United States and abroad (Baumgardner 2021). The CLS movement presented bold criticisms of legal scholarship, advocacy, and the dominant norms within the legal profession, criticisms that have proven remarkably prophetic and that are helping legal professionals conceptualize and approach the problems of today.

This qualitative research essay approaches one such problem of today. The sections that follow sift through a landmark symposium on the CLS movement, held forty years ago, to demonstrate how past CLS scholarship reveals important areas of concern and poses penetrating questions about our contemporary yearning for—and professional attempts to create—scientific law. After a brief introduction to this symposium, I turn to the Crits' powerful symposium writings and engage in a close textual analysis to reveal how the Crits' past concerns should be applied to current debates over scientific law.

## 2. The Stanford Symposium as a Source for Continued Critique

Many people who worked and studied in American law schools in the 1980s received their first—or most intense—taste of the CLS movement when they picked up the Critical Legal Studies Symposium issue of the *Stanford Law Review* in 1984. Crits who I have spoken to over the years have expressed how ecstatic they were about the reach of "the Stanford Symposium" and how they relished the opportunity to spread their ideas further than they had been able to in previous years of movement work.

The Stanford Symposium successfully introduced CLS to a wider audience, and it became a canonical centerpiece of the movement's history. But this journal issue presents numerous twists, turns, contradictions, and complexities to the reader. For one thing, the journal issue runs 674 pages and includes seventeen articles (if you count the opening "President's Page"). The Stanford Symposium consisted of articles written by Crits, but it also welcomed articles penned by non-members and avowed opponents of CLS. Taken together, it is quite easy to view the Stanford Symposium as a representation of CLS itself: an eclectic and disunified hodgepodge, with diverse scholars engaged in different kinds of articles (e.g., doctrinal analysis, dialogue, methodological description, parody, and legal history) with varied approaches to legal criticism and even more varied objects of criticism. The President's Page that introduces the Symposium admits as much:

Writing a foreword to this symposium has proven more difficult than we originally anticipated. Identifying precisely what constitutes Critical Legal Studies (CLS) is not easy. . . . The articles by CLS insiders also exhibit various focuses: the CLS view of legal history (Gordon); the CLS practice of "trashing" legal doctrine (Kelman); views of lawyers and concepts of legal practice (Simon); the relationship between CLS' purported emphasis on doctrine and theory and the law and society movement's commitment to studies of law in action (Trubek); an example of a Critical legal study (Tushnet); conflicting views within CLS on the utility of traditional philosophical discourse (Gabel and Kennedy); and a theoretical speculation about the history of Critical studies, its relationship to structuralism, and the politics of its future (President's Page 1984, pp. i-ii).

It is true that some of the more abstruse elements of the CLS movement get carried away in parts of the Stanford Symposium. A quick survey of the opening article of the Symposium—"Roll Over Beethoven"—includes readily accessible and concise lines such as these:

All utopian descriptions can be taken over and falsified to legitimate oppression and flight and alienation. So unalienated relatedness is vulnerable to that, and it's of no value at all as what you're calling an abstract formulation; but it is of value among people in the process of realizing it, of articulating and making as explicit as possible a general theory of life (Gabel and Kennedy 1984, p. 6).

It is not inconsistent to, on the one hand, realize the projective temporal character of human existence, in which no one is identity, and the living subject is continually not what he or she is by moving into the next moment in a creative and constitutive way. . . . It's possible to reconcile that with unalienated relatedness, in the sense that I use the word. In other words, that nothingness, to the extent that it means that existence is in time (Gabel and Kennedy 1984, p. 19).

I want paradox and unconsciousness. Paradox and unconsciousness allow one experientially, existentially, to exist outside of the contradiction-space of separateness and unity. The miraculous free will of nature in us, which generates connectedness even when we aren't thinking about it or when we're thinking against it—and free will, our own paradoxical free will and our ability to negate what we are. Those are the things that generate unalienated relatedness (Gabel and Kennedy 1984, p. 23).

But to read these lines in isolation, outside the larger context of the Stanford Symposium or the CLS movement in general, would be to miss the forest for the trees and to overlook the Symposium's lasting political potential. For example, an honest and openminded return to the Stanford Symposium can highlight the trenchant criticisms that leading Crits leveled against certain forms of empirical legal research and knowledge claims within the legal system during the 1980s. The Crits worried about the impact of certain methodologies and academic approaches to the future of legal scholarship and legal reform. Instead of generating objective and neutral conclusions that led to better scholarship and more just legal outcomes, certain kinds of empirical work can function to reproduce and deepen illegitimate hierarchies within law schools and across American society.

During the movement's heyday, the Crits were criticized by their enemies as anti-empiricists and radical obscurantists. That was a superficial and oftentimes ideologically driven assessment forty years ago, and it also ignores the fundamental character and enduring wrinkles in the Crits' concerns. For when we pull out, distill, and reframe the Stanford Symposium today, the evergreen nature of the Crits' concerns is transparent. The Crits did not think that time could be turned back, with quantitative tools and research forbidden from legal problem solving. Nor did they wish for such an outcome. Even the Crits' intellectual forebears, the legal realists, had sought to marry quantitative tools and research to progressive legal advocacy. But the Crits did not view the expanded and unreflective use of quantitative tools and research as an unequivocal good. Instead, the perspectives that the Crits aired in the Stanford Symposium compel us to ruminate over the best understandings and most productive uses of quantitative tools in legal scholarship and in legal practice. Can these tools—or their practitioners—ever truly be normatively agnostic? If not, how ought these tools to be approached in order to ensure positive normative outcomes within the legal system?

Close attention to the Symposium articles written by Crits and CLS fellow travelers, instead of the meandering and peripheral commentaries written by movement outsiders and critics of the Crits, demonstrates the modern applicability of the Crits' searing legal comments and reveals several of the chief concerns that still plague scientific law. Close attention to these articles will also allow today's reader to contemplate the scope and limits of the Crits' admonitions regarding quantitative research and legal problem solving. For, despite the harsh empirico-skepticism and polemical rhetoric often voiced within the CLS movement, I do not believe that the collective weight of the Crits' writings in the Stanford Symposium requires an abandonment of quantitative tools in progressive legal scholarship and advocacy.

The remainder of this qualitative research essay engages in a textual analysis organized around three common and interrelated CLS concerns, with each concern delineated in the context of the Stanford Symposium and then its applications to the most controversial facets of scientific law today. My intention in the pages ahead is not to portray the Crits as legal mystics or misunderstood augurs whose prescience could only be fully realized and applauded generations later. The Crits' concerns were ripe and relevant when the

Stanford Symposium took place in 1984, and they can be recovered and reapplied in ripe and relevant ways now.

### 3. Concern #1: Immunity from Critique

The first CLS concern that can be recovered from the Stanford Symposium is quite general, yet still essential to any contemporary discussion about the datasets, algorithms, and statistical models that are increasingly dominating legal spaces. The Critics argued that no research methodology, scholarly tool, or mode of political action should be immune from critique. A legal system will become sclerotic and suffer grave difficulties when legal professionals come to depend on a methodology, scholarly tool, or mode of political action, but also insulate that methodology, scholarly tool, or mode of political action from critique. High on the catalog of grave difficulties is that the fruits of the insulated project a false sense of legal finality. For instance, an unassailable methodology leads a judge to issue a particular ruling, a ruling that is then taken to be unimpeachable due to its privileged methodological origins.

The legal phenomena that were presented as final, unquestionable, and inevitable represented frequent targets of CLS ire, including in the Stanford Symposium. In their contribution to the Symposium, Allan C. Hutchinson and Patrick J. Monahan explain that a cardinal feature of “the CLS project is to identify the role played by law and legal reasoning in the process through which social structures acquire the appearance of inevitability” (Hutchinson and Monahan 1984, p. 217). Some of the best CLS scholarship aimed at unmasking the inevitable and subjecting the processes responsible for granting the appearance of inevitability to intense scrutiny. No research methodology, scholarly tool, or mode of political action should be immune from critique. Although this basic precept of self-reflexivity and intellectual humility may appear rather anodyne to anyone even moderately influenced by Cartesian doubt, the CLS assertion of universal critique addressed a blind spot amongst American legal professionals, especially amongst law professors. As one Crit comically observes in his Symposium article, “It is abundantly apparent that the vast preponderance of mainstream American legal academics were told (repeatedly) by their moms and dads, ‘If you don’t have anything nice or constructive to say, say nothing at all.’ In the eyes of these academics, to violate this wholesome norm is an unquestionable disgrace” (Kelman 1984, p. 297).

Decades later, we can observe a deepening fealty to this wholesome norm in some quarters of American society, at least as it applies to methodologies, tools, and political actions that have been placed under the broad umbrella of science. In the wake of the COVID-19 pandemic, the educated and enlightened are expected to pay obeisance to the scientific community and to signal their profound trust in science. Even when a possible doubt or a need for more information and greater clarification start to bubble to the surface, it is thought best to “say nothing at all”. Myriad declarations of “trust in science” have appeared on t-shirts, bumper stickers, yard signs, and campaign literature. It is natural to wonder whether the effect of such zealous trust has been a political re-education of sorts, the core of which is a reappraisal about scientific work and the moral impropriety of questioning it in any way. No, scientific conclusions should be understood as conclusions, full stop. Science—and that which has the aura of science—holds out the promise of finality for thorny questions and divisive topics in society.

Here is where the CLS concern becomes even more salient. For when quantitative tools, research, and “quantitatively supported” legal action are assigned greater legal weight and start to become immune from critique, it is not just a sense of legal finality that can be wrongly manufactured, but also a powerful sense of scientific settlement. The vogue “trust in science” dogmatism, when permitted to permeate the legal system, offers the illusion of determinacy, of science providing far greater resolution to a legal matter. The legal finality achieved through quantitative work both brings closure to the legal matter and also freezes the resolution (until, of course, new information generated from quantitative tools causes the law to thaw). To be scientifically settled is to be settled, and only to be resettled by science.

From the very beginning of the Stanford Symposium, we can locate clear expressions of the Crits' rejection of this kind of settlement. In their opening article for the Symposium, Peter Gabel and Duncan Kennedy are willing to trash their own ideas and those of their fellow Crits; CLS work on the fundamental contradiction, false consciousness, and the critique of rights are all approached, criticized, laughed at, reworked, and laid bare for future examination. Gabel and Kennedy engage in a meandering conversation, but one which is animated by their joint opposition to legal finality and to legal thought becoming frozen. These two leaders of the CLS movement perfectly model the virtue of self-critique that they are demanding from the broader legal system. If you can hold on during the authors' rollercoaster ride of a dialogue, which ranges from debates over the purpose of individual rights to disagreements about the nature—and limited describability—of the human condition, you will find Gabel and Kennedy showcasing uncertainty, doubt, intellectual humility, improvisation, theorizing, and retheorizing at every stage.

Duncan Kennedy, in particular, clearly wants more openness and unsettledness about the epistemological determinations made within the legal system, and he worries about what happens when people—especially people in authority—impose closure and seek settlement on ongoing areas of inquiry. "I don't believe that's true". Kennedy remarks near the end of one argument with Gabel. "But I must admit that if it turned out to be true, I couldn't say that it defeated some theory of mine. I don't believe that you can *know* the answer" (Gabel and Kennedy 1984, p. 47). Frozen features of the legal system foist answers upon those governed by the legal system, and they function to eliminate further investigation, decision making, and improvement within the system.

As a movement that predominantly consisted of legal scholars, the CLS movement was especially attuned to the uses and misuses of academic work. Scholarship and scholarly tools that gain authority should be vulnerable to rigorous analysis and trashed if that authority is unjustified or improperly wielded. In his contribution to the Stanford Symposium, one of the founding members of CLS—Mark Tushnet—notes how "the Critical Legal Studies movement takes as a problem to be examined the existence of 'received ideals' and 'authoritative techniques' in the law, in the words of Pound" (Tushnet 1984, p. 628). True to form, Tushnet's Symposium article supplies a classic example of a Crit selecting an area of law—in this instance, federal constitutional law—and then "penetrating the surface of decisions and scholarly commentary to discover the unexpressed assumptions on which the entire Supreme Court and most commentators are agreed", before finally pillorying those popular assumptions (Tushnet 1984, p. 627).

Trashing of this kind was one of the reasons why the Crits acquired a bad boy reputation in the law schools during the 1980s, with opponents viewing the Crits' aggressive examinations of their peers' scholarship and scholarly tools, their genre-bending counterexamples, and their humorous anti-orthodoxy as troublingly unprofessional. But as Mark Kelman methodically untangles in "Trashing", his article for the Stanford Symposium, this normal CLS practice was more than an excuse for playful mockery and ivory tower contrarianism. It was a necessary weapon that movement members used to ensure that no research methodology, scholarly tool, or mode of political action was immune from critique. In one exceptionally punchy section defending this weapon, Kelman links the skepticism embedded in trashing to its goal of helping us to more accurately perceive and interact with our surroundings:

*Trashing May Destabilize Pervasive Complacency-Inducing Rationalizations*

One goal, if not an inevitable effect, of trashing is to destabilize a variety of theoretical world views (and thus, one would hope, related commonsense world views) that imply the beneficence or inexorability of social life as we see it... much of the "trashing" work within CLS is designed to counter beliefs (which appear quite clearly in daily life) that the world is running smoothly... The impetus for collective transformation is in part the *perception* that the world is excessively imperfect; high-level liberal ideology corresponds to, even if it may

not cause, “commonsense” organizations of the perceptions of daily life that block the recognition of imperfection (Kelman 1984, pp. 327–29).

Detractors of the CLS movement were quick to label the Crits as pointless provocateurs, jerks content with amusing themselves by continuously laughing off others’ work. But it is clear from the movement’s oeuvre that a main reason that Crits pushed back against the urge for methodological immunity was to help legal professionals, in particular, better understand their own methodologies, tools, and political actions and then aid in improving them, if possible. Kelman describes how the Crits’ trashing could usefully demonstrate the limits of legal arguments and reform efforts and could be called upon to improve and radicalize those arguments and reform efforts.

At times, for instance, we will, in a more radical mode, advocate particular legal reforms, hoping both to better the short-term position of the reform’s beneficiaries *and* to expose the limits of legal reform. This second aim, political education, is perfectly concrete and constructive, even though it is far less relevant to those only interested in whether the reform ought to be enacted to help the beneficiaries. At other times, in our role as purely descriptive academics, hoping to *explain* the legal culture we all live in, we may simply deconstruct arguments in a way that is of no obvious immediate help whatsoever to those trying to pick and choose particular institutions they might find most desirable, except insofar as they are freed to evaluate their choices differently when their current cultural blinders are labeled, exposed, and, perhaps as a result, partly lifted (Kelman 1984, pp. 298–99).

At the time of the Stanford Symposium, Kelman deemed trashing to be “simply the best available academic posture” (Kelman 1984, p. 297). In fact, it was a posture that was struck regularly in relation to quantitative tools and quantitative legal scholarship. The Crits understood the yearning for scientific law and for a legal system that borrowed tools, methodologies, and standards for action from the natural and social sciences, and which rebuilt a legal academy that mirrored the science departments found in the modern research university. Properly scientized law schools would be able to notify legal professionals of relevant scientific discoveries and equip those professionals with new scientific resources capable of simplifying and improving their work. The Crits saw this yearning clearly reflected in the quantitative work of some scholars affiliated with the law-and-society movement and the law-and-economics movement. For example, Richard Posner extolled the rise of the law-and-economics movement for assisting in the necessary scientization of American law. One of the most important figures in the law-and-economics movement, Posner was the first editor of *The Journal of Legal Studies*. In the inaugural issue of the journal, Posner set out the aims of the new journal. First and foremost was the aim “to encourage the scientific study of law” and “the application of scientific methods to the study of the legal system” (Posner 1972, p. 437). The clarity and objectivity of science needed to be incorporated into theories and practices of law, and scholars like Posner intended to move American law beyond its “prescientific stage”.

As biology is to living organisms, astronomy to the stars, or economics to the price system, so should legal studies be to the legal system: an endeavor to make precise, objective, and systematic observations of how the legal system operates in fact and to discover and explain the recurrent patterns in the observations—the “laws” of the system. Although much pioneering work of high distinction has been done, it is plain that our subject is in its prescientific stage (Posner 1972, p. 437).

The Crits regularly subjected this research to penetrating scrutiny and rigorous examination. Across the Stanford Symposium, we find Crits pinpointing lacunae and putting forward new questions for quantitative legal scholarship conducted in the law-and-society movement and the law-and-economics traditions (Kelman 1984; Trubek 1984; Hutchinson and Monahan 1984; Schlegel 1984). And the Crits’ trashing could be quite cutting. John Henry Schlegel’s Symposium article elaborates on a faction of Crits who were “denouncing

as meaningless the efforts of empirical social science”, which led to great strains between the CLS movement and progressive law-and-society scholars (Schlegel 1984, pp. 394, 408). The Symposium contributions of Allan Hutchinson, Patrick Monahan, and David Trubek explore the Critics’ willingness to trash the leading tools and research of law-and-society scholars, even though the law-and-society movement was widely seen as a progressive academic movement, a valuable aid to leftist legal reformers, and a potential ally to the CLS movement in its growing battles within the law schools (Trubek 1984; Hutchinson and Monahan 1984). The law-and-society movement was not immune from critique.

#### 4. Concern #2: Feigned Depoliticization and Conservative Politicization

The second CLS concern that we can take away from the Stanford Symposium regards the politics of law and the role of ostensibly apolitical legal innovations in furtively reengineering the political dimensions of law. The Critics argued that “law is politics, all the way down”, and they worried about interventions made within a legal system that purported to depoliticize the system, but which facilitated the imposition of conservative political ideas into the system (Tushnet 1991, p. 1526). This concern clearly connects to, and extends beyond, the previous concern and its application to quantitative research and legal problem solving today. There is a popular belief that quantitative tools either eliminate or, at the very least, seriously reduce the role of politics, personal choice, and contingency in legal processes. Quantitative research and results are viewed as non-ideological and capable of ensuring a level of determinacy within the law—“*after running a series of regressions, the data plainly shows...*”. This perceived virtue is one of the main reasons why quantitative tools are seen as privileged tools deserving of immunity from the kinds of criticisms applied to other research tools.

But the Critics were concerned that seemingly apolitical and objective legal theory and praxis mask the political nature of law. As Peter Gabel reiterates in his contribution to the Stanford Symposium, people need to see the law for what it is and “overcome illusions about the nature of what is political” (Gabel and Kennedy 1984, p. 33). It is natural to desire the separation of law from politics, to believe in legal spaces prescinded from the logrolling, gamesmanship, and pettiness of partisan affairs. A perceived responsibility of the dedicated legal professional is to maintain the rule of law and to carve out such apolitical spaces. However, in the Stanford Symposium, the Crit scholars are unflinchingly skeptical of this exact ideal, “an ideal of practice as an activity that transcends both personal ethics and politics” (Simon 1984, p. 469). Two Critics expressly condemn the liberal legal views that envision the bracketing of law from politics and that understand legal reasoning and action as more than “vulgar political debate”:

The Critical scholars argue that the existence of hierarchy and contradiction in liberal society is masked by the ideal of the rule of law. Under this ideal, outcomes are said to be the product of impersonal, neutral methods of choice, rather than the imposed preferences of an illegitimate hierarchy... By obscuring the value choices inherent in the application of rules, the liberal model of adjudication makes it possible to believe that existing social hierarchies are not just the result of interrupted fighting. In the process, a world of deals begins to be transformed into a world of rights (Hutchinson and Monahan 1984, pp. 207, 209–10).

When we imagine that the legal system can operate mechanically, setting aside political and ethical considerations as the right tools and scholarship are aptly applied, a new light comes to grace our legal decisions. Even those decisions with far-reaching political implications can acquire a patina of necessity when those decisions are rendered and justified on the basis of the right tools and scholarship. In his Symposium article, “Critical Legal Histories”, legal historian Robert Gordon directly deals with the methodological challenges facing contemporary legal scholarship. Gordon laments how a false sense of necessity befalls some scholars’ interpretation of legal development, for they “obscure the ways in which these seemingly inevitable processes are actually manufactured by people who claim (and believe themselves) to be only passively adapting to such processes”

(Gordon 1984, p. 70). Whether it is through the use of history or the use of algorithms, legal scholars and practitioners can frame the law's past and present developments in a manner that eliminates the multiple moments of freedom, choice, and contingency. "Well, the numbers clearly say X, so we must act. . . . The levels of Y are two standard deviations below the mean, which warrants redress by. . .". In cases such as these, the data are not functioning merely as one type of information amongst many other types that can inform legal action. Instead, they represent the ultimate arguments for, and justification of, legal action. There is no perceived choice; the data tell us what is to be done. This political masquerade horrified the Critics. The right set of tools and scholarship could equip legal professionals to make choices—political choices—regarding legal action, while furnishing an image of apolitical necessity.

The Critics attempted to blow up this fiction by openly rejecting the pretense of neutral legal theory and praxis and inveighing against legal tools and scholarship that were claimed to advance such neutrality. The Stanford Symposium reflects this commitment well. Many of the Critics who contributed to the Symposium put forward their own personal descriptions of the CLS movement's focus on law's indeterminacy. "The same body of law, in the same context, can always lead to contrary results because law is indeterminate at its core, in its inception, not just in its applications", Robert Gordon succinctly writes (Gordon 1984, p. 114). William Simon declares that "one must acknowledge the indeterminacy of the system: that it consists of ambiguous and conflicting practices, that there are many ways in which its members can act while remaining in it, and that there are many ways in which it can develop without losing its identity" (Simon 1984, p. 501). Hutchinson and Monahan are just as incisive on the topic: "All the Critical scholars unite in denying the rational determinacy of legal reasoning. Their basic credo is that no distinctive mode of legal reasoning exists to be contrasted with political dialogue. Law is simply politics dressed in different garb; it neither operates in a historical vacuum nor does it exist independently of ideological struggles in society" (Hutchinson and Monahan 1984, p. 206).

But the Critics' intention in the Symposium is neither to discredit the entire enterprise of law nor to promote the utopian idea that a panacea is out there, only temporarily hidden, which will finally remove the political dimensions of law once revealed. The political and indeterminate nature of law is "an unavoidable reality", one Symposium author reminds us. But it also is "a moral and political opportunity" (Simon 1984, p. 469). The Critics believed that by openly acknowledging the political import of even ostensibly apolitical legal innovations, legal professionals can have open and honest political debates—both in legal scholarship and in legal practice—about how best to approach and transform the law. In his Symposium article, David Trubek explains, "If law is indeterminate, all scholarship on what the law is becomes a form of advocacy rather than a 'neutral' or 'scientific' activity. If there is no distinct form of legal reasoning, scholarly argumentation about the law blends into political and ideological debate" (Trubek 1984, p. 578).

It is futile to pray for either quantitative tools or newfangled academic theories gaining attention in the latest law review to depoliticize a particular field of law or to produce determinate outcomes within the American legal system. According to the Critics, we will arrive at better legal decisions and we will improve our social arrangements in the United States only when we own up to the fact that legal actors are tasked with making moral and political choices every day. From the quantitative social scientist offering expert testimony in a bankruptcy case to the EPA lawyer walking a federal judge through statistical models on water pollution levels, those acting within our legal system are regularly deciding which values to enshrine in the law and which to demolish. "Choosing between values is inescapable", so it is best that we fight frankly about what those values are and which of them to entrench in the law (Hutchinson and Monahan 1984, p. 208).<sup>2</sup>

<sup>2</sup> For more than a decade, the CLS movement engaged in important fights over the precise values that movement members wanted to see entrenched in the law. For more information on this subject, see (Baumgardner 2021; Kelman 1987).

Otherwise, it is much harder to detect the introduction of controversial political ideas into our legal system. This illuminates the second half of the Critics' concern over depoliticization, namely, that conservative politics would be carried in the belly of a putatively apolitical Trojan horse. Nay (neigh?), whinnied the Critics. In his masterly article in the Stanford Symposium, David Trubek shows how this concern relates to recurring CLS broadsides against quantitative tools and research. Trubek explicates these CLS attacks and lays out why Critics "believe that much of the actual practice of empirical research on law in the United States is politically conservative in a more direct and concrete way. Topics are defined and studies are conducted, it is alleged, so as to reify the existing system of law and existing beliefs" (Trubek 1984, p. 617). Instead of exploiting the malleability and liberatory potential of law to transform our society along lines of non-domination, racial and sexual egalitarianism, and anti-capitalism, some legal professionals fall victim to scientism. New positivist, social scientific approaches to law reburnish law's reputation without disturbing the status quo, thus entrenching preexisting moral and political values and unjust hierarchies without ever having to participate in open political combat. "For the Critical scholar, the pretense that social science methods lead to objective and value neutral knowledge hides an implicit and conservative political message behind a neutral and technocratic façade", Trubek stresses (Trubek 1984, p. 618).

This CLS concern should push present-day progressive lawyers who advocate for quantitative research to form the basis of progressive legal action to take seriously the political fit of such research. Are progressives relying on quantitative tools and scholarship in legal action exactly because these "viable" tools and scholarship easily fit into the dominant legal consciousness in American society?<sup>3</sup> Are these tools and scholarship actually assisting in the reproduction of the dominant legal consciousness? Maybe quantitative tools and scholarship really are being used to transform the dominant legal consciousness in the country. Maybe they are being wielded to "bring to light the world views encoded in modern legal consciousness and expose that which is false" so that "the blinders will fall from our eyes, and we will be free to create new systems of meaning and thus new relationships" (Trubek 1984, p. 593). But this certainly was not the case at the time of the Stanford Symposium.

The growing use of law-and-economics scholarship by lawyers, judges, and bureaucrats in the 1980s was an obvious bugbear for the CLS movement, and Critics pointed to this scholarship as evidence of the clandestine conservatization of law via quantitative legal work.<sup>4</sup> In his contribution to the Stanford Symposium, Mark Kelman—a frequent critic of the law-and-economics movement—attacks the scholarship coming out of the movement for representing bad science: it was poorly conducted, made inaccurate assumptions about human behavior, and ignored empirical realities relevant to the law. Moreover, the law-and-economics scholarship being picked up and applied by conservative legal forces was responsible for advancing objectionable political ideas into the American legal system while pretending to eschew politics. For example, "today's 'law and economics' sorts have applied cost-benefit analysis to entitlements, purportedly creating a coherent general picture of an apolitical legal method", Kelman notes. "But, in reality, the analysis is utterly indeterminate: Although the analysis purports to establish a rights framework ex nihilo, it in fact requires a preexisting rights framework in order to generate concrete results. Further, the analysis is unself-consciously limited, blinded by a pompous scientism" (Kelman 1984, p. 294).

<sup>3</sup> "Legal consciousness is that aspect of the consciousness of any society which explains and helps justify its legal institutions. The legal consciousness of a society is the way in which that society integrates understanding of legal order with other ideas which give meaning to its social world. Taken most broadly, legal consciousness includes all the ideas about the nature, function, and operation of law held by anyone in society at a given time" (Trubek 1984, p. 592).

<sup>4</sup> For more information about these concerns over conservatization, see (Kelman 1983; Horwitz 1980; Schlegel 1997; Baumgardner 2019, 2021).

### 5. Concern #3: Interpretability and The Interpretation Elite

The Stanford Symposium outlines a third and final CLS concern that can be applied to current debates over scientific law. This concern is connected to the previous two, but it relates more directly to the problems associated with legal interpretation. We can detect in the Symposium a resistance to legal tools that are elevated in a way that forces the legal system to contort and redefine legal phenomena into (1) material that is suitable for interpretation by the elevated tools, and (2) material that, once interpreted, is capable of effective utilization during legal action. Such elevated tools result in the privileging of some legal phenomena at the expense of countless other phenomena, while also enthroning the technical experts who fashion and wield the elevated tools as new members of the legal elite. They become a specialized class of interpretation elite.

In their discussion of liberal rights discourse in the American legal system, Peter Gabel and Duncan Kennedy broadly argue against the dishonesty, coerciveness, and unproductiveness of a legal system that pressures a person to translate their “political feelings” and “true needs and desires” into a pre-approved, formulaic language for those feelings, needs, and desires to gain legal legitimacy. Such a “false language”, according to Gabel, functions to suppress the “true political language, political modes of communication about the nature of reality and what it is that people are trying to achieve” (Gabel and Kennedy 1984, pp. 26–44). That is because not all real human needs are infinitely flexible and manipulable. Or, more precisely, not all our needs can be seamlessly translated in a manner that is intelligible to—and suitable for interpretation by—the analytical tools and interpretation elite that are lionized, at the moment, within a legal system.

As a result, many needs become lost in translation. But not all needs. Some are proven to be more translatable—and of greater legal utility once translated—than others, which means that those are the needs that the law regularly acts on. Legal professionals have eyes to see, and they pick up this lesson. The orthodox language and its corresponding analytical tools eventually are fetishized—minted as the coin of the realm, which all must dutifully acquire, trade, and worship (even those who are trying to reform and reorder the realm). Naturally, this language will be used in bad faith by some legal actors, as “just a peg or a hook on which a person who already has an intention to be demobilized, or an intention to be a reactionary can hang his hat—something to incorporate into his project that will give it some surface plausibility” (Gabel and Kennedy 1984, pp. 16–19). But it does not take an entire army of bad faith actors to perpetuate the cycle of unequal legal responses caused by a “false language” or to yield the repeated legitimation and entrenchment of social inequalities.

Today, there is a mounting worry that quantitative tools and the technical language that encircles them will become fetishized within the legal system, even as most lawyers and legal scholars likely would acknowledge that not all legal phenomena are quantifiably interpretable. The Critics were sensitive to this form of legal reductionism and the constrained normative visions of law that it engendered. In his Symposium article, David Trubek writes about how the Critics resist “methods that relate objective indicators of behavior with variables external to the actor; a central theme of Critical legal thinking is that the actor’s ideas about the meaning of the relations in which he/she is embedded are the most important thing for which a social explanation should account” (Trubek 1984, p. 617). Here we have located an immovable barrier between the CLS movement and empirical legal scholars who believe that their methodological approaches not only bless them with objective standards of measurement and a necessary “critical distance” from their subjects, but also that the resultant measured data from their approaches approximate reality and offer a comprehensive—or (more modestly) near comprehensive—interpretation of legal phenomena. “Though they believe they are in touch with ‘reality’, such researchers live in a set of false constructs whose pernicious social effect they themselves have strengthened through their analytic categories” (Trubek 1984, pp. 617–18).

By placing undue faith in a new interpretation elite, we also endow these legal actors with unearned power and disempower other legal actors. We teach people to believe that it is only—or primarily—members of the interpretation elite who are fit to interpret and influence

the law. In his Symposium article, “Critical Legal Histories”, Robert Gordon derides the vision of law that seeks to entrust legally significant work to a small class of elite who possess the right professional tools. This vision “reserves even what it believes to be the very marginal opportunities for legal influence on the direction of social change to an elite of policymakers: Mass movements and local struggles are not ordinarily thought of as makers of legal change” (Gordon 1984, p. 70). This constrained vision arrogates legal authority to the elite, despite the fact that “[m]ost legal change takes place all through civil society, in thousands of small interactions usually with no official visibly present at all” (Gordon 1984, p. 108).

In the Stanford Symposium and beyond, the Crits broadcast their distress about legal mystifications such as these, mystifications that could mislead the American people, reinforce unjust hierarchies in society, quiet nascent questions, and foreclose possibilities for structural transformation within the legal system. Their distress directly applies to current considerations about the proper use of quantitative tools by legal professionals and the quest by some legal professionals to advance scientific law. The unreflective propagation of—and undue exaltation of—quantitative tools in the legal system can lead to a heavily sanitized image of law. Law becomes depicted as rational, orderly, logical, impersonal, and socially comprehensive. To increasingly subject the law to quantitative tools, we are told, is to subject the law to reason and to have the law gradually improve and take on the properties of a good science.

This image averts our eyes from alternate images of the messy, malleable, socially incomplete, and embodied features of law. Put simply, legal interpretation that centers on quantitative tools and their actionable assessments distracts us from the essential, yet quantitatively unmeasurable and unintelligible, legal phenomena in our legal system, as well as the constructive roles played by those persons who are not members of the interpretation elite. This includes the majority of the American people who are actively making legal decisions, who are being affected by legal decisions, and who are enduring legal consequences and then reacting to those consequences. As we might expect, the actions of ordinary Americans differ on occasion from the actions that the interpretation elite would endorse. But that is not because ordinary people are necessarily less legally literate or trustworthy than the interpretation elite. Instead, they are tapping into different social tools than the elite would. As William Simon explains in his Symposium article:

The range of norms and practices that professionals conventionally understand as legal or intrasystemic are an arbitrarily limited subset of the universe of norms and practices that in fact constitute the system. At any moment, a modern society is constituted by a universe of current and remembered norms and practices that are ambiguous and contradictory. In such circumstances, different groups can commit themselves to different norms and practices, each believing that its own commitments express the true identity of the system (Simon 1984, p. 497).

## 6. Conclusions

The Critical Legal Studies Symposium issue of the *Stanford Law Review* in 1984 retains a special position in the CLS movement canon. Leading scholars within the movement were involved in the Symposium, and the Crits’ Symposium articles showcase common areas of academic study, political activism, and social critique in the movement. The Stanford Symposium is rich and complex, compiling large doses of both wisdom and anxiety. When reading the Stanford Symposium four decades after it was originally published, various elements leap from the page (and not the same elements that leapt years ago when I first read the Symposium). The aim of this article was to pull out, distill, and reframe a particular slice of the Symposium. Relaying specific concerns that recur across the Symposium hopefully will inspire us to consider new angles of a momentous modern development in the American legal system, namely, that the legal system increasingly is incorporating quantitative approaches and scientific expectations into the regular functioning of the system.

In this qualitative research essay, I have attempted to supply a close textual analysis that restates the Crits’ concerns as succinctly and plainly as possible, without positing

solutions that the Crits themselves did not posit in the Symposium. The next step in a renewed consideration of the Crits' concerns must include ideas about how each of the concerns can be addressed by quantitative researchers and lawyers who advocate for quantitative research to form the basis of progressive legal action. For starters, an openness to critique, a willingness to acknowledge the political opportunities and risks of quantitative legal work, a recognition of the numerous interpretive limits of quantitative tools and those who fashion and wield them, and the establishment of precautions that guard against the fetishization of quantitative tools and the technical language that accompanies them would go a long way in protecting legal professionals from the pitfalls that the Crits enumerated in the Symposium. It also may prove worthwhile to investigate why so many Crits—including those who participated in the Stanford Symposium—engaged in quantitative research and legal problem solving. . .

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