

## DEMYSTIFYING CLS: A CRITICAL LEGAL STUDIES FAMILY TREE

### ABSTRACT

From the first Conference on Critical Legal Studies in 1977, difficulties have arisen when trying to qualify what can be defined as critical legal studies. As either a jurisprudential banner or a specific reference, the term critical legal studies can lead to a variety of different meanings with little consistency. This article argues that due to the broad application of critical legal studies across different times and jurisdictions, it would benefit from a structured system of categorisation. By identifying various critical legal studies, this article briefly defines and categorises each major limb in relation to one another, in turn forming a critical legal studies family tree. Once this overview has been presented, this article focuses on the United States of America ('US')-based branch of Critical Legal Studies demonstrating how this method of categorisation provides clarity. Specifically, this demonstration addresses the roots and death of the US-based Critical Legal Studies and its effect on the continuation of critical legal studies works after this event.

### I INTRODUCTION

More than 40 years after the first Conference on Critical Legal Studies in 1977,<sup>1</sup> the movement itself has ground to a halt, with 'Critical Legal Studies' (or 'CLS') remembered as a historical movement of 'left intelligentsia' against legal liberalism.<sup>2</sup> At the same time, critical legal studies, concerning fields of legal inquiry that are posed to critique law from a critical position, or through

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<sup>1</sup> Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (New York University Press, 2004) 204 ('*Legal Education and the Reproduction of Hierarchy*').

<sup>2</sup> Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (Routledge, 1<sup>st</sup> ed, 1996) 185. See, eg, E Dana Neacsu, 'CLS Stands for Critical Legal Studies, If Anyone Remembers' (2000) 8(2) *Journal of Law and Policy* 415.

a critical lens, are flourishing.<sup>3</sup> Such is the multifaceted nature of the term ‘critical legal studies’ that differentiations often rest with necessary further identification of specific themes, theorists, or scholars. However, this adds complication to an already difficult area to navigate. This article proposes that the non-doctrinal approach taken by scholars of the Critical Legal Studies movement ‘mystifies’ critical legal studies as a term. To combat this mystification, this article proposes a critical legal studies family tree as an act of demystification. Focusing on the US-based Critical Legal Studies movement, this article will demonstrate the clarity this framework brings via the proposal of two different US-based Critical Legal Studies. For ease of understanding and clarity, this article adopts two different expressions of the term ‘critical legal studies’: the term is capitalised (and at times abbreviated) when referring to the Critical Legal Studies movement; and is written in lower case when referring to the broader application of critical legal studies.

Broadly, the approach undertaken in this article is inspired by Duncan Kennedy’s critique of structures and the specific quote in ‘Legal Education as Training for Hierarchy’, that there is ‘endless attention to trees at the expense of forests’.<sup>4</sup> In its original context, the quote relates to pedagogical structure in law schools, however Kennedy’s observation can also be levelled at existing works which attempt to clarify or demystify critical legal studies. While this article addresses the specifics and minutiae relating to CLS, its primary goal is a meta-analysis to categorise the often-singular grouping of critical legal studies. There is also an attempt at irony through this ‘forest type’ meta-approach and the designation of a family tree.

The foundation of this family tree draws from existing work in this area by Margaret Davies, Costas Douzinas and Adam Gearey. In their clarifications, Douzinas and Gearey categorise critical legal studies through national identities.<sup>5</sup> The authors identify similarities between the national varieties but address their individuality based on geographic lines, specifically looking at different branches of Critical Legal Studies in the US,<sup>6</sup> United Kingdom (‘UK’),<sup>7</sup> Australia,<sup>8</sup> and South Africa.<sup>9</sup> Taking a different approach to the same problem, Davies designates a broad and narrow categorisation to critical legal studies, designating the US Critical Legal Studies

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<sup>3</sup> See especially Cassandra Sharp and Marett Leiboff (eds), *Cultural Legal Studies: Law’s Popular Cultures and the Metamorphosis of Law* (Routledge, 2015). See also Matthew Stone, Illan rua Wall and Costas Douzinas (eds), *New Critical Legal Thinking: Law and the Political* (Routledge, 2012).

<sup>4</sup> Duncan Kennedy, ‘Legal Education as Training for Hierarchy’ in David Kairys (ed), *The Politics of Law A Progressive Critique* (Pantheon Books, revised ed, 1990) 38, 38.

<sup>5</sup> Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart, 2005) 229–58.

<sup>6</sup> *Ibid* 229.

<sup>7</sup> *Ibid* 239.

<sup>8</sup> *Ibid* 247.

<sup>9</sup> *Ibid* 253.

movement as narrow and critical race theory as broad.<sup>10</sup> However, while Douzinas and Gearey, and Davies' approaches provide some clarity, they have limitations.

Notably, Douzinas and Gearey's categorisation becomes muddled with the (re)location of the critical legal scholars they assign to specific locations, a point which the authors themselves identify.<sup>11</sup> The authors' acknowledgement of this issue highlights the placeholder nature of these categories, rather than creating a definitive structure. Similarly, it can be inferred from Davies' approach that a dichotomy is imposed, and a designated critical legal studies is either broad or narrow. Whilst imperfect, both approaches are useful as a starting point to think about the categorisation of different critical legal studies. Building upon these ways of thinking about critical legal studies, this article's presentation of a critical legal studies family tree aims to reduce complication and assist in the exploration of critical legal studies' complexities.

The core of this article is a literal genealogy; however, given Michel Foucault's influence on critical legal studies it would be remiss not to mention his reading of genealogy.<sup>12</sup> Notably, Foucault applied his interpretation of genealogy in *The History of Sexuality*,<sup>13</sup> however, he provided a concise overview of this method in the short essay, 'Nietzsche, Genealogy, History'.<sup>14</sup> In this essay, Foucault outlines that his reading of genealogy draws on Friedrich Nietzsche's *On the Genealogy of Morals*,<sup>15</sup> specifically highlighting Nietzsche's differentiation of the often synonymous origin, ancestry, and beginning.<sup>16</sup> For Foucault, this is not an exercise in splitting hairs, but an interrogation of words and histories that are often overlooked — those in the most 'unpromising places, in what we tend to feel is without history'.<sup>17</sup> Focusing on the different applications Nietzsche uses for words related to 'the start', Foucault argues that it is possible to travel past ideals of 'lofty origins' to 'lowly beginnings', and in turn, new historical perspectives.<sup>18</sup>

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<sup>10</sup> Margaret Davies, *Asking the Law Question* (Thomson Reuters, 4<sup>th</sup> ed, 2017) 191. Critical Race Theory is an American social theory which critiques institutions and race neutrality from a racialised perspective. Critical Race Theory drew from but distinguished itself from Critical Legal Studies and the Civil Rights Movement focusing on race, racism, and power: see especially Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York University Press, 2001).

<sup>11</sup> Douzinas and Gearey (n 5) 239, n 26.

<sup>12</sup> See, eg, Duncan Kennedy, 'The Stakes of Law, or Hale and Foucault!' (1991) 15(4) *Legal Studies Forum* 327.

<sup>13</sup> Michel Foucault, *The History of Sexuality, Volume One an Introduction*, tr Robert Hurley (Pantheon Books, 1978).

<sup>14</sup> Michel Foucault, 'Nietzsche, Genealogy, History' in John Richardson and Brian Leiter (eds), *Nietzsche* (Oxford, 1978) 139.

<sup>15</sup> Friedrich Nietzsche, *On the Genealogy of Morals* (Penguin Classics, 2013).

<sup>16</sup> Foucault, 'Nietzsche, Genealogy, History' (n 14) 140–1.

<sup>17</sup> *Ibid* 139.

<sup>18</sup> *Ibid* 142.

In a broad sense, the rationale Foucault provides through genealogy aids the justification to re-examine critical legal studies. As this article argues, the history of critical legal studies is, for the most part, settled; but this has led to a conflation between the variety of different critical legal studies. However, whilst the Foucauldian development is relevant in this general way, its specific methodology is not applicable to the very literal genealogy presented here through the critical legal studies family tree. Instead, this article proposes that through the creation of a family tree, different branches of critical legal studies can be clearly separated. To demonstrate the effectiveness of the critical legal studies family tree, this article first presents an overall understanding of the structure and its interrelated limbs. Having established the outline of the family tree, the focus shifts to a specific branch, undertaking a detailed assessment of the US-based Critical Legal Studies movement.

After addressing the roots of CLS, focus then turns to the proposed death of Critical Legal Studies in the mid-1990s. This article argues that this death adds to the mystification of critical legal studies, however the family tree may assist in counteracting this mystification and providing clarity. Specific attention is given to the death and its relation to three interconnected areas: the scholars who founded Critical Legal Studies; their location at Harvard Law School; and the rivalry between Critical Legal Studies and law and economics.

It must be noted, however, that the focus on these three areas should not be read as a rejection of internal issues in the US-based CLS, or conflicts between other left critiques of law, such as critical race and feminist legal theory; or similarly, issues with external parties, such as the Federalist Society at Harvard. Instead, through the interaction between key scholars, their location, and the rivalry of their approaches, this broad meta-analysis will demonstrate *a* cause of death and a way to understand the position of the Critical Legal Studies that continues posthumously.<sup>19</sup>

## II THE CRITICAL LEGAL STUDIES FAMILY TREE

A discussion of critical legal studies requires the term to be unpacked, providing an understanding of its origins, impact, and legacy. However, when asking the seemingly simple question ‘what is critical legal studies?’ the answer given depends on a number of factors including the time, location, and associated theorists, with each combination providing a host of different answers. These different answers demonstrate the breadth of critical legal studies. Appreciating this breadth contextualises the existing work undertaken on differentiating the various forms of critical legal studies. Davies addresses this issue by offering a broad and narrow reading of critical legal studies.<sup>20</sup> Davies’ framework outlines a way to separate the narrow category of Critical Legal Studies as a title, and the broad category of critical legal studies as a description. For example, the narrow categorisation focuses on the Critical Legal

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<sup>19</sup> See generally, James Gilchrist Stewart, ‘CLS is Haunted! A Perspective on Contemporary Critical Legal Studies’ (2020) 32(1) *Law and Literature* 135.

<sup>20</sup> Davies (n 10) 191.

Studies movement,<sup>21</sup> which Davies restricts to an existence within the US from the 1970s to early 1990s.<sup>22</sup> Contrastingly, Davies applies the broad categorisation to areas of legal theory which take a critical approach to law, including critical race theory and feminist legal theory.<sup>23</sup>

The division of critical legal studies into broad or narrow categories should be understood as a clarification of the term, rather than a separation of two distinct areas. Davies demonstrates that these two readings of critical legal studies can be identified, however the influence of the narrow category on the broad,<sup>24</sup> and to some extent vice versa,<sup>25</sup> is accepted within the literature.<sup>26</sup> This interwoven relationship between both broad and narrow critical legal studies means the distinction Davies draws is not always immediately clear. This lack of clarity demonstrates the nuanced relationship between a number of broad and narrow critical legal studies, although it should be noted that this link is not present in all Critical Legal Studies works.<sup>27</sup> The use of a broad–narrow distinction does, however, provide a blunt distinction, based on parameters of time, location, and author.<sup>28</sup>

Similarly, Douzinas and Gearey categorise critical legal studies through a series of geographic locations.<sup>29</sup> This categorisation alleviates the dichotomous nature of Davies' broad–narrow approach, but still presents some foundational issues. The primary issue is acknowledged by the authors in their discussion of Critical Legal Studies in the UK and the 'Brit Crits':

There is a problem with the 'Brit' Crit. Many of the scholars associated with this position are not British. Although some may have become British through long association with British bad habits, others are resolutely non-British, or even anti-British.<sup>30</sup>

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<sup>21</sup> Roberto M Unger, *The Critical Legal Studies Movement* (Harvard University Press, 1983).

<sup>22</sup> Davies (n 10) 191.

<sup>23</sup> Ibid.

<sup>24</sup> See Patricia J Williams, 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' (1987) 22(1) *Harvard Civil Rights-Civil Liberties Law Review* 401; David M Trubek, 'Foundational Events, Foundational Myths, and the Creation of Critical Race Theory, or How to Get Along with a Little Help from Your Friends' (2011) 43(5) *Connecticut Law Review* 1503; Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back to Move Forward' (2011) 43(5) *Connecticut Law Review* 1253.

<sup>25</sup> See, eg, Duncan Kennedy, *Sexy Dressing Etc* (Harvard University Press, 1993).

<sup>26</sup> See, eg, Trubek (n 24); Crenshaw (n 24); Mari J Matsuda, 'Looking to the Bottom: Critical Legal Studies and Reparations' (1987) 22(2) *Harvard Civil Rights-Civil Liberties Law Review* 323.

<sup>27</sup> Trubek (n 24); Crenshaw (n 24).

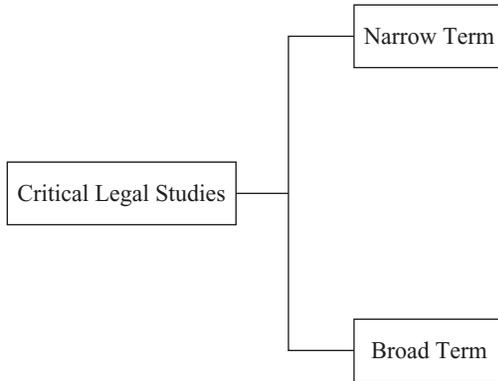
<sup>28</sup> Davies (n 10) 191.

<sup>29</sup> Douzinas and Gearey (n 5) 229.

<sup>30</sup> Ibid 239.

Douzinan and Gearey recognise their framework’s limitations and do not impose it as a mode of firm categorisation. Instead, it is used to differentiate the historical locations of Critical Legal Studies in the authors’ larger project of ‘[c]ritical legal thought’, itself a conscious progression from Critical Legal Studies.<sup>31</sup>

The work that Davies, Douzinan and Gearey have done grounds this article’s presentation of the critical legal studies family tree. Using Davies’ broad–narrow approach as the starting point shapes the first two limbs of the family tree.



**Figure 1: Family Tree: Broad–Narrow**

This article is concerned with the US-based Critical Legal Studies movement, which falls under Davies’ narrow categorisation. As such, the discussion and refinements made under the family tree will reflect this. However, this does not mean that there is not a similar, plausible argument for refining the works under the broad category. Instead, it should be understood that substantial discussion of the broad category falls outside the scope of this article and its demonstration of the critical legal studies family tree. The broad category houses a non-exhaustive list of critical legal studies, including the aforementioned critical race theory and feminist legal theory,<sup>32</sup> but also critical historical scholarship, psychoanalytical theory, postmodernism, law and literature, and queer legal theory, all of which Davies identifies under this heading.<sup>33</sup> In addition to Davies’ selection, there are emerging critical fields that should also be included, such as law and popular culture,<sup>34</sup> cultural legal studies,<sup>35</sup> and comics and law.<sup>36</sup>

<sup>31</sup> Ibid 258.

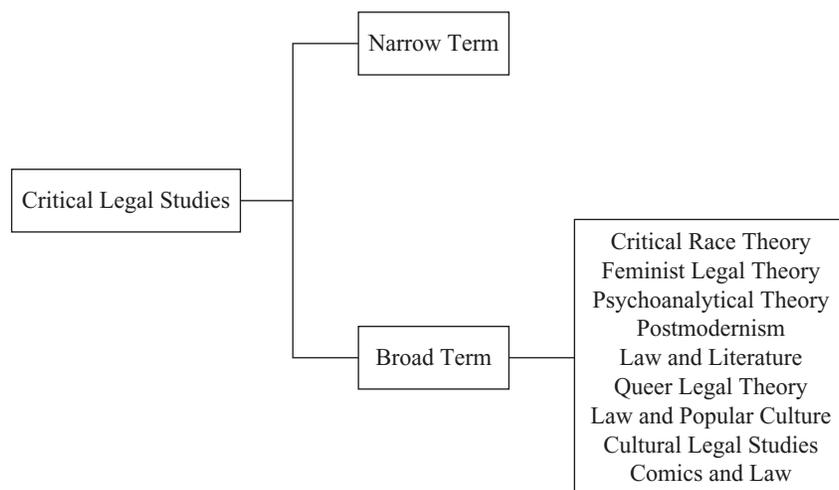
<sup>32</sup> Davies (n 10) 191.

<sup>33</sup> Ibid.

<sup>34</sup> See, eg, William P MacNeil, *Lex Populi* (Stanford University Press, 2007).

<sup>35</sup> Sharp and Leiboff (n 3).

<sup>36</sup> Thomas Giddens (ed), *Graphic Justice: Intersections of Comics and Law* (Routledge, 2015); Thomas Giddens, *On Comics and Legal Aesthetics: Multimodality and the Haunted Mask of Knowing* (Routledge, 2018).



**Figure 2: Family Tree: Broad complete**

Having established and identified broad critical legal studies, the next step is to define what distinct areas can be identified under Davies’ narrow categorisation. There are specific limitations in Davies’ broad–narrow approach and its application to the narrow US-based Critical Legal Studies. Davies draws some distinctions between variants of the narrow Critical Legal Studies, however these are general and less important than the broad–narrow divide itself. For example, Davies provides a location and timeline for the US-based Critical Legal Studies,<sup>37</sup> but her introduction to the very different British Critical Legal Studies is mentioned in a footnote only.<sup>38</sup> This article contends that, following Douzinas and Gearey, this difference within the narrow category needs to be clearer. The two dominant narrow Critical Legal Studies are the British and the American approaches.<sup>39</sup> Unlike the broad category, narrow Critical Legal Studies are defined primarily by time and geographic location. Despite featuring a crossover of influences, topics, and authors, the Critical Legal Studies of the US and UK need to be recognised as different Critical Legal Studies. Instead of conflating similarities and presenting a unified narrow branch, these shared factors create two narrow limbs for the US and British Critical Legal Studies.

In the foundational years of Critical Legal Studies, this divide may not have been clear.<sup>40</sup> However, its origins are unquestioned, as Douzinas outlined in 2005: ‘Critical legal thought ... started in America in the Seventies and was first introduced in Britain

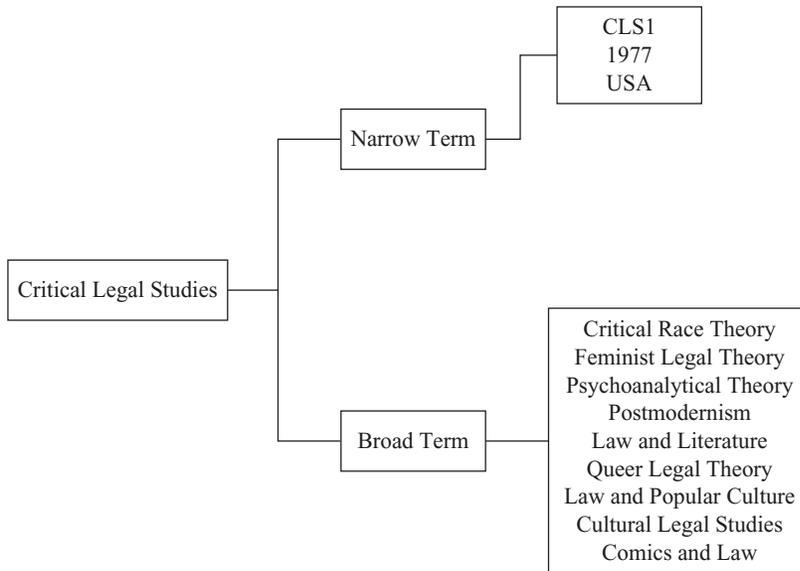
<sup>37</sup> Davies (n 10) 191.

<sup>38</sup> Ibid 193 n 5.

<sup>39</sup> Although other countries had and continue to have critical legal scholarship, it is either less dominant than the US and UK branches or more generally housed within the broad category and falls outside the scope of this article.

<sup>40</sup> See, eg, Costas Douzinas, ‘A Short History of the British Critical Legal Conference or, the Responsibility of the Critic’ (2014) 25(2) *Law and Critique* 187, 189.

in the early Eighties'.<sup>41</sup> For the family tree this positions the US-based Critical Legal Studies as the first limb. In an attempt to tackle the geographic issues presented by Douzinas and Gearey,<sup>42</sup> this article presents the limbs numerically, rather than with associated nationalities. As such, the initial limb under the narrow heading is 'CLS1', representing the US-based Critical Legal Studies.



**Figure 3: Family Tree: Narrow CLS1 1977**

CLS1 is referred to as the Critical Legal Studies movement,<sup>43</sup> pertaining to the scholarship and meetings of this organisation, primarily in the US. This grew out of the 1977 inaugural Conference on Critical Legal Studies held in Madison, Wisconsin.<sup>44</sup> CLS1 was founded on the writing of notable legal scholars Duncan Kennedy, Morton Horwitz, and Roberto Unger, and is identifiable by specific terms and concepts, such as 'trashing'<sup>45</sup> and the 'indeterminacy' of law.<sup>46</sup> This article is primarily concerned with CLS1. It is, however, not the only narrow variant of Critical Legal Studies.

CLS1 originated in the US before being introduced, rather than transplanted, into the UK several years after its inception. Initially, a distinction between British and US Critical Legal Studies may not have been clear, with 'Brit Crit' authors Peter

<sup>41</sup> Costas Douzinas, 'Oubliez Critique' (2005) 16(1) *Law and Critique* 47, 58.

<sup>42</sup> Douzinas and Gearey (n 5) 229–58.

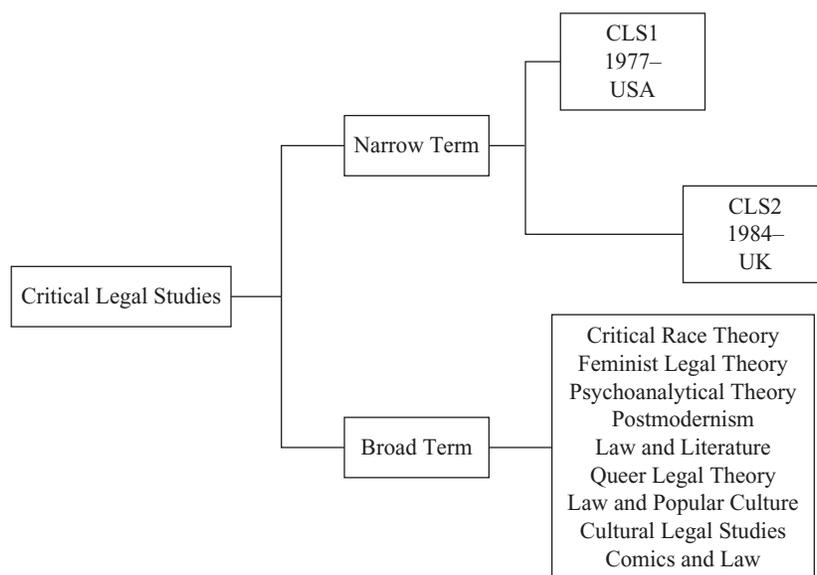
<sup>43</sup> Unger, *The Critical Legal Studies Movement* (n 21).

<sup>44</sup> Kennedy, *Legal Education and the Reproduction of Hierarchy* (n 1).

<sup>45</sup> Mark G Kelman, 'Trashing' (1984) 36(1) *Stanford Law Review* 293, 293.

<sup>46</sup> Mark Tushnet, 'Defending the Indeterminacy Thesis' (1996) 16(3) *Quinnipiac Law Review* 339, 341.

Fitzpatrick and Alan Hunt stating in 1987 that '[c]ritical legal scholarship has not formed clearly delineated "national" varieties'.<sup>47</sup> However, by 1993, fellow 'Brit Crit' Peter Goodrich presented an article on the distinctly US-based Critical Legal Studies movement.<sup>48</sup> Goodrich's article enforces the geographic distinction, tellingly titled 'Sleeping with the Enemy: On the Politics of Critical Legal Studies in America',<sup>49</sup> questioning the issues faced specifically by US-based Critical Legal Studies compared with legal critique in the UK.<sup>50</sup> By 2005, Douzinas was more confident still, stating that aside from the name, 'not much links the two sides'.<sup>51</sup> In terms of categorisation, this article follows the clear division between these two branches of Critical Legal Studies,<sup>52</sup> and presents British Critical Legal Studies as 'CLS2', under the narrow categorisation of the critical legal studies family tree.



**Figure 4: Family Tree: Narrow CLS2 1984**

<sup>47</sup> Peter Fitzpatrick and Alan Hunt (eds), *Critical Legal Studies* (Blackwell, 1987) 1.

<sup>48</sup> Peter Goodrich, 'Sleeping with the Enemy: An Essay on the Politics of Critical Legal Studies in America' (1993) 68(2) *New York University Law Review* 389.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid* 392 n 11.

<sup>51</sup> Douzinas, 'Oubliez Critique' (n 41) 59.

<sup>52</sup> A number of US-based sources on Critical Legal Studies do not address any variety of Critical Legal Studies outside of the US: see, eg, James Boyle (ed), *Critical Legal Studies* (New York University Press, 1992); Brian H Bix (ed), *Philosophy of Law: Critical Concepts in Philosophy* (Routledge, 2016). This is seen to a lesser extent in later works from the Brit Crits: see, eg, Costas Douzinas and Colin Perrin (eds), *Critical Legal Theory* (Routledge, 2011) which has no foundational CLS1 articles in the four-volume collection. Instead, Douzinas and Perrin include Pierre Schlag, 'US CLS' (1999) 10 *Law and Critique* 199 to historically address CLS1.

The creation of the family tree, which offers the neat categorisation of CLS1 and CLS2, comes with its own set of issues; relevant here is the issue of a clear starting point. For example, CLS2 can potentially be traced back further than 1984 and before the introduction of CLS1, with the seminal book *Images of Law* by Zenon Bankowski and Geoff Mungham in 1976.<sup>53</sup> A similar issue arises for CLS1 with *Law Against the People*, an edited collection on critically demystifying law, published in 1971.<sup>54</sup> Theoretically, both books offer earlier starting points for CLS1 and CLS2, however whilst influential, they should not be considered part of the Critical Legal Studies canon. The purpose of this family tree is not to encompass all critical works, but rather those that identified with and worked under the banner of Critical Legal Studies. Therefore, whilst *Images of Law* was influential on CLS2 specifically,<sup>55</sup> it should be viewed as a separate critical work, rather than Critical Legal Studies.

Instead, the date given to the start of the CLS2 limb relies on Fitzpatrick and Hunt's *Critical Legal Studies*,<sup>56</sup> which states that '[i]n Britain the Critical Legal Conference was formed in 1984'.<sup>57</sup> In keeping with Davies' initial distinction, the identification and categorisation of CLS2 is used to outline what CLS1 was not. Whilst certain CLS2 works will be relevant to the critique and contextualisation of CLS1, further analysis of this category falls outside the scope of this article.

At this stage, the narrow side of the critical legal studies family tree has two limbs, CLS1 and CLS2. Despite the existing similarities and differences in both the theory and practice of CLS1 and CLS2, there is a major distinction vital to the unpacking of the narrow Critical Legal Studies and the development of the family tree: the death of CLS1.

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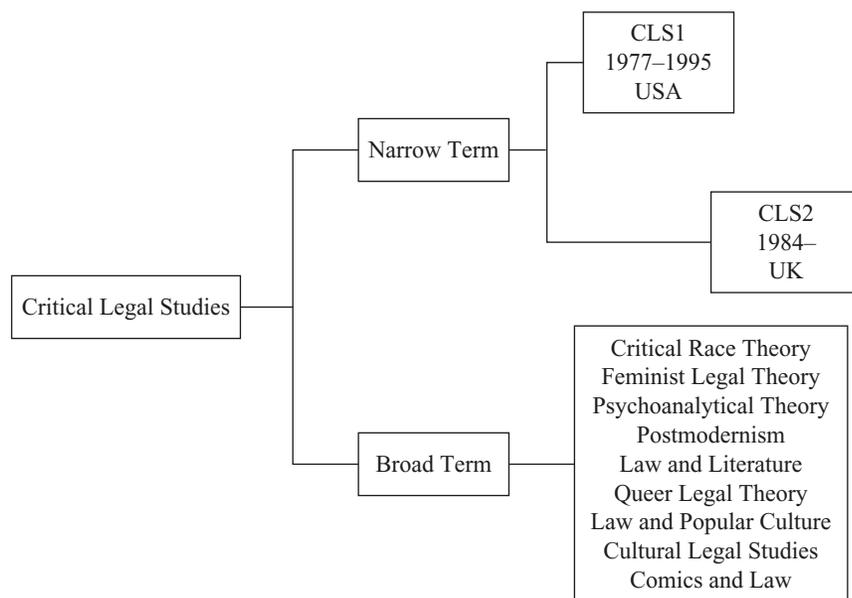
<sup>53</sup> Zenon Bankowski and Geoff Mungham, *Images of Law* (Routledge, 1976).

<sup>54</sup> Robert Lefcourt, *Law Against the People* (Random House, 1971).

<sup>55</sup> For CLS2, see especially Costas Douzinas and Lynda Nead (eds), *Law and the Image: The Authority of Art and the Aesthetics of Law* (University of Chicago Press, 1999); Peter Goodrich, 'Screening Law' (2009) 21(1) *Law and Literature* 1.

<sup>56</sup> Fitzpatrick and Hunt (n 47).

<sup>57</sup> Fitzpatrick and Hunt (n 47) 1.



**Figure 5: Family Tree: Narrow CLS1 1977–1995**

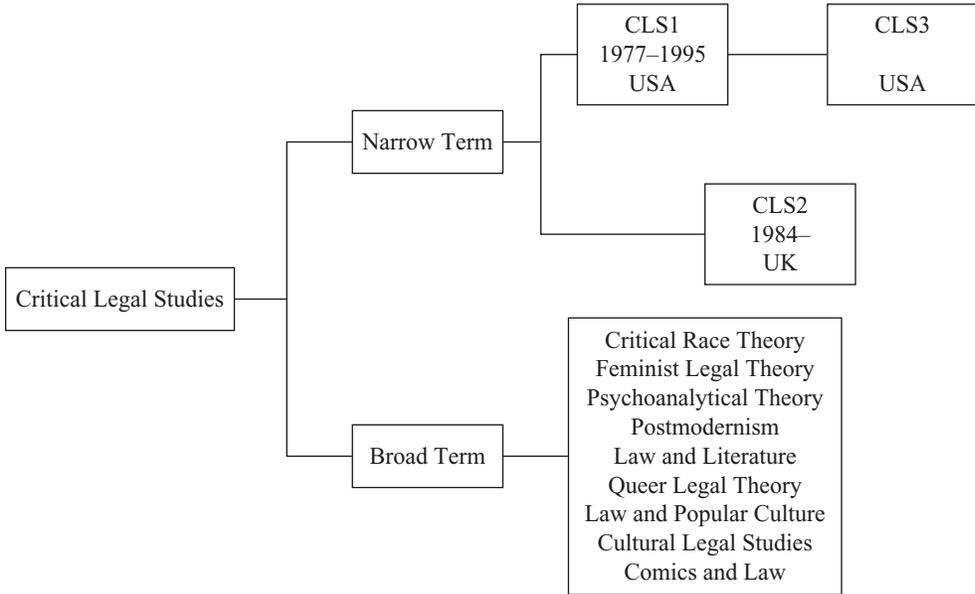
Within the structure of this family tree, the death of CLS1 provides two important outcomes. First, it further differentiates itself from CLS2, which has not ‘died’. Second, the death of CLS1 provides a categorisation for US-based Critical Legal Studies post-1995. For CLS2, the CLC is still running and early CLS2 works like Hunt and Fitzpatrick’s *Critical Legal Studies*,<sup>58</sup> or Douzinas, Goodrich, and Yifat Hachamovitch’s *Politics, Postmodernity, and Critical Legal Studies*,<sup>59</sup> demonstrate modes of thinking that can still be seen in contemporary CLS2 works, sometimes by the same authors.<sup>60</sup> CLS1 has not followed this path, and instead transitioned to what has been called a death.<sup>61</sup> The result of this death is a schism in US-based Critical Legal Studies, resulting in the creation of a new limb: CLS3.

<sup>58</sup> Fitzpatrick and Hunt (n 47).

<sup>59</sup> Costas Douzinas, Peter Goodrich and Yifat Hachamovitch (eds), *Politics, Postmodernity, and Critical Legal Studies: The Legality of the Contingent* (Routledge, 1994).

<sup>60</sup> See, eg, Ben Golder and Peter Fitzpatrick, *Foucault’s Law* (Routledge, 2009).

<sup>61</sup> See below Part III.



**Figure 6: Family Tree: Narrow CLS3**

Until this point, the divisions presented via the family tree should cause little to no debate.<sup>62</sup> However, the CLS3 limb is not something already articulated within Critical Legal Studies;<sup>63</sup> instead, it is a creation of this article. CLS3 should be understood as a contemporary Critical Legal Studies — it follows the categorisation of the narrow US-based Critical Legal Studies, appearing after the death of CLS1. Unlike CLS1 or CLS2, CLS3 is resultant only on the death of CLS1, rather than a conference or a grouping of scholars. For clarity, CLS3 should also be understood as the US-based Critical Legal Studies that still continues to this day. By investigating how the CLS1 death occurred, this article will demonstrate a key factor in the mystification of critical legal studies.

### III THE CLS1 EULOGY

In the 1 December 1995 edition of the *Harvard Law Record*, the student-run Harvard Law School paper, Hope Yen penned an article on CLS1. Under the title ‘As HLS Mulls its Mission, CLS Scholars Remain Quiet’, the article is a response to the lack of engagement by the once vocal Crits on development plans for Harvard Law School by the new Dean, Robert Clark.<sup>64</sup> The article begins on page two of the *Harvard*

<sup>62</sup> See Davies (n 10) 191–221; Douzinas and Gearey (n 5) 229–58.

<sup>63</sup> But see Adam Gearey, “‘Change is Gonna Come’”: Critical Legal Studies and the Legacies of the New Left’ (2013) 24 *Law and Critique* 211, 224.

<sup>64</sup> Hope Yen, ‘As HLS Mulls Its Mission, CLS Scholars Remain Quiet’, *Harvard Law Record* (Cambridge, Massachusetts, 1 December 1995) 2.

*Law Record*, and continues on page four, with a secondary title ‘Crits at HLS a Dying Breed?’.<sup>65</sup> Although Harvard-centric, Yen’s article is an important piece of more general CLS1 history. The article’s focus on the silence of the Crits allows Yen to question Crits still on the Law School faculty, interviewing Kennedy and Horwitz. Within the quotes that Yen uses, both Professors of Law refer to CLS1 as ‘dead’.<sup>66</sup>

Yen’s article offers a unique insight into the death of CLS1: first, by identifying from prominent Crits that a death has occurred; second, from the location in which this information was gathered and published; and third, with its relation to Dean Clark and his association with law and economics.<sup>67</sup> These three factors are linked throughout the history of CLS1, with its key actors, their location, and competing theories of jurisprudence shaping CLS1 and, inevitably, its end. When Yen captures both Kennedy and Horwitz saying that CLS1 is dead and Dean Clark stating that he did not ‘kill’ it,<sup>68</sup> the article can be read as a posthumous discussion of CLS1 itself, rather than Clark’s plans for the Law School. To best appreciate this reading, the history of CLS1, focusing on prominent Crits, Harvard Law School, and law and economics will be discussed, in the lead-up to Yen’s article and the declared death of CLS1.

The death of CLS1 will be discussed with reference to three categories: the CLS1 founders; their location; and the CLS1 rivals. Given the organic and loosely affiliated nature of CLS1, the many universities it had clusters at, as well as the early relationship between CLS1 and law and economics,<sup>69</sup> these titles are imperfect. However, given what each title denotes, it is possible to understand them as placeholders, representative of key issues, rather than unequivocal and definitive terms. The location in question is Harvard Law School, the founders are Kennedy, Horwitz and Unger, and the rival is law and economics. Categorised in this way, the specific rise and fall of CLS1 at Harvard Law School can be seen as endemic to CLS1 as a whole.

#### A *The CLS1 Founders*

Harvard Law School acted as a microcosm for CLS1. It was home to some of the most prominent names in CLS1, which given its prestige, went a long way in vetting the movement more broadly. The relationship between Harvard Law School and CLS1 can be traced back to the hiring of three legal theorists in 1971: Duncan Kennedy, Morton Horwitz, and Roberto Unger.<sup>70</sup> In accordance with the critical legal studies family tree, this act by the Law School predates the beginning of CLS1. However,

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<sup>65</sup> Ibid 4.

<sup>66</sup> Ibid 2.

<sup>67</sup> See below Part III(C).

<sup>68</sup> Yen (n 64) 2.

<sup>69</sup> See James R Hackney, *Legal Intellectuals in Conversation: Reflections on the Construction of Contemporary American Legal Theory* (New York University Press, 2012) 22.

<sup>70</sup> Ibid 28.

the hiring of these theorists serves as a prelude to the movement proper, as Kennedy recounted in a 2012 interview:

When I got to Harvard Law School, I fell in with Morton Horwitz and Roberto Unger. We were all hired at the same time, and as it very often happens in law faculties, people that are hired in the same year form a kind of cohort. There's a kind of intimacy that comes from arriving at the same time, but it developed quickly way beyond that into a very deep intellectual alliance.<sup>71</sup>

The alliance Kennedy speaks of was manifested through the creation of CLS1. Kennedy, Horwitz, and Unger all contributed key texts to the Critical Legal Studies movement, with their work during the prelude to CLS1 establishing a grounding in areas further developed after the inaugural Conference on Critical Legal Studies in 1977.

In keeping with this structural meta-analysis approach, this article will assess the themes and structure of these theorists' works during this time. Through this demonstration, unity within the scholarship will be presented without the need for a detailed and extensive literature review. For example, during this pre-CLS1 phase, Kennedy published 'How the Law School Fails: A Polemic',<sup>72</sup> and 'Form and Substance in Private Law Adjudication'.<sup>73</sup> Despite the length of these papers, especially 'Form and Substance',<sup>74</sup> these works can be considered fairly minor for Kennedy, with his more notable published CLS1 work coming after the first Conference on Critical Legal Studies.<sup>75</sup> Both articles hint, however, at the proceeding CLS1 with Kennedy's first polemic bearing traceable roots to his more famous polemic,<sup>76</sup> as well as themes of formal and ad hoc implications of law, seen in 'Form and Substance'.<sup>77</sup> These articles cover issues on structures of rhetoric and hierarchies within institutions, which feed into the dominant themes throughout Kennedy's later CLS1 work.<sup>78</sup> The foundational pre-CLS1 work for Kennedy was his 1975 unpublished manuscript *The Rise and Fall of Classical Legal Thought*, which remained in this form until being formally published in 2006.<sup>79</sup>

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<sup>71</sup> Ibid.

<sup>72</sup> Duncan Kennedy, 'How the Law School Fails: A Polemic' (1971) 1(1) *Yale Review of Law and Social Action* 77 ('How the Law School Fails').

<sup>73</sup> Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89(8) *Harvard Law Review* 1685 ('Form and Substance').

<sup>74</sup> Ibid. The article is 95 pages long.

<sup>75</sup> See Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28(2) *Buffalo Law Review* 205.

<sup>76</sup> Kennedy, *Legal Education and the Reproduction of Hierarchy* (n 1).

<sup>77</sup> Kennedy, 'Form and Substance' (n 73) 1685.

<sup>78</sup> Ibid.

<sup>79</sup> Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (BeardBooks, 2006) ('*Rise and Fall*').

*Rise and Fall* set the tone for a dominant branch of CLS1 with the use of structuralism and critical theory to assess what Kennedy calls ‘classical legal thought’ (from 1850–1940).<sup>80</sup> In the 2006 published version of *Rise and Fall*, Kennedy included a preface to the 1975 work, outlining that by discussing structuralism and critical theory with regard to law and legal history, he aimed to provide more techniques to a legal repertoire.<sup>81</sup> Candidly, Kennedy also admitted that his hope was for this work to be included in the fields of critical theory and structuralism. Whilst the latter was not clearly achieved, the work’s thematic resonance with CLS1 can be seen through the issues Kennedy outlines. For example, *Rise and Fall* traces five issues through the period of classical legal thought which Kennedy identifies as ‘Legal Consciousness’,<sup>82</sup> ‘The Phenomenological Approach to Legal Reasoning, by Analogy and by Deduction, to Produce a Conception of the “Mode of Integration of a Subsystem”’,<sup>83</sup> ‘The Notion of Nesting’,<sup>84</sup> ‘The Ontology of Rights and Powers’,<sup>85</sup> and ‘Reason Dies While Giving Birth to Liberalism’.<sup>86</sup> For Kennedy, *Rise and Fall*’s structure and subject matter is identifiably a form of critical legal studies, before the term was openly coined.

Choosing to publish through Harvard University Press, rather than following Kennedy’s self-publication method, Horwitz also released a book on legal history. Published in 1977, *The Transformation of American Law, 1780–1860* won the Bancroft Prize the following year.<sup>87</sup> *The Transformation of American Law* evidenced a different way in which legal history could be explored through a broad CLS1 approach. Although these are both historical works, Horwitz and Kennedy differ in both form and methodology. Horwitz also revisits history through a contemporary critical lens, but does not impose a framework in the way Kennedy approached *Rise and Fall*.<sup>88</sup> Instead, moving away from the dominant jurisprudential focus of constitutional law, Horwitz focused on the underrepresented analysis of private law.<sup>89</sup> *The Transformation of American Law* identified a tendency for previous historical work to look at public law as being in the public interest<sup>90</sup> and for private law to be ‘private’, despite its influence on the distribution of power and wealth in American society.<sup>91</sup> Horwitz challenged this dominant approach, demonstrating a move from

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80 Ibid vii.

81 Ibid xiv.

82 Ibid xiv.

83 Ibid xvii.

84 Ibid xx.

85 Ibid xxi.

86 Ibid xxii.

87 Morton J Horwitz, *The Transformation of American Law, 1780–1860* (Harvard University Press, 1977) (*The Transformation of American Law*).

88 Kennedy, *Rise and Fall* (n 78) x.

89 Horwitz (n 87) xii.

90 Ibid xiv.

91 Ibid xv.

the historical ideals of legal realism's critique of public law,<sup>92</sup> to the foundational CLS1 stance which viewed all law as politics.<sup>93</sup>

The difference in approach, demonstrated by Kennedy and Horwitz, shows a wide berth in the foundations of CLS1. It is important to note that these differences were also clear at the time, with Kennedy identifying that 'in 1975, Morty Horwitz and I were arguing about a series of different methodological issues that had a lot of influence on the first stages of Critical Legal Studies at the intellectual level'.<sup>94</sup> These discussions were in regard to the different approaches they took to their historical work, with Kennedy reiterating his structural and critical position, and Horwitz taking an approach relative to his Marxist allegiances.<sup>95</sup> Rather than fragmenting or dissolving CLS1 before it began, these differences paved the way for the diverse approaches taken to law under the banner of CLS1. This diversity is further exemplified by Unger's work, which moved away from the direct legal historical approach taken by both Kennedy and Horwitz, instead presenting a philosophical approach to law in the pre-CLS1 period.

Beginning with *Knowledge and Politics* in 1975,<sup>96</sup> and continuing with *Law in Modern Society* in 1976,<sup>97</sup> Unger set the tone for the philosophical side of CLS1. Whilst not strictly a series, Unger notes that *Law in Modern Society* builds upon *Knowledge and Politics*, and both books follow a similar style.<sup>98</sup> In comparison to both Kennedy and Horwitz, Unger's works begin more broadly. *Knowledge and Politics* opens with a statement from the author that the book's purpose is to 'help one understand the context of ideas and sentiments within which philosophy and politics must now be practiced'.<sup>99</sup> The book is not so much a call to arms as a map one might use to understand the current (1975) climate of philosophy and politics. As such, *Knowledge and Politics* covers a wide range of topics, but with liberalism at the heart of Unger's critique. This theme can be seen directly in the initial chapters on 'Liberal Psychology',<sup>100</sup> 'Liberal Political Theory',<sup>101</sup> and 'The Unity of Liberal Thought'.<sup>102</sup>

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<sup>92</sup> See Oliver Wendell Holmes Jr, *The Common Law* (Dover Publications, rev ed, 1991).

<sup>93</sup> Hackney (n 69) 26–7.

<sup>94</sup> Tor Krever, Carl Lisberger and Max Utzschneider, 'Law on the Left: A Conversation with Duncan Kennedy' (2015) 10(1) *Unbound* 1, 24.

<sup>95</sup> *Ibid.*

<sup>96</sup> Roberto M Unger, *Knowledge and Politics* (The Free Press, 1975).

<sup>97</sup> Roberto M Unger, *Law in Modern Society: Towards a Criticism of Social Theory* (The Free Press, 1976) ('*Law in Modern Society*').

<sup>98</sup> *Ibid* v.

<sup>99</sup> Unger, *Knowledge and Politics* (n 96) v.

<sup>100</sup> *Ibid* 29.

<sup>101</sup> *Ibid* 63.

<sup>102</sup> *Ibid* 104.

In his follow-up text, *Law in Modern Society*, Unger further follows the thread of liberalism, this time addressing it with regard to social theory. The underlying aim of the book is to lead towards a critique of social theory.<sup>103</sup> Again, Unger addresses the topic at hand broadly, demonstrating and positioning law within the realm of modernity, primarily by addressing different cultures<sup>104</sup> and then assessing how liberalism has effected change internationally.<sup>105</sup> Whilst there is undoubtedly a marked difference between the three authors and their works, their own voices and styles evident and distinct in this pre-CLS1 time, the central theme of critiquing and questioning liberalism is unifying. In a post-CLS1 world there is a potential argument that the works themselves were at best tenuously connected, either broadly critical, or merely progressive. However, collectively their unified approach to demystifying liberal notions of law laid the groundwork for CLS1.

### B *The CLS1 Location*

The groundwork for CLS1, completed by Kennedy, Horwitz, and Unger, was undertaken during their time at Harvard Law School. This location, as proposed above, acted as a microcosm for CLS1: what happened to CLS1 at Harvard Law School directly impacted CLS1 as a whole. The relationship between Harvard Law School and CLS1 therefore becomes a fundamental part of the CLS1 story. Importantly, the relationship between CLS1 and Harvard Law School was new.<sup>106</sup> The instigation of this relationship hinged on a changing socio-political climate<sup>107</sup> and changes in jurisprudence which led to universities hiring legal theorists like Kennedy, Horwitz, and Unger. Inadvertently, these factors helped to create and directly affect CLS1, specifically with its relationship to Harvard Law School. By addressing how this relationship began, it is possible to identify the pressures which led to the death of CLS1.

As was argued earlier in this article, the relationship between CLS1 and Harvard Law School can be traced back to the 1971 hiring of Kennedy, Horwitz, and Unger. However, the importance of this action is compounded by the fact that, historically, the broad type of critical work undertaken by these impending CLS1 scholars was not traditionally welcomed at Harvard Law School.<sup>108</sup> Instead, from the early part of the 20<sup>th</sup> Century this type of scholarship had been deliberately nurtured at Yale Law School.<sup>109</sup> As Laura Kalman identifies, the hiring of the early Critics by Harvard and not Yale demonstrated a deliberate transition in both institutions:

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<sup>103</sup> Unger, *Law in Modern Society* (n 97).

<sup>104</sup> See, eg, *ibid* 47–133.

<sup>105</sup> See, eg, *ibid* 134–91.

<sup>106</sup> Hackney (n 69) 28.

<sup>107</sup> See below Part III(C).

<sup>108</sup> Laura Kalman, *Yale Law School and the Sixties: Revolt and Reverberations* (The University of North Carolina Press, 2005) 7. See Hackney (n 69) 28.

<sup>109</sup> Kalman (n 108) 7.

Yale, which had embraced forward-looking legal realism in the 1930s, rejected realism's descendant, Critical Legal Studies [CLS1], at the same time that Harvard Law School, which had once turned its back on realism, made a home for realism's child and for scholarship that represented one logical extension of sixties activism.<sup>110</sup>

In her assessment, Kalman's identification leads to a series of issues which underpin the relationship between CLS1 and Harvard Law School. Kalman's insight contextualises CLS1 historically as a descendant of legal realism, and then contemporaneously as an extension of 1960s activism; by unpacking this statement, the significance of Harvard Law School as the location for CLS1 is made clear. The connection Kalman draws between legal realism and CLS1 further illuminates the relationship between CLS1 and Harvard Law School. The implication in Kalman's quote is that CLS1 would follow a similar path to legal realism and be rejected by Harvard Law School.<sup>111</sup> The hiring of Kennedy, Horwitz, and Unger demonstrated that Harvard was open to 'increasing [its] intellectual dynamism',<sup>112</sup> however its history with legal realism placed the emergence of CLS1 in a precarious position. To appreciate the importance of this position for CLS1, it is necessary to briefly look at the relationship between legal realism, CLS1, and Harvard Law School.

Kalman is not alone in her connection of CLS1 and legal realism, with Legal realism often heralded as a predecessor of CLS1,<sup>113</sup> along with claims that CLS1 is a continuation of legal realism.<sup>114</sup> Legal realism does differ from some CLS1 approaches,<sup>115</sup> but its focus on judicial subjectivity under the guise of scientific formalism draws a strong correlation. Relative to the idea of a CLS1 location was legal realism's own relationship with Harvard Law School, notably through former student Oliver

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<sup>110</sup> Ibid.

<sup>111</sup> Ibid 7–8.

<sup>112</sup> Steven M Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton University Press, 2008) 193.

<sup>113</sup> Hackney (n 69) 27; Goodrich (n 2) 185–6.

<sup>114</sup> Hackney (n 69) 27; Goodrich (n 2) 185–6; Debra A Livingston, 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship' (1982) 95(7) *Harvard Law Review* 1669, 1682; Neil Duxbury, 'The Reinvention of American Legal Realism' (1992) 12(2) *Legal Studies* 137, 138; William W Fisher III, Morton J Horwitz and Thomas A Reed (eds), *American Legal Realism* (Oxford University Press, 1993) xi–xv; Andrew Altman, 'Legal Realism, Critical Legal Studies, and Dworkin' (1986) 15(3) *Philosophy and Public Affairs* 205; John Hasnas, 'Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument' (1995) 45(1) *Duke Law Journal* 84; David Fraser, 'What a Long, Strange Trip It's Been: Deconstructing Law from Legal Realism to Critical Legal Studies' (1988) 5 *Australian Journal of Law and Society* 35, 38; Davies (n 10) 200.

<sup>115</sup> See Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton University Press, 1990) 77–9.

Wendell Holmes Jr.<sup>116</sup> The legal realists are often exemplified by Holmes and his work in both *The Common Law*,<sup>117</sup> and ‘The Path of the Law’.<sup>118</sup> Within these works, Holmes embodied the critical stance of the legal realists, demonstrating an application of broader philosophical theory and critique of law.<sup>119</sup> This critical stance also included challenging the dominant formalist pedagogy, which was embodied by Harvard Law School’s Socratic Method.<sup>120</sup> Although legal realism ultimately failed in directly overthrowing formalism at Harvard Law School, its influence was felt throughout the 20<sup>th</sup> century, culminating in new jurisprudential approaches, including CLS1.

The legal realists’ decision to focus their challenge on Harvard Law School related to the creation of the Socratic casebook method by a former Dean of the Law School, Christopher Columbus Langdell.<sup>121</sup> Langdell’s formalist pedagogical approach, which he instigated at Harvard Law School, transformed and dominated legal education from the early part of the 20<sup>th</sup> century.<sup>122</sup> Sometimes referred to as ‘Langdellianism’,<sup>123</sup> the method was embraced heavily by a large number of law schools across the US at this time.<sup>124</sup> Critically, this method encouraged students to ‘believe law was separate from morality and preference’, in turn draining law of its ‘ideological political content’.<sup>125</sup> Despite its success,<sup>126</sup> the method’s vacuous nature made it a target for more inclusive modes of legal reasoning. However, this was not exclusive to the legal realists, with an early charge against Langdellianism being led unsuccessfully by Roscoe Pound, who called for the implementation of a sociological jurisprudence.<sup>127</sup> Although he was also unsuccessful, the movement spurred by Holmes was described as ‘the most concerted attempt to challenge Harvard’s control over legal education’.<sup>128</sup> As a result of this effort by the legal realists, their approach was seen as a valid alternative, and was desirable to other schools, most notably when it was taken up at Yale.<sup>129</sup>

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<sup>116</sup> See Louis Menand, *The Metaphysical Club* (Farrar Straus and Giroux, 2001).

<sup>117</sup> Holmes, *The Common Law* (n 92).

<sup>118</sup> Oliver Wendell Holmes Jr ‘The Path of the Law’ (1897) 10(8) *Harvard Law Review* 457.

<sup>119</sup> See, eg, Holmes, *The Common Law* (n 92) 188.

<sup>120</sup> Anthony Chase, ‘The Birth of the Modern Law School’ (1979) 23(4) *American Journal of Legal History* 329, 329–31.

<sup>121</sup> *Ibid*; Kalman (n 108) 17.

<sup>122</sup> Kalman (n 108) 17.

<sup>123</sup> Neil Duxbury, *Patterns of American Jurisprudence* (Oxford University Press, 1995) 140–141.

<sup>124</sup> *Ibid*.

<sup>125</sup> *Ibid*.

<sup>126</sup> Duxbury (n 123) 9–18.

<sup>127</sup> *Ibid* 54; Kalman (n 108) 18.

<sup>128</sup> Kalman (n 108) 18.

<sup>129</sup> *Ibid* 19.

Historically, with Harvard's rejection and Yale's acceptance of legal realism, it was not expected that Harvard Law School would hire young critical scholars like Kennedy, Horwitz, and Unger. Their unexpected appointment, paired with the lack of critical roots within Harvard Law School, presented an uncertain foundation for CLS1 at Harvard. More importantly to this current analysis, the level of uncertainty allows a challenge to be levelled at the terminology used by Kalman in the second part of her quote.<sup>130</sup> Kalman begins by stating that Harvard Law School made 'a home for realism's child' and identifies this child as a 'logical extension of sixties activism'.<sup>131</sup> This article proposes that the concept of a home for CLS1, as an extension of 1960s activism, from an institution such as Harvard Law School is problematic. The connotation of the term 'home' implies certain values that were not evident in the existence of CLS1,<sup>132</sup> which is why the use of 'location' has been employed in this article instead. The distinction between location and home moves beyond mere semantics and removes the inferred emotion with the designation of a home, which can include ownership, belonging, and safety. The idea of a location instead is one where CLS1 could be practiced, but where it would also be in competition with other modes of jurisprudence, specifically law and economics.

### C *The Rivals: CLS1, Liberalism, and Law and Economics*

Following a similar path to the legal realists and their fight against formalism, CLS1 and the Crits also challenged the dominant structures of law. However, transitions made in American society during the 20<sup>th</sup> century shifted the dominant form of law from formalism to liberalism.<sup>133</sup> Given the breadth of the term, the 'liberalism' in question can be understood as 'the set of political ideas that had descended from the New Deal and that had shaped the steady post-war expansion of federal social and economic responsibilities'.<sup>134</sup> The shaping of these responsibilities were such that liberalism infiltrated all walks of American life, including law and the academe.<sup>135</sup> As historian Alan Brinkley continues, '[f]aith in both the value and the durability of liberalism shaped not only the politics, but also much of the scholarship of the post-war era'.<sup>136</sup> The Crits' focus, especially via Kennedy, was inside the law school,<sup>137</sup> and as Kennedy later affirmed, '[t]he mainstream of the law school world was not conservatism; the mainstream was liberalism'.<sup>138</sup> Collectively, the critique and criticism of liberalism was the primary target of the Crits.<sup>139</sup>

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<sup>130</sup> See above n 109 and accompanying text.

<sup>131</sup> *Ibid* 7.

<sup>132</sup> See below Part IV.

<sup>133</sup> Duxbury (n 123) 32–64.

<sup>134</sup> Alan Brinkley, *Liberalism and its Discontents* (Harvard University Press, 1998) ix.

<sup>135</sup> *Ibid*.

<sup>136</sup> *Ibid*.

<sup>137</sup> Kennedy, 'How the Law School Fails' (n 71); Kennedy, *Legal Education and the Reproduction of Hierarchy* (n 1).

<sup>138</sup> Hackney (n 69) 24.

<sup>139</sup> See above Part III(A).

In countering liberalism, the Crits and CLS1 were not alone. Notably, much earlier than CLS1,<sup>140</sup> law and economics had developed similar anti-liberal sentiments. Law and economics formed within the Chicago School of Economics, primarily offering alternatives to Keynesianism — the economic driving force behind liberalism<sup>141</sup> — and applying these alternatives to law.<sup>142</sup> At Chicago University, law and economics was spearheaded by Edward Levi and Aaron Director,<sup>143</sup> spawning a journal of the same name in 1958. In the third volume of the journal, Ronald Coase published an article, ‘The Problem of Social Cost’.<sup>144</sup> Presenting a mixture of real case law and theoretical economics, Coase’s seminal piece attacked existing economic arguments, specifically the imposition of taxes, fines, and restrictions on businesses that harm others. This article challenged the dominant concept of the Pigouvian Tax,<sup>145</sup> and instead looked at market-based alternatives that would be less economically damaging to businesses which caused harm.

‘The Problem of Social Cost’ transformed what would come to be known as law and economics, notably when Coase took over as editor of the journal and openly pushed the approach he had taken in this article.<sup>146</sup> Coase’s influence and the change in direction brought in interest from young scholars including Richard Posner who, as a prolific author, would further refine law and economics.<sup>147</sup> On its own, the journal, and even the academics at Chicago, were not enough to bring about an end to liberalism. However, the direction implemented by Coase helped to build a foundation against it. Within jurisprudence and the academe, these efforts, paired with the unlikely allies of the civil rights movement and the revolutionary 1960s,<sup>148</sup> helped to destabilise liberalism until ‘[b]y the end of the 1960s ... [the] secure liberal universe was already beginning to crumble’.<sup>149</sup>

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<sup>140</sup> Hackney (n 69) 22.

<sup>141</sup> Michael Stewart, *Keynes and After* (Pelican Books, 2<sup>nd</sup> ed, 1968) 240.

<sup>142</sup> Rob Van Horn and Philip Mirowski, ‘The Rise of the Chicago School of Economics and the Birth of Neoliberalism’ in Philip Mirowski and Dieter Plehwe (eds), *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Harvard University Press, 2009) 139.

<sup>143</sup> Ronald H Coase, ‘Law and Rconomics at Chicago’ (1993) 36(1) *The Journal of Law and Economics* 239, 247, 251.

<sup>144</sup> Ronald H Coase, ‘The Problem of Social Cost’ (1960) 3 *The Journal of Law and Economics* 1.

<sup>145</sup> *Ibid* 28. A Pigouvian tax, named after its founder, Arthur Pigou, argues for higher taxes on private companies to balance their self-interest with a broader social interest. A Pigouvian tax is a higher tax on businesses that have higher social costs: see generally Arthur C Pigou, *The Economics of Welfare* (Macmillan, 4<sup>th</sup> ed, 1932).

<sup>146</sup> Coase, ‘Law and Economics at Chicago’ (n 143) 253.

<sup>147</sup> *Ibid* 251. See, eg, Richard A Posner, *Economic Analysis of Law* (Little, Brown and Company, 1973). See also Richard A Posner, *The Economics of Justice* (Harvard University Press, 1983).

<sup>148</sup> Brinkley (n 134) ix.

<sup>149</sup> *Ibid* x.

Despite their shared target of liberalism, CLS1 and law and economics occupied different political positions, from which they led their attacks. Whilst the categorisation of CLS1 as politically left and law and economics as politically right is an oversimplification, it is one which aids the narrative. Ideologically, these directions broadly designate the politics aligned with both movements. They imply a binary opposition that was not always evident, as CLS1 and law and economics did interact.<sup>150</sup> However, as CLS1 developed it remained opposed to liberalism and distanced itself further from law and economics.<sup>151</sup> This distance, however, merely clarified the nature of the relationship between both movements as liberalism continued to wane, moving to a relationship of direct competition. As Neil Duxbury identified, ‘[f]ew American academic lawyers seem to dissent from the proposition that ... law and economics and [CLS1] have been the “best-organized, most ambitious voices in the law schools”’.<sup>152</sup>

Given the status and locations of CLS1 and law and economics, the competition occasionally left the law school and made for public consumption. Notably, this was seen when Mark Kelman’s *A Guide to Critical Legal Studies* singled out Posner’s approach to law and economics in a chapter titled ‘Legal Economists and Normative Social Theory’.<sup>153</sup> In the form of a book review for the *Wall Street Journal*, Posner, at this stage an appeals court judge, penned a response to Kelman’s claims.<sup>154</sup> Although he compliments Kelman as a critic of mainstream law,<sup>155</sup> Posner calls Kelman out as ‘too quick to find contradiction, too dismissive of efforts to reconcile apparent conflicts, [and] too contemptuous of practical reason’.<sup>156</sup> This bickering in the public eye can be seen as somewhat sporting and even healthy between two competing legal movements. However, the elephant in the room, the dying form of post-war American liberalism,<sup>157</sup> highlights the very real competition of a winner-takes-all situation.

<sup>150</sup> Krever, Lisberger and Utzschneider (n 94) 11. See also Richard Rorty, ‘The Banality of Pragmatism and the Poetry of Justice’ (1990) 63 *Southern California Law Review* 1811, 1812; Richard A Posner, *The Problematics of Moral and Legal Theory* (The Belknap Press, 1999). Posner unpacks the difference between postmodernism and pragmatism in law and asks himself: am I ‘a right-wing “Crit”?’: at 266.

<sup>151</sup> Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1990) 114–85.

<sup>152</sup> Duxbury (n 123) 304. Cf Schalg (n 52) 206.

<sup>153</sup> Kelman (n 151) 114.

<sup>154</sup> Richard A Posner, ‘Bookshelf: A Manifesto for Legal Renegades’, *The Wall Street Journal* (New York, 27 January 1988).

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*

<sup>157</sup> Brinkley (n 134) x.

## IV THE SLOW DEATH OF CLS1

With a contextual framework made up from the founders, their location, and their rivals, the climate and pressures surrounding CLS1 have been presented. This article proposes that this climate and context provide an understanding of events that occurred over time eventually led to the death of CLS1. The likelihood of the CLS1 death became more apparent as the flaws in liberalism began to show more broadly, and interest in both CLS1 and law and economics as potential replacements for legal liberalism grew. However, as this interest grew, so did critiques and criticisms of both legal movements.<sup>158</sup> Aside from the aforementioned factors, the lack of a coherent CLS1 alternative to legal liberalism failed to instil confidence in those who might have been more politically supportive of other CLS1 aims.<sup>159</sup> In contrast, the election of Ronald Reagan in 1980 and the push towards supply-side economic policy thematically resonated with law and economics. Culturally, there was a push towards what would become coined as neo-liberalism, which affected politics and institutions alike.<sup>160</sup>

Whilst the wider political climate was moving towards a conservatism that aligned with law and economics, the ‘extension of sixties activism’,<sup>161</sup> CLS1 was faltering at Harvard Law School. As the notoriety of CLS1 had grown, so had tensions within the law faculty at Harvard. Broadly, this tension was between three identifiable groups: the Crits; traditional liberals; and those affiliated with law and economics.<sup>162</sup> Such was the environment that at least one Professor left Harvard, after 20 years’ service, for Chicago Law School.<sup>163</sup> However, these tensions truly came to a peak in 1987, when Harvard Law School denied tenure to two CLS1 scholars. When David Trubek, a Visiting Professor, and Clare Dalton, an Assistant Professor, applied for tenure at Harvard Law School and were denied, the Crits and their sympathisers took this as a direct attack.<sup>164</sup> There was no clear evidence this was an attack, and no expectation that every application for tenure would be granted, as Trubek had found

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<sup>158</sup> See, eg, Richard Bauman, *Ideology and Community in the First Wave of Critical Legal Studies* (University of Toronto Press, 2000); Ronald M Dworkin, ‘Is Wealth a Value?’ (1980) 9(2) *The Journal of Legal Studies* 191.

<sup>159</sup> Bauman (n 158); Richard Michael Fischl, ‘The Question That Killed Critical Legal Studies’ (1992) 17(4) *Law and Social Inquiry* 779.

<sup>160</sup> David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) 13; Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (ZoneBooks, 2015) 10, 122–31.

<sup>161</sup> Kalman (n 108).

<sup>162</sup> ‘Vorenberg, Former Law School Dean, Dies at 72’, *The Harvard Crimson* (online, 14 April 2000) <<https://www.thecrimson.com/article/2000/4/14/vorenberg-former-law-school-dean-dies/>>.

<sup>163</sup> Jennifer A Kingson, ‘Harvard Tenure Battle Puts “Critical Legal Studies” on Trial’, *The New York Times* (online, 30 August 1987) <<https://www.nytimes.com/1987/08/30/weekinreview/harvard-tenure-battle-puts-critical-legal-studies-on-trial.html>>.

<sup>164</sup> *Ibid.*

previously when he was denied tenure at Yale Law School.<sup>165</sup> However, the timing of the denial moved beyond the issue at hand and became representative of CLS1 at Harvard Law School. Whilst tensions had been running high between the different legal factions,<sup>166</sup> the denial of tenure was something institutionally instigated, rather than from an individual. In itself, this top-down rejection of CLS1 scholars represented an institutional decline in the approval or acceptance of CLS1 at Harvard Law School. Trubek did not request a review and returned to the University of Wisconsin Law School.<sup>167</sup> Dalton sought a review and her tenure denial was upheld.<sup>168</sup>

The decision at Harvard Law School rippled through the legal academe and the broader community with the help of newspapers like the *New York Times*, which had covered the story.<sup>169</sup> Reading between the lines, those with an interest in the saga of CLS1 at Harvard would have seen that the movement was not going to wield the power it once had, however at this stage its actual death would not have been so easy to predict. In hindsight, the *New York Times* article did contain a quote from Crit Robert Gordon, of Stanford Law School, which was quite telling. Gordon gets to the heart of the seriousness of the competition between CLS1 and law and economics, stating that ‘[t]here’s a peculiar kind of vanity or megalomania at Harvard, that the place is the soul of the American ruling class ... Whoever wins in local institutional battles there thinks they will control America’s cultural and institutional destiny’.<sup>170</sup> A critical reading of Gordon’s observation gives a pre-emptive understanding that only one challenger of legal liberalism was likely to survive.

In 1989, two years after the denial of tenure to Trubek and Dalton, the Dean of Harvard Law School, Vorenburg — who had overseen the prominent CLS1 years — stepped down.<sup>171</sup> Vorenburg was succeeded by Robert C Clark, a traditionalist with a background in corporate law,<sup>172</sup> whose appointment was met with dissatisfaction from the Crits.<sup>173</sup> Gerald Frug, a Crit and part of the six-person faculty search committee that helped shortlist the potential Deans, believed the appointment of Clark was a mistake.<sup>174</sup> Harvard University President Derek Bok, however, gave

<sup>165</sup> Hackney (n 69) 28.

<sup>166</sup> Kingson (n 163).

<sup>167</sup> *Ibid.*

<sup>168</sup> Carol Kleiman, ‘Evidence Tenuous for Denied Tenure’, *Chicago Tribune* (online, 14 October 1993) <<https://www.chicagotribune.com/news/ct-xpm-1993-10-14-9310140190-story.html>>.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> Allan Gold, ‘Traditionalist is Named as Harvard Law Dean’, *The New York Times* (online, 18 February 1989) <<https://www.nytimes.com/1989/02/18/us/traditionalist-is-named-as-harvard-law-dean.html>>.

<sup>172</sup> See, eg, Robert Clark, *Corporate Law* (Little Brown Company, 1986).

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

his full support to Clark, overriding Frug and any other critics.<sup>175</sup> The appointment of Clark allowed a reshuffling of the faculty, separating the factions, and removing more of the power Crits held in the Law School,<sup>176</sup> a move that set the tone for the start of a new decade.

In 1991, law and economics' Ronald Coase won the Nobel Prize for Economic Science.<sup>177</sup> With this award, Coase joined Law and Economic influencers Friedrich von Hayek (winner in 1974) and Milton Friedman (1976).<sup>178</sup> The prestige of this award and the lineage behind it further legitimised the law and economics approach. Now facing a Nobel Prize-winning opponent, reflective of governments throughout the world,<sup>179</sup> CLS1 as the 'extension of sixties activism' was being framed as legal whimsy.<sup>180</sup> Given the reflective nature of law and economics to a certain political and business class, the final blow to CLS1 came in the form of corporate endowments, notably the endowments provided by John M Olin and the Olin Foundation.<sup>181</sup> After giving money to the law and economics movement in the 1970s,<sup>182</sup> the Olin Foundation pushed for a law and economics program at Harvard Law School, which was accepted by the University President, Derek Bok.<sup>183</sup> Similar to Gordon's earlier observation, Steven Teles identified Harvard Law School as a target for the Olin Foundation: 'Because of its size and prestige, Harvard Law School has an outsized impact on American legal culture and the character of the legal professoriate'.<sup>184</sup> The multiyear grant created The John M Olin Center for Law, Economics, and Business, which would go on to receive funding of more than \$18 million from the Olin Foundation.<sup>185</sup>

## V CONCLUSION: ENDING CLS1, BEGINNING CLS3

The ongoing competition between CLS1 and law and economics throughout the 1980s provides some context to the question asked in Yen's 1995 article for the *Harvard Law Record*. Broadly, in the face of a changing law school, where are the Crits? It can be argued that as the unsuccessful side in a jurisprudential overhaul, the Crits had stepped out of the limelight, no longer gracing the pages of mainstream newspapers

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<sup>175</sup> Ibid.

<sup>176</sup> Yen (n 64) 2.

<sup>177</sup> 'All Prizes in Economic Sciences', *The Nobel Prize* (Web Page) <<https://www.nobelprize.org/prizes/uncategorized/all-prizes-in-economic-sciences/>>.

<sup>178</sup> Ibid.

<sup>179</sup> See, eg, Harvey (n 160) 37–8, 62–3.

<sup>180</sup> Kalman (n 108).

<sup>181</sup> John J Miller and Karl Zinsmeister, *Agenda Setting: A Wise Giver's Guide to Influencing Public Policy* (The Philanthropy Roundtable, 2015) 38.

<sup>182</sup> Ibid 39.

<sup>183</sup> Ibid 40.

<sup>184</sup> Teles (n 112) 192.

<sup>185</sup> Ibid.

and magazines.<sup>186</sup> However, in Yen's specific context, within Harvard Law School, the Crits also 'Remain Quiet'.<sup>187</sup> Turning to both Kennedy and Horwitz, as well as Clark, Yen receives unanimous confirmation that CLS1 is not as it once was. Whilst there is a heavy motif of death around CLS1 in the article, there is no unified understanding of what has actually died. Each interviewee, and Yen herself, draw different conclusions, reflecting the complexity of the situation.

Yen's article presents a short quote from Clark, who bluntly states: 'I didn't kill them'.<sup>188</sup> Given the animosity from the Crits to Clark's appointment,<sup>189</sup> this short statement is telling, first as to the assumption that the death could be Clark's fault by proxy, and that even outside of the immediate CLS1 community, people are aware that CLS1 is dead. Yen moves from Clark's protest-like statement to her own experience of CLS1 at Harvard Law School. Yen, herself citing Kennedy in the same article, states that CLS1 is as 'dead as a doornail'.<sup>190</sup> Once Yen has made her observation, she provides a longer quote from Clark, in which he refers to CLS1 as entering another phase in its lifecycle, having changed, or retired.<sup>191</sup> Clark's choice of words, which this time made no mention of death, seems applicable only after any threat of CLS1 has long gone.

While thematically similar, Yen and Clark do present different ideas of what death means to CLS1. In questioning Kennedy, however, Yen achieves a more detailed understanding from one of the CLS1 founders:

You have to distinguish Critical Legal Studies the movement, from Critical Legal Studies the academic school ... There isn't at Harvard Law School or nationally any CLS[1] movement left. The movement completely collapsed several years ago. The school of thought, which is academic, is alive and well, but the school of thought doesn't have any activist component, period.<sup>192</sup>

Kennedy's response provides an assessment of CLS1 as living a half-life, one that is no longer able to do what it used to. Kennedy's concession is that despite not wanting to create 'just another set of bibliographical headings' when CLS1 began, the current state of CLS1 is just that.<sup>193</sup> Horwitz follows a similar line about the state of the then contemporary CLS1, but optimistically argues for a resurgence once it

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<sup>186</sup> See, eg, Kingson (n 163); Gold (n 171); Louis Menand, 'What is 'Critical Legal Studies': Radicalism for Yuppies' (17 March 1986) *The New Republic*; Marc Granetz, 'Duncan the Doughnut' (17 March 1986) *The New Republic*.

<sup>187</sup> Yen (n 64) 2.

<sup>188</sup> *Ibid.*

<sup>189</sup> Gold (n 171); Yen (n 64) 2.

<sup>190</sup> Yen (n 64) 2.

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.* 4.

is safe to come out again.<sup>194</sup> Although not referencing them directly, the implication Horwitz makes is that the situation that befell Trubek and Dalton in 1986 was still a very real concern for the younger Crits, something which Kennedy agreed with, and had addressed a year earlier.<sup>195</sup>

Both Kennedy and Horwitz, as representatives of the Crits at Harvard Law School, presented a dire view of CLS1, but with an overarching assumption that it will live on in one form or another. However, the hope for CLS1 to re-emerge in a decade, as per Horwitz,<sup>196</sup> or to continue as an area of academic interest, as per Kennedy,<sup>197</sup> seems to deny, or not fully appreciate, that in the same article there is a consensus that CLS1 is dead. Given that CLS1 never re-emerged and that its academic influence also waned, the optimism that Kennedy and Horwitz showed was ill-placed. Instead, what can be taken from Yen's article is that the death of CLS1 was not hyperbole and that in 1995 CLS1 *was* as 'dead as a doornail'.<sup>198</sup>

Recognising CLS1 as dead, rather than on hiatus, clarifies two important areas. First, in relation to Yen's article, it frames the responses to the state of CLS1 as individual acts of mourning. For example, this can be seen with Clark's uncomfortable and jocular tone presenting a pre-emptive 'not guilty', backed up with pleasantries about a once real foe that is no longer a threat.<sup>199</sup> This act of mourning is also evident in Horwitz and Kennedy's demonstration of optimism that CLS1 will continue or be reborn. Even Yen's premise for the article, her line of questioning about 'what happened to the Crits?', becomes an act of discovery; that the once vibrant CLS1 at Harvard Law School is dead. The second clarification is more important to critical legal studies as a whole as it creates a way to understand and interpret the narrow US-based CLS work that continued post-1995. As was proposed earlier in this article, in accordance with the structure of the family tree, this Critical Legal Studies will be categorised as CLS3.

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<sup>194</sup> Ibid.

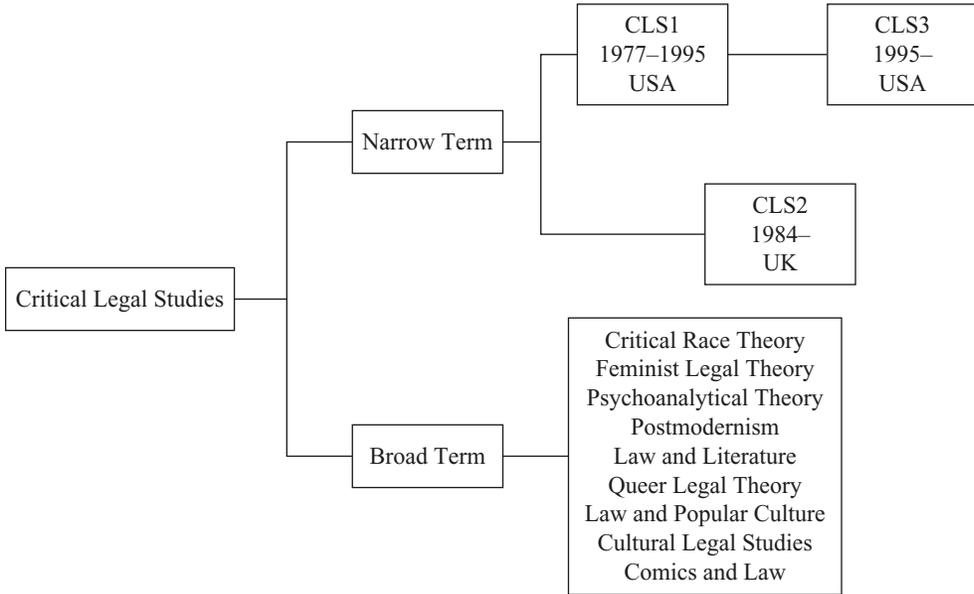
<sup>195</sup> Gerard J Clark, 'A Conversation with Duncan Kennedy' (1994) 24(2) *The Suffolk University Law School Journal* 56, 58.

<sup>196</sup> Yen (n 64) 2.

<sup>197</sup> Ibid.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid.



**Figure 7: Family Tree: Complete**

CLS3, beginning with the declaration of CLS1's death in 1995<sup>200</sup> and continuing thereafter, completes this demonstration of the critical legal studies family tree. The creation of this genealogy, a refinement on both Davies and Douzinas and Gearey's original divisions, provides a framework that aids in the overall demystification of critical legal studies. The idea of the critical legal studies family tree provides a system to address the questions 'what is critical legal studies?' or 'which critical legal studies?'. By using the family tree as a flowchart or map, these questions can be answered, albeit after further measures are accounted for. These measures include the need to identify a broad or narrow reading, whether it relates to US-based or another (most notably British) CLS2, and if it was before or after CLS1 was considered 'dead as a doornail'.<sup>201</sup> Depending on the qualifiers chosen, the answers become evident by following the correlating limbs of the family tree, demystifying these questions. The ability to answer 'which critical legal studies?' is a step towards its demystification, but the clarity created by dividing critical legal studies into branches and limbs comes with its own set of related questions. Primarily, as this article is concerned with CLS1, it is now by proxy, also concerned with CLS3. Identifying these two closely related but distinctly different areas of Critical Legal Studies provides insight into how a description of the US-based Critical Legal Studies could differ so strongly between the late-1980s and the late-1990s; demonstrating the effectiveness of the critical legal studies family tree.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid.