

Introduction

Most legal scholars in Canada would admit to more than a passing acquaintance with the school of thought that goes under the self-styled banner of critical legal studies. Roberto Unger's transformative politics,¹ Mari Matsuda's proposed epistemological alliance with the disempowered,² Karl Klare's call for radical democratization of contemporary workplaces,³ Frances Olsen's critique of the ideological underpinnings of modern family law,⁴ Duncan Kennedy's classical legal consciousness,⁵ Robert Gordon's critical legal histories,⁶ and Patricia Williams's

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- 1 Robert M. Unger *Politics: A Work in Constructive Social Theory* (Cambridge: Cambridge University Press 1987). *Politics* currently consists of three volumes: *Social Theory: Its Situation and Its Tasks*; *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy*; and *Plasticity Into Power: Comparative-Historical Studies on the Institutional Conditions of Economic and Military Success*.
- 2 Mari J. Matsuda 'Looking to the Bottom: Critical Legal Studies and Reparations' (1987) 22 *Harv. Rights-Civil Liberties LR* 323. See also Matsuda 'Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice' (1986) 16 *New Mex. LR* 613.
- 3 Karl E. Klare 'Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform' (1988) 38 *Cath. U. LR* 1. See also Klare 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941' (1978) 62 *Minn. LR* 265.
- 4 Frances E. Olsen 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 *Harv. LR* 1497. See also Olsen 'From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois: 1869-1895' (1986) 84 *Mich. LR* 1518.
- 5 Duncan Kennedy 'Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940' (1980) 3 *Res. in Law & Society* 3. See also Duncan Kennedy 'The Structure of Blackstone's Commentaries (1979) 28 *Buff. LR* 205.
- 6 Robert W. Gordon 'Critical Legal Histories' (1984) 36 *Stan. LR* 57. See also Gordon 'New Developments in Legal Theory' in David Kairys (ed.) *The Politics of Law: A Progressive Critique* (New York: Pantheon 1982) 281.

critique of the rights critique⁷ – most, if not all, of this scholarship⁸ has a certain currency in Canadian legal thought. Legal theory and jurisprudence courses offered in law faculties across the country invariably involve some coverage of critical legal studies. Canadian law reviews are replete with references and citations to the work of American critical legal scholars. Yet despite the air of familiarity and the art of acknowledgment, the reception varies dramatically from coverage to commitment and from footnote to text. Akin perhaps to the way in which legal realism⁹ has manifested itself in Canada,¹⁰ insights offered by American critical legal scholars appear to have entered into the substance of Canadian legal scholarship intermittently, almost surreptitiously, and rarely in the form of a wholehearted embrace.

This is not to say that all Canadian scholars see critical legal studies in the same translucent light. Several divergent reactions can be discerned. First, there are those scholars who ignore critical legal studies entirely, or make dismissive attempts at rebuttal.¹¹ This type of reaction

7 Patricia J. Williams 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' (1987) 22 *Harv. Civil Rights–Civil Liberties LR* 401. See also Williams 'Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism' (1987) 42 *U. Miami LR* 127.

8 The list is meant to be illustrative, not exclusive. For symposia, see 'A Symposium of Critical Legal Studies' (1985) 34 *Am. U. LR* 929; 'Symposium of Critical Legal Studies' (1985) 6 *Cardozo LR* 691; 'Perspectives on Critical Legal Studies' (1984) 52 *Geo. Wash. LR* 239; 'Critical Legal Studies Symposium' (1984) 36 *Stan. LR* 1; and 'Symposium: A Critique of Rights' (1984) 62 *Tex. LR* 1363. For anthologies, see Allan C. Hutchinson (ed.) *Critical Legal Studies* (Towota: Rowman & Littlefield 1989) and *Critical Legal Studies* (Cambridge: Harvard Law Review Association 1986); and Kairys (ed.) *The Politics of Law*, supra note 6. See also Mark Kelman *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press 1987). For a bibliography, see 'A Bibliography of Critical Legal Studies' (1984) 94 *Yale LJ* 461.

9 See, for example, Karl Llewellyn *The Bramble Bush* (Oceana Edition 1960) (originally published in 1930); Jerome Frank *Law and the Modern Mind* (1930); Morris Cohen 'Property and Sovereignty' (1927) 13 *Cornell LQ* 8; Robert Hale 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 *Pol. Sci. Q.* 470. See, generally, Laura Kalman *Legal Realism at Yale: 1927–1960* (Chapel Hill: University of North Carolina 1986); and Joseph W. Singer 'Legal Realism Now' (1988) 76 *Cal. LR* 465 (Review Essay).

10 See R.C.B. Risk 'Volume 1 of the Journal' (1987) 37 *UTLJ* 193 for a discussion of the impact of the writings of American scholars such as Felix Frankfurter, Roscoe Pound, and Realist scholars upon Cecil Wright, J.A. Corry, John Willis, and Vincent MacDonald; see also Jerome E. Bickenbach & Clifford Ian Kyer 'The Harvardization of Caesar Wright' (1983) 33 *UTLJ* 162. See Denise Réaume 'The Judicial Philosophy of Bora Laskin' (1985) 35 *UTLJ* 438 for an analysis of the impact of American 'sociological jurisprudence' on Bora Laskin. For an overview of these schools of thought, see G. Edward White 'From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America' (1972) 58 *Va. LR* 999.

11 See, for example, John Underwood Lewis 'Survey of Canadian Law: Jurisprudence' (1988) 20 *Ottawa LR* 671, at 681 ('CLS is destined to have as legal theories go, the

apparently does not respect borders.¹² Then there are those who partially rely on but then discard critical insights as if they were fungible goods. For these scholars, it is as though the theoretical advances made by progressive scholars south of the border were doctrinal points of reference capable of being used interstitially to bolster or flavour a previously existing and independently supportable thesis.¹³ Still others adopt critical methodologies but refuse to embrace their political implications.¹⁴ Finally, there are those who are unmoved by the central thrust of recent critical legal scholarship in the United States, rely none the less on minor elements of that scholarship, and continue to engage in progressive critique.¹⁵ Unlike in the United States academic community, however, where the critical legal studies movement by and large has captivated the hearts and enlisted the minds of progressive legal scholars, the reaction in Canada from friend and foe alike has been one of cautious restraint.

lifespan of a fruit fly'); and Jerome E. Bickenbach's review of Allan C. Hutchinson and Patrick J. Monahan (eds) *The Rule of Law: Ideal or Ideology* (Toronto: Carswell 1987) in (1989) 39 *UTLJ* 211, at 213 (article by Hutchinson and Monahan entitled 'Democracy and the Rule of Law' dismissed as 'a glib and smart-alecky call to arms from the hearties in *CLS* (Canadian Section)'). For a more sustained critique of critical legal theory, see Richard W. Bauman 'The Communitarian Vision of Critical Legal Studies' (1988) 33 *McGill LJ* 295 (critical legal scholars criticize law for being political but refuse to disclose their political views).

- ¹² See 'An Exchange on Critical Legal Studies Between Robert W. Gordon and William Nelson' (1988) 6 *Law & Hist. Rev.* 139; see also Dean Carrington 'Of Law and the River' (1984) 34 *J. of Legal Ed.* 222 (critical legal scholarship will 'result in the learning of the skills of corruption, bribery and intimidation').
- ¹³ Patrick Monahan's work is a case in point. The influence of critical legal scholarship on his writing and thought appears to have waned over time: contrast Monahan 'At Doctrine's Twilight: The Structure of Canadian Federalism' (1984) 34 *UTLJ* 47 with Monahan *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell 1987). Yet even in *Politics and the Constitution*, his most recent work, tenets of critical legal thought ('[a]ll aspects of social life should be subject to the revisionary potential of politics' - at 104, citing R. Unger 'The Critical Legal Studies Movement' (1983) 96 *Harv. LR* 561) mingle with economic critiques of federalism based on the writing of Ronald Coase (at 225, citing R. Coase 'The Problem of Social Cost' (1960) 3 *J. of Law & Econ.* 1).
- ¹⁴ See, for example, Edward M. Morgan 'Criminal Process, International Law, and Extraterritorial Crime' (1988) 38 *UTLJ* 245 (jurisprudence on extraterritoriality reflects contradiction between similarity and difference). Others argue that there are no political implications of critical methodologies. See Stanley Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press 1989).
- ¹⁵ See, for example, Judy Fudge, 'The New Constitution and Old Style Liberalism' in *Labour Law Under the Charter* (Kingston: Queen's Law Journal 1988) 61-111, at 108 ('cumulative effect' of Supreme Court *Charter* decisions in labour relations has been 'to reinforce the legitimacy of legal relations and categories essential to a liberal political economy').

One major exception to the lukewarm reception given to critical legal scholarship in Canada lies in the writings of Professor Allan Hutchinson, of York University's Osgoode Hall Law School.¹⁶ One of Canada's most prolific legal scholars, Hutchinson has tackled such diverse and eclectic topics as the rhetorics of James Boyd White,¹⁷ the legal formalism of Ernest Weinrib,¹⁸ the Wittgensteinianism of Brian Langille,¹⁹ the 'liberal lie of the Charter,'²⁰ the 'thick' and 'thin' versions of the Rule of Law,²¹ the efficacy of litigation,²² no-fault insurance schemes,²³ and the proper way to make bouillabaisse.²⁴ In *Dwelling on the Threshold: Critical Essays on Modern Legal Thought* Hutchinson has gathered together and revised some of his more thought-provoking articles and added several new essays. The result is a text that offers the reader a provocative and at times profound vision of human personality and political practice.

Dwelling on the Threshold is not without its flaws. Hutchinson covers so

- 16 There are, of course, others. See, for example, Richard F. Devlin 'Law's Centaur: A Preliminary Theoretical Inquiry Into the Nature and Relations of Law, State and Violence' (1989) 27 *Osgoode Hall LJ* 220; Jamie Cassells 'Liberal Presuppositions' (1988) 38 *UTLJ* 378; Toni Pickard 'Experience as Teacher: Discovering the Politics of Law Teaching' (1983) 33 *UTLJ* 279; and Martin F. Katz 'After the Deconstruction: Law in the Age of Post-Structuralism' (1986) 24 *U. West. Ont. LR* 51. See also J. Stuart Russell 'The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy' (1986) 18 *Ottawa LR* 1. For Canadian scholars who seek to strengthen the theoretical underpinnings of critical legal scholarship, see Rosemary J. Coombe 'Room for Manoeuvre: Toward a Theory of Practice in Critical Legal Studies' (1989) 14 *Law & Social Inquiry* 69 (practice theory provides stable framework for critical legal theory); and Peter D. Swan 'Critical Legal Theory and the Politics of Pragmatism' (1989) 12 *Dalhousie LJ* 349 (pragmatism provides stable framework for critical legal theory). See also Alan Hunt 'The Big Fear: Law Confronts Postmodernism' (1990) 35 *McGill LJ* 507 (pragmatic conception of truth rooted in social practice provides stable framework for critical theory).
- 17 'From Cultural Construction to Historical Deconstruction' (1984) 94 *Yale LJ* 209; compare James Boyd White *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character and Community* (Chicago: University of Chicago Press 1984).
- 18 'The Importance of Not Being Ernest' (1989) 34 *McGill LJ* 233; compare Ernest J. Weinrib 'Legal Formalism: On the Immanent Rationality of law' (1988) 97 *Yale LJ* 949.
- 19 'That's Just the Way It Is: Langille on Law' (1989) 34 *McGill LJ* 145; compare Brian Langille 'Revolution Without Foundation: The Grammar of Scepticism and Law' (1988) 34 *McGill LJ* 451.
- 20 'Private Rights / Public Wrongs: The Liberal Lie of the Charter' (1988) 38 *UTLJ* 278 (with Andrew Petter)
- 21 Hutchinson and Monahan 'Democracy and the Rule of Law,' supra note 11
- 22 'Charter Litigation and Social Change: Legal Battles and Social Wars' in R. Sharpe (ed.) *Charter Litigation* (Toronto: Butterworths 1986) 357
- 23 'Beyond No-Fault' (1985) 60 *Cal. LR*
- 24 'Part of an Essay on Power and Interpretation (With Suggestions on How to Make Bouillabaisse) (1986) 63 *NYUL* 850

diverse a territory – Michel Foucault (chapter 9), Ronald Dworkin (chapter 3), ‘the rise and ruse of administrative law’ (chapter 4), the politics of health care (chapter 10) – that as a result the book at first glance seems diffuse and directionless. In addition, depth is sometimes sacrificed for wit. Readers familiar with Hutchinson’s writings will also recognize the polemics, the hyperbole, and the metaphoric overkill. Yet despite the diversity of the essays and a writing style that is anything but minimalist, three themes recur throughout the text that demand the reader’s attention. The first, which bears on human personality, stresses the view that narrative and interpretation are the means by which meaning is given to the worlds in which we live. The second, which bears on political practice and institutional reform, is that as citizens we should aspire to and aim for an expansion of the democratic sphere so we can participate equally in the construction of those narratives that shape our lives. The third is that the judiciary is illegitimate, for it is élitist, antidemocratic, and inimical to citizen participation in the formation of rules that govern collective existence.

In this essay I explore some of the reasons behind the resistance to critical legal studies among progressive legal scholars in Canada. I also hope to demonstrate that Hutchinson’s negative vision of law and its possibilities clashes with his critical perspective on politics and human personality. Though these objectives appear divergent, I hope to show that they are in fact two sides of the same coin, namely, that at least part of what animates progressive Canadian resistance to critical legal studies also explains Hutchinson’s negative view of law. Part I seeks to elicit and describe in some detail the three themes which dominate *Dwelling on the Threshold*. Part II delves into an epistemological tradition that informs much of contemporary critical scholarship in general and *Dwelling on the Threshold* in particular. This epistemological tradition generates a powerful critique of claims to objectivity in legal discourse and legal scholarship, a critique based on a conception of language at odds with the possibility of obtaining an objective definition of external reality. American critical legal scholarship has introduced this critique into the lexicon of legal scholarship, but its inspiration can and ought to be traced to earlier theoretical developments in structural linguistics and literary theory. Part III examines why progressive legal scholars in Canada have been slow to absorb the insights of critical legal scholarship. I identify two dominant strands of progressive legal scholarship in Canada, historical materialism and normative instrumentalism, and analyze some of the challenges posed to each by *Dwelling on the Threshold* and the epistemological tradition to which it belongs. In my view, much of the resistance among progressive Canadian scholars to the insights of

critical scholars south of the border lies in the embrace by the latter of this contentious vision of language. In this part, I also address the tension introduced into Hutchinson's project by his insistence that the judiciary is an antidemocratic and élitist institution. I argue that Hutchinson has not fully embraced the implications of the first two themes of *Dwelling on the Threshold*, which, in my view, combine to provide a basis for seeing the judiciary as a potential ally in the democratization of Canadian life.

I

In his preface, Hutchinson states that he believes in 'the idea that, in order to say different things about law, it is necessary to say them differently as well' (p. viii). The ensuing text, simultaneously playful and serious, does not let the reader down. Chapter 1, entitled 'In Training,' is a one-act play set on a train 'bound for anywhere' (p. 1). The characters, Rachel, Charles, and Robert, debate whether the outside scenery is best described as 'pure Vivaldi,' 'Wagner,' 'Madonna,' or 'a hint of Pachelbel' (pp. 1–2). Interspersed amid the dialogue are extracts from various texts, some real, others fictional, including a book review from the *Toronto Globe and Mail* and several paragraphs from John Fowles's novel *Mantissa*, as well as the musical score from the hit single 'Do Do Do, Da Da Da,' by the English rock and roll band, The Police. The focal point of the chapter is a long exegesis (written by Hutchinson) on the relation between power, knowledge, and legal discourse, extracted from a book Rachel reads when not engaged in conversations with Charles and Robert about such topics as objective truth, parenting as a social responsibility, and the meaning of a sign. Rachel's fictional/nonfictional readings put forth the thesis that life is a series of texts or stories interwoven with stories offered by communal connection; '[h]istory and human action only take on meaning and intelligibility within their narrative context and dramatic settings' (p. 13). According to its author, there is nothing but story: '[t]here are many stories being imagined and enacted, but we can only listen to them and comprehend them within the vernacular contexts of other stories' (p. 13).

In this text within a text, Hutchinson introduces the reader to the first of three themes that dominate *Dwelling on the Threshold*. Human beings are imagined as meaning-producing agents, engaged in a perpetual process of giving and receiving meaning to their lives and the lives of those around them through narrative acts. Inscribed on the brute fact of reality are multiple interpretations of that reality generated by individuals, communities, institutions, and history itself. These

interpretations, or narratives, to use Hutchinson's term, make sense or give meaning to the world around us and provide frameworks of understanding through which we live our lives. The production of meaning thus is a thoroughly interpretive and textual process, whereby stories are told, experienced, and felt as lived realities by individuals and collectivities. We enter a world not of our own making and live out scripts written by others, but we are possessed with a limited capacity to transcend our contexts and participate in the rewriting of the narratives that give meaning to our lives. Identity, reason, and criteria for judgment are made possible by narrative history and narrative possibility. Crucial to this conception of human personality is the notion that there is no vantage point from which we can test conflicting interpretations against the yardstick of truth. There is nothing but interpretation; objectivity is a 'philosophical front' that hides interests vested in interpretive acts (p. 33). As a result, 'any claims to offer an objective analysis or value-free judgment immediately become suspect' (p. 33).

Also in this text within a text are traces of the second theme that informs *Dwelling on the Threshold*, namely, that social institutions ought to be shaped according to the ideal of radical participatory democracy. Rachel's book ends with an exhortation for the nurturing of 'the language of civic virtue and the story of democratic egalitarianism' (p. 22). This call for democratic reform is the institutional counterpart to Hutchinson's vision of human personality. The aspiration is that individuals will be able to participate equally in the construction of narratives that influence and affect their lives. Given the narrative dimension to human existence and the view that there is no Archimedean point from which we can judge the truth or falsity of interpretive acts, it follows for Hutchinson that social institutions ought to be organized to provide for equal participation in collective and individual self-definition. In a subsequent chapter addressing the philosophy of Michel Foucault, more depth is provided to the call for an expansion of the democratic realm. Hutchinson proposes a 'radical form of dialogic democracy' that would 'not rest on any metaphysical foundation or rely on any un-deconstructed privileging of individual or community' (p. 290). Contrasting his vision of democracy with traditional conceptions 'which seek to entrench a dominion of Truth that makes "debased" slaves of its citizens' (p. 291),²⁵ he advocates the enhancement of opportunities in which citizens are able to participate in continuous conversation 'to promote and experience new forms of

²⁵ Citing J.J. Rousseau *The Social Contract* (Baltimore: Penguin 1968)

intersubjectivity' (p. 291). He calls for the infusion of democratic values in a localized fashion. In his view it would be a mistake to think or conceive of democratic reform in a totalizing or global manner, for democratic reform emerges out of and is dependent on particular moments in social life. Hutchinson offers the example of rape crisis centres, which he sees as 'democratic microcosms in action – they provide emotional and physical support, challenge and change the institutional responsibilities of hospitals and the police, and attack the structure of male domination' (p. 292). Hutchinson thus envisages and advocates the democratization of various particular sites of intersubjective activity: 'the university classroom, the factory floor, the lawyer's office, the doctor's consulting room, the political committee rooms, the science laboratory and the like' (p. 292).

Remaining true to his desire to say different things differently about law, Hutchinson reinvents Ronald Dworkin's *Law's Empire*²⁶ as a major motion picture in a chapter entitled 'Indiana Dworkin and Law's Empire.' The protagonist, Indiana Dworkin, 'defends Law's Empire against the intellectual barbarians who work for its demise and the forces of legal evil that covet its moral prestige' (p. 58). Hutchinson's analysis of Dworkin evokes the third undercurrent to his writing. Hutchinson charges that mainstream legal scholars ignore profound economic inequality by the use of deft but illegitimate argumentative techniques. In *Law's Empire*, for example, Dworkin articulates and defends a theory of 'law as integrity' against both conventionalism, which prescribes that judges ought to determine the content of legal rights by reference to existing legal conventions, and pragmatism, which advocates that judges determine the content of legal rights by reference to what is best for the community. According to the conventionalist, 'judges must respect the established legal conventions of their community except in rare circumstances,' one such convention being the convention of precedent.²⁷ According to the pragmatist, 'judges do and should make whatever decisions seem to them best for the community's future.'²⁸

26 Ronald Dworkin *Law's Empire* (Cambridge: Harvard University Press 1986). For a detailed analysis and critique, see John Stick 'Literary Imperialism: Assessing the Results of Dworkin's Interpretive Turn in *Law's Empire*' (1986) 34 *UCLA LR* 371.

27 Dworkin, *supra*, 116. According to Dworkin, when there is neither precedent nor any other convention governing the case before her, the judge may exercise discretion and apply a 'forward-looking justification' (be it justice, the common good, or whatever) in order to dispose of the case. *Ibid.* 115.

28 *Ibid.* 95. This is not to say that precedent plays no role in judicial decision-making. For a pragmatist, according to Dworkin, precedent enters the judicial calculus strategically, not as a principle in and of itself. What guides the course of judicial judgment is the

For Dworkin, conventionalism does not accurately describe or justify legal practice. The conventionalist description fails for it offers a distorted picture both of adjudication in cases where conventions do not determine results and of how practices come to be questioned and transformed over time. The conventionalist justification fails because it does not always secure the right balance between predictability and flexibility. Nor does pragmatism hold up to descriptive or prescriptive scrutiny. As description, it offers a problematic picture of judicial decision-making in the context of a vague statute.²⁹ As prescription, pragmatism fails as well for reasons which harken back to *Taking Rights Seriously*:³⁰ its conception of rights as dependent on what judges think is best does violence to the competing and preferred vision of rights as 'trumps over what would otherwise be the best future properly understood.'³¹ Dworkin's alternative, law as integrity, requires that a political community act towards all its members in a coherent and principled manner.

Dworkin's text is described by Hutchinson in the form of a press release of a movie script, complete with antagonists (the 'Literary Fish'³² and the 'Utility Monster'³³) who challenge Dworkin's position but who are defeated through intellectual combat. Thus tamed, the antagonists become transformed into compliant foot-soldiers in the ongoing battle against the forces of evil. Critiques are then levied against the substance of Dworkin's thesis through the medium of fictional movie reviews in various film journals. The *Journal of Film Optics* charges that Dworkin is misrepresenting reality, by ignoring intersubjectivity, women, and 'the rich emotions of life' (p. 71). *Film Community* slams the work as trading in the 'devalued moral coinage' of economic transactions (p. 74). According to Hutchinson, this is because Dworkin's thesis embraces a conception of community wherein '[p]eople are bound in associative

judge's conception of the common good, however contestable that may be in practice and between and among members of the judiciary (ibid. 158-9).

29 Dworkin's argument is that a pragmatic judge would enforce a statute whose wisdom she doubts for the reason only that enforcement is important to 'protect the legislature's ability to coordinate social behaviour.' (ibid. 158). But if the statute was so unclear that it would not further social coordination, then a pragmatic judge would have no reason to enforce it. Yet in practice, judges do attempt to clarify vague statutes. Therefore, pragmatism fails as an adequate description of legal reality (ibid. 158-60).

30 (Cambridge: Harvard University Press 1977)

31 Dworkin, *supra* note 26, 160

32 Fish, *supra* note 14. See also Fish *Is There a Text in This Class?* (Cambridge: Harvard University Press 1980).

33 One presumes the reference to be to Richard Posner *Economic Analysis of Law* 3d ed. (Boston: Little, Brown 1986).

arrangements that are “contingent on reciprocity” (pp. 73–4).³⁴ Individuals in Dworkin’s world would treat others as friends only if the treatment is reciprocal. With the additional indictment that the work is ‘profoundly elitist and undemocratic’ (p. 74), Hutchinson’s third theme begins to emerge with some clarity. Dworkin’s writings are devoted to establishing a regime of principle defined and defended by the judiciary, whose members are ‘elevated to the rank of moral prophets and philosopher monarchs’ (p. 75). In so doing Dworkin devalues democratic participation in the formulation of rules that govern collective life. In Hutchinson’s words, ‘[p]rincipled discourse represents one small part of the dramatic dialogue that composes communal life and politics’ (p. 75). Government by ‘judicial proconsuls’ frustrates participatory politics, the institutional correlate to the narrative or textual dimension of human personality. *The Popular Press* continues on the subject of the partiality of legal discourse, asking ‘[h]as Dworkin spoken to many women, gays, blacks, or Indians lately?’ (p. 80). And *The Hollywood Times* cruelly analogizes: [a]s in the pornographic film trade, judicial fetishism is no less a fetish because it is dignified with euphemistic garb’ (p. 80). Having been castigated by the critics, Dworkin’s statements on law’s positive impact on segregation are then contrasted with statistical data on crime, unemployment, and poverty among blacks in the United States. An irate letter to the editor by ‘Charles Hutchins’ completes the chapter. It quotes Chekhov: ‘everything is peaceful and quiet and only mute statistics protest’ (p. 83).

Hutchinson makes it clear that the criticisms that he levies at legal scholarship apply with equal force to judicial decision-making. Elsewhere in *Dwelling on the Threshold* he adopts the personas of five judges deciding *Derek and Charles v. Anne and Martin*, a fictional lawsuit addressing among other issues whether there is a duty to rescue. Doctrin J writes reasons similar to those of Dworkin’s conventionalist. Strictly doctrinal in approach, Doctrin J makes no effort to analyze the reasons why the common law rules governing rescue situations are the way they are, stating that ‘it is incumbent ... to resolve the issues presented in accordance with the law as it is, and not as some would like it to be’ (p. 185). Refuge from the storms of policy and expediency is sought in the idea that the legislature’s function is to enact laws which aim for substantive justice. The judiciary’s function is simply to interpret and apply that law. Mill J, by contrast, is avowedly utilitarian and thus akin

34 Quoting R.W. Emerson ‘Self-Reliance’ in *Essays and Lectures* (New York: Literary Classics 1983) 262

to Dworkin's pragmatist. 'The common law,' for Mill J, 'is a vast and intricate doctrinal edifice, but its chief architect has been policy and not logic' (p. 191). The policy foremost in the fictional judge's mind is efficiency. A duty to rescue is recognized in some cases to be efficient, as the costs to the defendant are often slight as compared with those that would occur and fall on the plaintiff were he or she not rescued. The third judge, Wright J, writes reasons based not in precedent or policy but principle. As such, Wright J exhibits the judicial craft of 'law as integrity.' Critiquing the pragmatism of utilitarianism, Wright J states that '[r]ights are trumps over social welfare' and that '[i]ndividuals are not to be conceived of as a means by which to maximize social utility, but instead are to be treated as ends in themselves' (p. 203). Wright J concludes that a no-rescue rule 'is consistent with both moral and economic principle' (p. 207). A fourth judge, Prudential J, articulates a vision of social justice that would include a no-fault insurance scheme and criminal provisions for those who fail to rescue persons in imminent and serious danger, but refuses to so order 'out of deep respect for constitutional traditions' (p. 215). Prudential J articulates a vision of the judiciary as 'entrusted with [the] democratic responsibility to prompt and, ultimately, cajole the legislature to action' (p. 211). Finally, Lefft J, on the eve of retirement, writes a scathing set of reasons for judgment, critiquing the process of accident compensation, which 'serves to dehumanize ... add[s] insult to injury by offering cold cash instead of communal support, ... [and] reflects a profound indifference to life and suffering' (p. 220). Lefft J locates the cause in an imbalance of information, which is a reflection of the fact that '[t]he corporate elite hold a monopoly on knowledge which comprises the foundation and guarantee of its power' (p. 221). The objective, in Lefft J's view, 'must be to equalize risk throughout society and restore control of those risks to those who undergo the dangers flowing from such risks. The equalization of risk would not eliminate risk from the world, but it would 'ensure that all persons can decide the risks to which they are individually exposed' (p. 220). Lefft J calls for 'a complete restructuring of all aspects of social life' and a redistribution of knowledge and information so that citizens are informed of the proper information as to the extent of risk which they face in their lives (p. 220).

With this mock set of reasons, the vision of law and politics presented in *Dwelling on the Threshold* is laid bare. Aligning himself with Lefft J's swan song, Hutchinson paints a picture of law and the judiciary as 'hold[ing] in place the deep structure of society that sacrifices people for profits' (p. 216). Legal advances in the area of victim compensation and tort law reform 'amount to nothing more than a sugar coating on a

bitter pill' (p. 216). For Hutchinson, the law 'places society in a condition of bondage' (p. 217). Judicial reasoning is one means by which citizens are lulled into believing that such a condition is either natural or beyond repair: '[j]udgments are rationalizations of our ideological prejudices' (p. 217). Despite the fact that judges and lawyers often act 'with genuine and well-intentioned sincerity,' they participate in legitimating 'the tragic toll of human life in our industrialized society' (p. 217). Though Hutchinson's remarks via Lefft J are restricted to the debate surrounding a duty to rescue in tort law, this vision of the role and function of the judiciary presented by Lefft J is woven throughout the entire text. Were *Dwelling on the Threshold* a movie script, the judiciary would be cast as villain.

II

When the students of Ferdinand de Saussure gathered together and published his lecture notes under the title of *A Course in General Linguistics*³⁵ in 1913, the result was a text that offered a way of imagining and thinking about language and reality that profoundly affected the way in which scholars have attempted to understand and change the worlds in which we live. Saussure challenged the idea that words, the building blocks of linguistic communication, have an essential meaning untrammelled by the vagaries of time and space. Ever since at least the writings of Hume,³⁶ the notion that it is possible to know aspects of the external world in some unmediated manner, was subject to a radical form of scepticism simple in its articulation ('how do you know that?') but devastating in its effect ('if you don't know how you know, then how can you claim that what you know is true?'). The Kantian response to Humean scepticism was one of concession and rejoinder. It is true, Kant argued, that one can never really know external reality in an unmediated manner; knowledge is a product of mind and therefore separate from and only interpretive of the worlds in which we live. This is not to say that there is not a world out there independent of our sensations and perceptions of it,³⁷ but it is to say

35 Ferdinand de Saussure *Course in General Linguistics* Roy Harris (trans.) (London: Duckworth 1983). For an accessible introduction, see Jonathan Culler *Ferdinand de Saussure* rev. ed. (Ithaca: Cornell University Press 1986); for a detailed analysis of the relation between Saussure's work and critical legal theory, see Gary Peller 'The Metaphysics of American Law' (1985) 73 *Cal. LR* 1151.

36 David Hume *A Treatise of Human Nature* (Oxford: Clarendon Press 1978).

37 See, for example, George Berkeley 'A Treatise Concerning the Principles of Human Knowledge' (1710) in G. Berkeley *Principles, Dialogues, and Philosophical Correspondence* C.M. Turbayne (ed.) (Indianapolis: Bobbs-Merrill 1965).

that knowledge of the external world is dependent on those sensations and perceptions and therefore suspect. All we can know is our representations of external reality; whether those representations are true to the reality that they represent will never be known with certainty. Yet there are certain a priori truths that none the less are discoverable through self-reflection. It is these truths that scholars must discover, according to Kant, for they constitute the preconditions of human understanding and moral freedom.³⁸

Unlike Kant, Saussure was primarily concerned with the role and place of language in our stock of representations of the external world. But like Kant, Saussure conceded a sharp divide between representation and reality. This combination of a focus on language and on a distinction between representation and reality provides the basis of a critique that underpins much of contemporary critical legal scholarship in general and *Dwelling on the Threshold* in particular. For Saussure, words (or more properly, signs) gain their identity and ability to function in language and human communication not from any intrinsic or inherent meaning that they possess or from any connection they may have with the external world but rather from their relation to other words (or signs). More specifically, in Saussure's view there are two aspects of a sign or word: the signifier, which is the actual sound (if spoken) or image (if written), and the signified, which is the meaning that speakers and listeners associate with that sound or written image. Thus, when one says the word 'law,' the signifier associated with that sign is the simple one-syllable noise or sound that emerges from the speaker's mouth, whereas the signified associated with it is the meaning or concept that 'law' evokes in the speaker and the listener. Saussure's claim was that the relationship between the signifier and the signified is arbitrary. There is no necessary or natural connection between the way the word 'law' sounds or looks and the meaning that it evokes or carries. Words do gain their meaning in a relational manner, but not from the relationship between signifier and signified. Rather, words gain meaning from their relations with other words. Sound and sense are established through difference. 'Law' sounds the way it does because it does not sound like other signifiers. And 'law' gains its meaning from its relation to other signs in the system of language that we use to interpret the world. Its meaning emerges through its difference from, say, 'politics' or 'crime.' 'Law' as a concept has meaning only in so far as it occupies a place in the language structure.

38 Immanuel Kant *Critique of Pure Reason* N.K. Smith (trans.) (London: Macmillan 1982)

The insight that there is an arbitrary relation between the signifier and the signified could represent either a mundane or a powerful claim about language. The mundane claim would simply be that the signifier does not determine what is being signified. This claim would amount to the argument that the sound we use to evoke a concept or to trigger a certain meaning is arbitrary. We could use a signifier other than 'law' to signify what we mean by 'law'; in that sense the signifier or sound bears an arbitrary relation to what it signifies. The claim is mundane in so far as it states merely that there could be a multiplicity of signifiers referring to the same concept. When one reflects on the fact that there is a multiplicity of languages in the world using different sounds and images ('law,' 'droit') to signify roughly the same phenomenon, it is clear that the claim that the signifier does not determine the signified, or that sound does not determine sense, is not all that earth-shattering. But the claim that there is an arbitrary relation between the signifier and the signified is potentially a powerful one. The more powerful version of this claim is that the concepts signified by signifiers are themselves arbitrary, that what we mean by 'law' as opposed to 'politics' or 'crime,' for example, is itself arbitrary. The claim is contentious in so far as it rejects the notion that there is an essential meaning to what we attempt through language to signify, that there are natural dividing lines between concepts independent of the words that we use to describe them. Instead, the claim is that a concept gains its definition, its coherence, its meaning *through* signification. In short, Saussure supplemented the Kantian insight that our view of reality is inevitably shaped by the concepts we use to understand it with the notion that the mind's window onto the world is a textual one, in that language is always already participating in our conceptions of the real.

The Saussurian insight that meaning is not imagined in terms of a relation of identity between sound and sense but rather that meaning is *produced* by difference, by the relationships and contrasts words have with other words, gave birth to modern structural linguistics.³⁹ Saussure himself introduced the concept of structure or system as a way of establishing the proposition that linguistics is a field of inquiry amenable to scientific analysis despite the contingency of meaning. He drew a distinction between language and speech, language (*langue*) being a self-contained structure or system and the essential precondition of speech (*parole*), which is the actual performance of what the system of

39 See Charles S. Peirce *Semiotics and Significs* C.S. Hardwick (ed.) (Bloomington: Indiana University Press 1977); Louis Hjelmslev *Prolegomena to a Theory of Language* Francis J. Whitfield (trans.) (first published 1943; Madison: University of Wisconsin Press 1961).

language permits or makes possible.⁴⁰ Language is associated with the social and speech with the individual. Thus, for Saussure, '[i]n separating language from speaking we are at the same time separating (1) what is social from what is individual, and (2) what is essential from what is accessory and more or less accidental.'⁴¹ Since signs acquire their meaning from their differences with other signs, it is possible to speak of the meaning of a sign as being produced by the language system and not as something intrinsic to an individual sign. Yet as the quote above implies, language (as opposed to speech) is essential and social. For Saussure, the language system is a social system, the product of the conventions of a 'speech community,' a domain that predates individual participation.⁴²

This way of inquiring into the nature of phenomena, of distinguishing between structure and event and concentrating on the essential components of the former, paralleled developments in anthropology and sociology, where scholars began to turn their minds to discerning the 'unconscious foundations' of history that ground or underlie the 'conscious expressions' of historical data.⁴³ The structuralist sees events as instantiations of deeper ahistorical cultural codes, norms, or structures, which make possible, explain the significance of, and give *meaning* to contingent and otherwise meaningless individual actions. Thus the structuralist is concerned with linking discrete actions to an underlying system of norms – in Saussure's case, linguistic acts to the rules of a language; in Levi-Strauss's, symbols to myth. The division of the world into structure and event, seeing the former as essential and fixed and the latter as particular and contingent, laid the foundation for an even more far-reaching claim about the relation between language and reality, a claim made most strongly by Jacques Derrida. Derridean 'deconstruction'⁴⁴ now constitutes a dominant undercurrent in contemporary

40 Saussure, *supra* note 35, 13–15. Compare Bernard S. Jackson *Semiotics and Legal Theory* (London: Routledge & Kegan Paul 1985) (claiming the existence of universal structures of signification).

41 Saussure, *supra* note 35, 14

42 *Ibid.*

43 Claude Levi-Strauss *Structural Anthropology* Claire Jacobson and Brooke G. Schoepf (trans) (first ed. 1958; Garden City: Anchor Books 1967) 23. For an overview of the role of structure in sociology, see David Rubinstein 'The Concept of Structure in Sociology' in Mark L. Wardell and Stephen P. Turner (eds) *Sociological Theory in Transition* (Boston: Allen & Unwin 1986) 80–94. For a study of the relationship between structuralism and contemporary legal theory, see Thomas C. Heller 'Structuralism and Critique' (1984) 36 *Stan. LR* 127. For a critique of structuralist tendencies in critical scholarship and a detailed analysis of the relationship between structure and subjectivity, see Coombe, *supra* note 6.

44 Derrida's principal texts include *Glas* J.P. Leavey and R. Rand (trans) (Lincoln:

critical legal scholarship⁴⁵ and informs much of *Dwelling on the Threshold*.

The Derridean claim took seriously the Saussurian insight that meaning emerges through difference. That is, if there is no necessary connection between the signifier and the signified, between sound and sense, and instead the meaning of a sign emerges from the position that the sign occupies in a broader linguistic structure, then meaning is always the 'sign of a sign.' There is an endless deferral of meaning. The search for an origin or a foundation that would ground meaning is futile, for the origin that one offers as an end to the search is simply yet another sign in the chain of meaning, which sign has meaning only by reference to still another sign. The phenomenon of endless deferral renders problematic any search for an authoritative definition or interpretation of reality. This is not to make the idealist claim that there is no reality absent our representations of it.⁴⁶ The Derridean claim instead is that the *meaning* we ascribe to reality, or the interpretations we

University of Nebraska Press 1987); *Margins of Philosophy* A. Bass (trans.) (Chicago: University of Chicago Press 1982); *Positions* A. Bass (trans.) (London: Athlone Press 1981); *Dissemination* B. Johnson (trans.) (London: Athlone Press 1981); *Writing and Difference* A. Bass (trans.) (Chicago: University of Chicago Press 1978); and *Of Grammatology* G.C. Spivak (trans.) (Baltimore: Johns Hopkins University Press 1974). For useful secondary texts, see Christopher Norris *Derrida* (Cambridge: Harvard University Press 1987); Irene E. Harvey *Derrida and the Economy of Différance* (Bloomington: Indiana University Press 1986); Christopher Norris *Deconstruction: Theory & Practice* (London: Methuen 1982); and Jonathan Culler *On Deconstruction: Theory and Criticism After Structuralism* (Ithaca: Cornell University Press 1982). See also Chris Weedon *Feminist Practice and Poststructuralist Theory* (Oxford: Basil Blackwell 1987).

45 See, for instance, the essays collected in 'Deconstruction and the Possibility of Justice' (1990) 11 *Cardozo LR* 919-1734; J.M. Balkin 'Nested Oppositions' (1990) 99 *Yale LJ* 1669 (review essay); Drucilla Cornell 'Time, Deconstruction, and the Challenge to Legal Positivism: The Call to Judicial Responsibility' (1990) 2 *Yale J. Law & Hum.* 267; Jerry Frug 'Argument as Character' (1988) 40 *Stan. LR* 869; Daniel Williams 'Law, Deconstruction and Resistance: The Critical Stance of Derrida and Foucault' (1988) 6 *Cardozo Arts & Ent. LJ* 357; Drucilla Cornell 'Post-Structuralism, the Ethical Relation, and the Law' (1988) 9 *Cardozo LR* 1587; J.M. Balkin 'Deconstructive Practice and Legal Theory' (1987) 96 *Yale LJ* 743; John Leubsdorf 'Deconstructing the Constitution' (1987) 40 *Stan. LR* 181; B. de Souza Santos 'Law: A Map of Misreading: Toward a Post-modern Conception of Law' (1987) 14 *J. Law & Soc.* 279; Clare Dalton 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94 *Yale LJ* 997; James Boyle 'The Politics of Reason: Critical Legal Studies Theory and Local Social Thought' (1985) 133 *U. Pa. LR* 685; David Kennedy 'Critical Theory, Structuralism and Contemporary Legal Scholarship' (1985) 21 *New Eng. LR* 209; Peller, *supra* note 35; G.E. Frug 'The Ideology of Bureaucracy in American Law' (1984) 97 *Harv. LR* 1276; Girardeau A. Spann 'Deconstructing the Legislative Veto' (1984) 68 *Minn. LR* 473; Joseph Singer 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 *Yale LJ* 1; and Mark Tushnet 'Critical Legal Studies and Constitutional Law: An Essay in Deconstruction' (1984) 36 *Stan. LR* 623.

46 For an example of this view, see Berkeley 'Principles,' *supra* note 37.

impose on reality, cannot be fixed by reference to an origin or foundation. Any attempt to fix meaning on or interpret reality by reference to an origin is open to the charge that what is affixed is not definitive. Reference to structure or a speech community is of no assistance: structure or a speech community is as much determinative of interpretive events as it is determined by interpretive events.⁴⁷

The view that meaning emerges through difference produces certain insights into the phenomenon of interpretation and immediately renders suspect any claim that there is an objectively correct interpretation of a text. Interpretation becomes a process whereby one meaning is imposed on textual possibility and other potential meanings are actively excluded. The deconstructive critic is sensitive to the way in which this process of inclusion and exclusion conflicts with the apparent stability of the interpretation that is its end-product. An interpretation that asserts objectivity, for example, must repress the process by which the interpreter actively constructs the interpretation out of textual possibility. The repression is necessary in so far as the interpreter's active participation undermines the accompanying claim of objectivity. Deconstruction is a term used to describe what a critic does when demonstrating that interpretations that seek to arrest the infinite play of meaning by fixing an origin for truth and knowledge must depend for their validity on the very ideas that they seek to exclude.⁴⁸ This is not to suggest that there is no role for logic or authorial intention in the ascription of meaning; rather, it is to make the more modest claim that neither the author's intent nor the text itself wholly accounts for textual meaning and that rational discourse that is concerned with the imposition of meaning on a text seeks to exclude but none the less depends upon the invocation of rhetoric for its stability and persuasive power.⁴⁹ Nor is it to suggest that the act of interpretation is inherently a subjective act, for subjectivity is not a given that stands separate and apart from the act of interpretation; rather, subjectivity itself is constituted through interpretive endeavours and is thus always provisional and open to revision.⁵⁰ These

47 See Derrida 'Structure, Sign and Play in the Discourse of the Human Sciences' in *Writing and Difference*, supra note 44, 278-93.

48 See Derrida *Of Grammatology*, supra note 44, 141-64.

49 See Christopher Norris 'Law, Deconstruction, and the Resistance to Theory' (1988) 15 *Law & Soc. Rev.* 166, at 169.

50 Barbara Johnson in *A World of Difference* (Baltimore: Johns Hopkins University Press 1987) puts the point this way (at 13):

In the case of the opposition between subjectivity and objectivity, deconstruction *seems* to locate the moment of meaning-making in the nonobjectivity of the act of reading rather than in the inherent givens of a text, but then the text seems already to

insights are but instances of the more general proposition that what is asserted as other or external or subordinate to the object of one's discourse is essential to the constitution of that object.⁵¹

Dwelling on the Threshold opens a window onto a strand of critical legal theory that is concerned with demonstrating that mainstream legal scholarship and judicial decision-making lay claim to a degree of objectivity only by suppressing the fact that the law is not something 'out there,' discoverable through the exercise of reason, but instead is an ever-shifting web of active interpretations of legal, political, social, and economic data. Hutchinson's first theme, that the meaning of human existence is thoroughly narrative in nature, owes a large debt to and indeed makes sense only in the light of the theoretical insights developed by Saussurian linguistics and its progeny. This tradition, which Hutchinson openly acknowledges, emphasizes the fact that meaning is imposed on or given to relations, actions, reactions – in short, on the raw data of external reality. Meaning does not lie in wait for the legal observer to discover. Appeals to the 'right' answer that do not acknowledge the constitutive role played by the interpreter must hide the fact that the answer obtained is the result of a process where the interpreter participates in the construction of what is then held out to be objectively correct. The imposition of meaning provides the basis for order and understanding and creates further opportunities to interpret and reinterpret pre-existing interpretations. Accounts of the 'true' meaning of a phenomenon – whether a constitution, a statute, a case, an event, a relation, or a history or nature of a polity – are simply interpretations or narratives that structure and give meaning to something that is itself meaningless.

Hutchinson's second and third themes, that the democratic realm ought to be enlarged to provide a greater degree of political participation and that the judiciary is antidemocratic, rest on the simple proposition that the legitimacy of narrative depends on the manner of its articulation. Since it is the act of narration that is the crucial moment in the formation of order, sense, and meaning, institutions ought to be organized to maximize the ability of individuals to participate in this process. Echoing his criticism of Dworkin, he writes that '[p]olitics is

anticipate the reading it engenders, and at the same time the reader's 'subjectivity' is discovered to function something like a text, that is, something whose conscious awareness of meaning and desire is only one aspect of a complex unconscious signifying system which determines consciousness as one of its several effects.

⁵¹ This way of reading texts emerges from Derrida's reading of Rousseau's *Confessions*. See Derrida *Of Grammatology*, supra note 44, 140–64.

legitimated by participation and not principle' (p. 75). And because judicial reasoning is a process by which narratives are scripted and imposed on persons without the participation of those intimately affected by its outcome save the immediate parties to a dispute, law is an institution that constructs meaning imperialistically, by decree, order, and threat of imprisonment. *Dwelling on the Threshold* is an illustration of important aspects of contemporary critical legal scholarship, which in turn owes many of its insights to earlier developments in structural linguistics and literary theory. Although Hutchinson does not address directly the strengths and weaknesses of progressive legal scholarship in Canada, his work and the tradition to which it belongs speak to scholars interested in the limits and possibilities of law as a vehicle for social change.

III

The mixed reception of critical legal studies in Canadian progressive legal scholarship involves more than the fact that, in Northrop Frye's words, 'Canada has always been a cool climate for heroes.'⁵² Several possible explanations present themselves. For years there has been a vibrant and healthy 'left' legal scholarship in Canada, which predates and continues to survive the emergence of critical legal scholarship in the United States.⁵³ A certain sense of hard-won intellectual prowess, together perhaps with a defensiveness towards the quick popularity of critical legal studies, may account in part for its lukewarm reception, at least by progressive scholars in Canada. The left-wing intellectual tradition in Canadian universities has long been an established and

52 Northrop Frye *Divisions on a Ground: Essays on Canadian Culture* (Toronto: Anansi 1982) 85

53 See, for example, J.R. Mallory *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press 1954); Leo Panitch (ed.) *The Canadian State: Political Economy and Political Power* (Toronto: University of Toronto Press 1977); G.B. Macpherson *The Rise and Fall of Economic Justice and Other Essays* (Oxford: Oxford University Press 1985); L. Panitch and D. Schwartz *From Consent to Coercion: The Assault on Trade Union Freedoms* (Toronto: Garamond Press 1985); Neil Boyd *The Social Dimension of Law* (Toronto: Prentice-Hall 1986); R.D. White *Law, Capitalism and the Right to Work* (Toronto: Garamond Press 1986); Michael Mandel *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson 1989); Judy Fudge 'Community or Class: Political Communitarians and Worker's Democracy' in Allan C. Hutchinson and Leslie Green (eds) *Law and the Community: The End of Individualism?* (Toronto: Carswell 1989) 57-92; Harry J. Glasbeek 'Some Strategies for an Unlikely Task: Progressive Use of Law' (1989) 21 *Osgoode Hall LJ* 387; see also Harry J. Glasbeek and Michael Mandel 'The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms' (1984) 2 *Socialist Studies* 85.

respected voice in Canadian intellectual circles and years ago underwent many of the growing pains currently experienced by the relatively young critical legal studies movement.⁵⁴ There may well be a sense that there is precious little that the United States can teach the Canadian left.

A second, more generous, potential explanation relates to the Canadian trait of simultaneous attraction to and wariness of all things American, including critical scholarship. Sensitive to the realities of economic and cultural imperialism, progressive scholars in Canada may well be loath to participate in a joint critical enterprise, the intellectual parameters of which are controlled by alien political machinations south of the border. Put less xenophobically, progressive scholarship in the United States emerges out of and responds to a unique set of historical influences and ideological circumstance. Canadian history and Canadian politics generate a qualitatively different set of intellectual and ideological concerns.⁵⁵ To interpret those concerns through the albeit attractive methodological lens of American critical legal theory would be to misrepresent, or at least stifle, much of what is unique about legal practice and legal history in Canada.

The combination of these two relatively straightforward explanations gives rise to a third and, in my view, deeper explanation for the less than enthusiastic reception of critical legal studies among the Canadian left. The politics of reason in Canada not only occupy a left/right spectrum but also are filtered through the fear of economic and cultural domination by the United States.⁵⁶ What constitutes success in mainstream Canadian intellectual circles is often, though not exclusively, defined with an eye to the Ivy League. The redefinition of critical

54 For a description, see Calvin Trillin 'A Reporter at Large (Harvard Law)' *The New Yorker* 26 March 1984.

55 The classic statement in this regard remains Gad Horowitz 'Conservatism, Liberalism and Socialism in Canada: An Interpretation' (1966) 32 *Can. J. of Econ. & Pol. Sci.* 143 (collectivist strand in Canadian political culture distinguishes Canadian ideological formation from its American counterpart). Elsewhere I have attempted to sketch out the implications of the Horowitz thesis in the context of constitutional doctrine. See Patrick Macklem 'Constitutional Ideologies' (1988) 20 *Ottawa LR* 117. For a recent reassessment of the Horowitz thesis, see H.D. Forbes 'Hartz-Horowitz at Twenty: Nationalism, Toryism and Socialism in Canada and the United States' (1987) 20 *Can. J. Pol. Sci.* 287.

56 See, for example, Harold Innis 'Great Britain, the United States and Canada' in *Essays in Canadian History* (Toronto: University of Toronto Press 1956) 405 ('Canada has had no alternative but to serve as an instrument of British imperialism and then of American imperialism'). For an overview of the work of political economists addressing this issue, see Glen Williams 'Canada in the International Political Economy' in W. Clement and G. Williams (eds) *The New Political Economy* (Kingston: McGill-Queen's University Press 1989) 116-37.

scholarship in Canada along the lines of critical legal studies, while it may raise the profile of critical scholarship in the eyes of mainstream intellectual circles by mimicking American academic trends, may also have the effect of blunting the critical power that traditional left-wing scholarship possesses in Canada. In other words, what is 'critical' is simply a matter of perspective. 'Radical reconstruction' in the United States may well be little more than the existing Canadian welfare state. Progressive scholars may well be hesitant to redefine left-wing scholarship in a way that would legitimate current institutional practices in Canada.

Yet for all their appeal, these explanations, in my view, do not complete the picture. *Dwelling on the Threshold* and the critical tradition to which it belongs are rooted in an approach to language and objectivity that stands in stark opposition to much of Canadian progressive legal scholarship. By 'progressive legal scholarship' I mean to cast the definitional net widely and refer generally to scholarship that assumes or is concerned with demonstrating that critical features of existing economic, social, political, or legal arrangements are unjust because they work to the disadvantage of disadvantaged groups in society. Despite the generality of this definition and the multiple and often conflicting strands of progressive legal scholarship in Canada, I think it is safe to say that two traditions dominate the field. The first is historical materialism or Marxist legal scholarship. The second is what I term normative instrumentalism. In this part, I intend to outline briefly what I see to be the points of resistance in historical materialism and normative instrumentalism to the insights developed by critical scholars in the United States, and to situate *Dwelling on the Threshold* in relation to each.

HISTORICAL MATERIALISM

Historical materialism is concerned with examining the ways in which state action – whether legal, political, or administrative – participates in the stabilization of the process of capital accumulation. By *materialism*, I mean that it attempts to explain state action by reference to material circumstance. That is, historical materialism focuses on material phenomena, such as food and shelter, that are essential to the establishment and maintenance of elementary forms of individual and social existence. These material circumstances require the production of goods and services, which in turn creates relations of production among individuals and groups in society. The particular forms that these relations of production will take depend on available technology and the nature of the resource being exploited or produced. Together, these

relations of production, or social practices, constitute the material base of society, which shapes the establishment and maintenance of social institutions, including law.⁵⁷ By *historical*, I mean to emphasize that dispositions specific to certain relations of production are not universal, ahistorical features of human nature. Ideas and values about human existence ought to be understood as ideological and historical in nature, broadly justificatory of and in the last instance dependent on the particular form of the relations of production currently existing in society. Transformations in the relations of production will occasion changes in the way in which people see themselves and their relations with others. Most contemporary scholars in the field embrace a relatively sophisticated view of the relation between the material base and the production of legal rules, and view productive relations as engendering the formation of complex ideological belief systems that give meaning to and legitimate everyday practices, including the production of legal rules.⁵⁸ Yet most sophisticated versions of historical materialism ultimately assume or seek to demonstrate the existence of a causal relation and a priority between material reality and the formation of law.

Certain strands of critical legal theory based on the application and extension of Saussurean linguistics challenge historical materialism in ways that might explain some of the lukewarm reaction to critical legal studies among the Canadian left. The relationship between these two schools of thought is complex and manifold, yet two aspects are worthy of mention. First, the criticism that it levies against objectivity challenges the historical materialist view that legal forms are ultimately dependent upon economic forms, however mediated through ideological formation. Second, some elements of current critical scholarship suggest that the legal forum is an important potential site for economic, social, and political transformation. Both aspects of the challenge provide at least a partial explanation for the less than openly enthusiastic reception of

57 The most well known quote from Marx establishing this proposition is the following:
[I]n the social production which men carry on they enter into definite relations that are indispensable and independent of their will; these relations of production correspond to a definite stage of development of their material powers of production. The sum total of these relations of production constitutes the economic structure of society – the real foundation, on which rise legal and political superstructures and to which correspond definite forms of social consciousness. The mode of production in material life determines the general character of the social, political and spiritual processes of life.

K. Marx 'Preface' to *A Contribution to the Critique of Political Economy* (Chicago: C.H. Kerr 1904) 11

58 See, for example, Louis Althusser 'Ideology and Ideological State Apparatuses' in *Lenin and Philosophy and Other Essays* (London: New Left Books 1971).

critical legal scholarship at least among the historical materialist strand of progressive legal scholarship in Canada. As well, both serve to illustrate why the negative vision of law presented in *Dwelling on the Threshold* clashes with Hutchinson's perspective on politics and human personality.

With respect to the first, Duncan Kennedy has convincingly argued that 'a set of legal conceptions ... is part of the definition of the commodity mode of production,'⁵⁹ by which he means that legal rules participate in the constitution and reconstitution of what is identified as the material base of society. According to the historical materialist, the maintenance of elementary forms of human existence requires the formation of relations of production among individuals and groups in society. These basic relations of production are said to lead to the formation of forms of consciousness and law. A capitalist mode of production, for example, engenders a legal system that respects private property and freedom of contract and a form of consciousness that might be said to include seeing people as 'free and equal individuals related to each other as proprietors of their own capacities and of what they have acquired by their exercise.'⁶⁰ The historical materialist will argue that the material base, the social practices and human relations surrounding production in society, is factually and logically prior to legal and ideological formation. This gives rise to powerful reservations about law as a site for social change in so far as the legal sphere is imagined as consequent to the material base. Social change is occasioned through transformations in the material base, through changing established social practices. In so arguing, however, the historical materialist must repress the fact that legal and ideological activity participate in the process of giving meaning to those social practices and human relations that cumulatively comprise society's material base. The economy is imagined as defining law (in the non-deterministic version, the economy is imagined as defining the outer limits of law's possibilities), yet on closer inspection law participates in the definition of the economy. In order to understand what the historical materialist means by the relations of production we must refer to what those relations of production are said to determine, namely, the law. Yet if the law participates in the

59 Duncan Kennedy 'The Role of Law in Economic Thought: Essays on the Fetishism of Commodities' (1985) 34 *Amer. U. LR* 939, and authorities cited therein. See also David Trubek 'Where the Action Is: Critical Legal Studies and Empiricism' (1984) 36 *Stan. LR* 575; and Hugh Collins *Marxism and Law* (Oxford: Oxford University Press 1982) 78-93, and his discussion of J. Plamenatz II *Man and Society* (London: Longmans 1963) 280 and following (to describe relations of production one must make reference to legal rules).

60 C.B. Macpherson *Possessive Individualism: From Hobbes to Locke* (Oxford: Oxford University Press 1962)

construction of the relations of production, it can hardly be said that the relations of production are 'fundamental.' Robert Gordon puts it this way: 'in practice, it is just about impossible to describe any set of "basic" social practices without describing the legal relations among the people involved – legal relations that don't simply condition how people relate to each other but to an important extent define the constitutive terms of the relationship.'⁶¹ Law, imagined as constrained by social practices that cumulatively comprise society's material base, in fact participates in the very constitution of these practices. This is but an instance of the more basic insight that material reality, thought by historical materialism to shape our (legal) conceptions, in fact has no meaning apart from our interpretations of it.

If the law is intimately involved in the construction of meaning of social practices, then the legal sphere is as much a site for social change as the economic sphere. Social practices are imbued with meaning in part *through* the categories that legal discourse uses to make sense of the world, and, as every realist knows, those categories are contested sites of interpretation. Neither 'property' nor 'contract' in the abstract, for example, provides a decision-maker with any guidance in concrete cases.⁶² The ideal of property (freedom of use and enjoyment of a thing) requires further concretization (what 'things' deserve property protection? what if use conflicts with enjoyment? use with use? enjoy-

61 Robert W. Gordon 'Critical Legal Histories' (1984) 36 *Stan. LR* 57, at 103. See also Karl Klare 'Law-Making as Praxis' (1979) 40 *Telos* 123; James Boyle 'The Politics of Reason: Critical Legal Theory and Local Social Thought' (1985) 133 *U. Penn. LR* 685; Trubek, *supra* note 59, 609; and Peller, *supra* note 35, 1266–8.

62 The literature on the 'indeterminacy' thesis is vast. For a recent analysis, see Ken Kress 'Legal Indeterminacy' (1989) 77 *Cal. LR* 283. See also Lawrence B. Solum 'On the Indeterminacy Crisis: Critiquing Critical Dogma' (1987) 54 *U. Chi. LR* 462; Andrew Altman 'Legal Realism, Critical Legal Studies, and Dworkin' (1986) 15 *Phil. & Pub. Affairs* 205; Charles M. Yablon 'The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation' (1985) 6 *Cardozo LR* 917; Joseph Singer 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 *Yale LJ* 1; and Duncan Kennedy 'Legal Formality' (1973) 2 *J. of Legal Studies* 351.

In my view, much of the literature is centred around a false debate. Legal principles are both determinate and indeterminate depending on the degree of specificity or particularity from which one is arguing. The more concrete the proposition the more determinate it is. The more abstract the proposition, the more indeterminate it becomes. Law is filled with both abstract and concrete propositions; thus the legal system is both determinate and indeterminate. The claim of indeterminacy cuts into the legitimacy of legal discourse only in the sense that it states that an abstract organising principle of law can generate contradictory specific rules. Freedom of contract can justify upholding a contract *and* permitting a breach, depending on the meaning one gives to that abstract ideal within the context of a particular case. What is important is not so much the abstract rhetoric of freedom of contract (for it can be used to justify opposite conclusions) but rather the concrete meaning that is given to that abstract ideal and the manner in which this is carried out. See the text accompanying note 65, *infra*.

ment with enjoyment?) before it can be useful in particular instances. The indeterminate formality of the ideal of property ownership must be supplied with substantive content before it can provide guidance in particular cases. Similarly, freedom of contract as an abstract ideal is also purely formal, providing no guidance to lawmakers or judges unless or until substantive content is added to render it determinate in particular cases. The purely formal notion of freedom of contract, that individuals ought to be free to exchange commodities between and among each other, requires substantive content before it can be made meaningful in particular instances. Each step in the interpretive process presents opportunities and pitfalls for the advancement of the interests of those who are disempowered or disadvantaged in society. Social and economic practices are defined and constituted by the addition of substantive content to formal ideals through judicial, legislative, and 'private' action, but there is nothing inherent in the process of constitution and reconstitution of those relations that renders those relations, and the sphere of rule-making in which this process occurs, immune from the pressures and possibilities of reform and transformation.

Although the general themes that structure the essays are derived from a tradition that challenges historical materialism in the above ways, Hutchinson subscribes to these challenges in a somewhat less than enthusiastic fashion. He charges that British legal scholars working in the Marxist tradition⁶³ are 'guilty of reductionism,' for 'it is difficult to appreciate why any particular mode of politico-economic organization requires any given set of rules' (p. 122). He also argues that '[w]hile the abandonment of the regimes of "property" and "contract" would be significant, a different mix of their detailed rules would not,' adding that 'even if the whole judicial process was willingly committed to the perpetuation of "capitalism," it is often difficult to know why one particular rule in one particular situation is necessarily demanded' (p. 122). Moving away from early versions of instrumental Marxism ('the law is not simply an institutional instrument at the disposal of the ruling class' (p. 89)), he stops short of abandoning the materialist proposition that the economic form logically and historically precedes the legal form. Instead he embraces the Miliband vision⁶⁴ of law and the state as 'relatively autonomous' from the interests of the ruling class (p. 89).

63 He refers to J.A.G. Griffith *The Politics of the Judiciary* (London: Fontana 1985) and Patrick McAuslan 'The Ideologies of Planning Law' (1979) 2 *Urb. L. & Policy* 1.

64 Ralph Miliband *The State in Capitalist Society: The Analysis of the Western System of Power* (London: Quartet 1973). Compare Nicos Poulantzas *Political Power and Social Classes* (London: Verso 1975) (the state as the site of class struggles that shape economic structure).

Remnants of historical materialism in Hutchinson's writing thus may explain his animosity towards law and the judiciary. Since law is at best 'relatively autonomous' from the interests of economically dominant groups in society, it is not a likely ally in the struggle for social change. And the judiciary – antidemocratic, élitist, and committed to principle not participation – is antithetical to the democratic project Hutchinson wishes to defend in his text. In presenting this picture of the judiciary and law, however, Hutchinson falls prey to the essentialism that he so persuasively disavows. Having emphasized the narrative nature of human existence and the idea that there is nothing but interpretation, it is difficult for Hutchinson to shield law and the judiciary from the ramifications of these insights and claim the judiciary and its offspring of rules and principles to be essentially regressive or antidemocratic. Just as there is nothing inherent in the concepts of freedom of contract and private property that renders them essentially incapable of serving the cause of progressive social justice, there is nothing inherent in the judiciary or law writ large that prevents them from being used in a similar manner. It no doubt is the case that decision-makers more often than not interpret the law and social reality in ways that reinforce the status quo rather than use their interpretive power to assist disadvantaged groups in society.⁶⁵ It thus is possible to speak of historical patterns to acts of judicial interpretation and argue that certain interests have been systematically ignored, downplayed, or marginalized in favour of others through judicial action. Yet the critical insight is not so much that there has been a historical tilt to judicial interpretation, but rather that the ascription of necessity or objectivity to such tilt tends to perpetuate its existence. Despite its intentions to the contrary, *Dwelling on the Threshold* risks participating in the very tradition that it criticizes. Viewing law through the lens of necessity and objectivity obscures the fact that it is a human endeavour and a site in which contested visions of the world vie for realization. It may be that the law has succeeded in constructing criteria to judge the legitimacy of interpretive possibilities that marginalize claims which challenge established social practices, and Hutchinson is adept at demonstrating law's success in this regard. By suggesting that this process entails the abandonment of the judicial

65 See Joel Bakan 'Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought' (1989) 27 *Osgoode Hall LJ* 173, at 172, n183 ('the elite perspective encoded in the world view of judges lends an impoverished understanding of domination and oppression at best and, at worst, a denial that it exists and its further entrenchment'). See also Paul Brest 'Who Decides?' (1985) 58 *S. Cal. LR* 661 and Martha Minow 'Foreword: Justice Engendered' (1987) 101 *Harv. LR* 10.

forum in favour of the political realm, however, Hutchinson cedes an important site of political and interpretive activity to a set of interests that oppose his democratic vision. The abandonment of the legal forum, however unreceptive it may be to the democratization of Canadian life, will only compound the difficulties one faces in attempting to assist disadvantaged groups in society. However muted their voices may be in the current state of affairs, it is better than silence.

If one takes seriously the narrative vision of human personality invoked by Hutchinson, then it leads one comfortably to the adoption of an approach to institutional reform that calls for the enhancement of democratic participation in narrative construction. It also suggests that imperial imposition of interpretations ought to be resisted in so far as it is antithetical to the aspiration of democratic narrative, which in turn leads to a healthy scepticism of the legal form. By operating within a specialized and technical language, law as a site for the production and reproduction of narrative is accessible only to the few capable of mastering the codes that make for meaningful interpretation or to those with the power to purchase persuasive spokespersons. But there is nothing inherent in the legal form that renders it incapable of participating and facilitating the democratic agenda that Hutchinson proposes. In fact, legal stories are not unlike the stories we use to give meaning to our lives, histories and relations with others, the crucial difference being the fact that legal stories are backed by the coercive power of the state.⁶⁶ Yet some of these stories become the reality against which new narratives are engendered. By selection, delineation, emphasis, and shading, legal stories serve also to empower some individuals and disempower others. Law thus is a privileged process of social self-definition and self-presentation, favouring some aspects of human experience and understandings at the expense of others. In Hutchinson's own words, legal stories 'provide the possibilities and parameters for our own self-definition and understanding' (p. 14). Given the centrality of law in the process by which meaning is given to our worlds, Hutchinson ought to enlist its aid in the realization of his democratic project. His failure to do so illustrates a continued reliance on a version of materialism that conflicts with his vision of human personality and political practice.

66 See Robert M. Cover 'Violence and the Word' (1986) 95 *Yale LJ* 1601 ('legal interpretation takes place in a field of pain and death'). See also Robin West 'Adjudication is not Interpretation: Some Reservations About the Law-as-Literature Movement' (1987) 54 *Tenn. LR* 203.

NORMATIVE INSTRUMENTALISM

Unlike historical materialism, normative instrumentalism exhibits little hesitation in enlisting law and the judiciary in efforts to ameliorate disadvantaged groups in society. Normative instrumentalism is meant to refer to that mode of scholarship that sees law as an instrument for achieving results thought to be worthy by their conformity to an articulated abstract norm. By *instrumentalism*, I mean that this type of inquiry sees law as an instrument that can be used to effect incremental changes in the way economic, social, and political life is organized. The standards used by the normative instrumentalist to determine the direction of legal reform emerge out of an analysis of deficiencies of current legal modes of organizing and regulating human behaviour. By *normative*, I mean that these deficiencies are identified by reference to certain normative ideals, such as fairness, equality, and efficiency.⁶⁷ The normative ideals then serve as the end against which an existing social practice is measured. Law is viewed as a means of achieving certain normative objectives. Legal rules are praised when they conform to the end posited as normatively desirable and criticized when there is a poor fit between means and ends. The normative instrumentalist scholar is sensitive to the possibility that legal rules and legal regimes may give insufficient weight to certain interests and undue weight to other interests. Normative instrumentalism typically is respectful of the institutions that offer possibilities for legal reform, cautious in the extent to which its proposals require legal change, and grounded in an expertise gained through practical knowledge of the way law works in practice.

Much of normative instrumentalism does not depend on a claim of objective textual meaning for its persuasive authority and to this extent is not threatened by criticism of claims to objectivity. Prescriptive rather than descriptive, normative instrumentalism, in Edward Rubin's words, 'concedes the primacy of the normative realm.'⁶⁸ To the extent this type of scholarship does continue to insist on an objective meaning to a text and to criticize existing legal practices for not conforming to that meaning, however, it will run into epistemological difficulties. A constitutional argument that there is an objectively correct interpretation

67 See Edward L. Rubin 'The Practice and Discourse of Legal Scholarship' (1988) 86 *Mich. LR* 1835, at 1851 for a similar description of 'standard legal scholarship.' See also Robert S. Summers *Instrumentalism and American Legal Theory* (Ithaca: Cornell University Press 1982). Compare Thomas Grey's definition of legal pragmatism: see T.C. Grey 'Holmes and Legal Pragmatism' (1989) 41 *Stan. LR* 787, at 860.

68 Rubin, *supra*

of a constitutional guarantee that can act as a benchmark or standard to assess judicial craftsmanship, for example, cannot withstand the withering scrutiny of those who question the source of that objectivity.⁶⁹ That which is posited as the objective foundation for subsequent interpretation can always be demonstrated to be neither objective nor foundational. It will not be objective because it will be supplied by the interpreter as well as the text. Meaning is *given* to the instrument being interpreted, not discovered. It will not be foundational because it cannot escape the charge that its meaning is never fixed but is itself subject to interpretation.

Yet the insights developed by critical scholars speak to normative instrumentalism in a number of other ways. That is because Rubin's description may be more wishful than he is willing to concede. Normative instrumentalism often reintroduces objectivity – correct answers, valid interpretations, areas beyond the pale of legitimate legal inquiry – at the edges. Critical scholarship calls into question, or at least demands justification of, aspects of the economic, political, and legal system that normative instrumentalism far too often takes for granted or assumes is beyond the scope of legitimate legal inquiry. For example, much of legal scholarship is concerned with establishing whether a certain subject matter is an appropriate subject matter for the judiciary or whether it is best left to the legislature. 'Institutional deference,' first introduced by Henry Hart and Albert Sacks in the 1950s,⁷⁰ is a concept that acts to seal off certain issues from substantive judicial scrutiny by suggesting that some issues or questions are not suited for judicial scrutiny because

69 David Beatty and Steven Kennett, for example, in 'Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies' (1988) 67 *Can. Bar Rev.* 573, argue that 'there are objective principles and standards of evaluation which organise and constrain the Court's powers of review which will generally ensure to the advantage of those who are relatively less well off in our country' (at 582). They then proceed to demonstrate conclusively that, in *Reference re Alberta Public Service Employee Relations Act* [1987] 1 SCR 313, 38 DLR (4th) 161, the court erred in applying a test under section 2(d) of the Charter of Rights and Freedoms and should have concluded that the Charter does protect the right to strike. The fact that logic, reason, and precedent dictate a conclusion opposite to that reached by a majority of the court in their view vindicates their claim. Notably absent from their analysis, however, is any claim of objectivity with respect to the *invocation*, as opposed to the application, of the test utilized by the court. In no way can it be said that the text dictated the test employed (however erroneously) by the court.

70 H. Hart and A. Sacks *The Legal Process: Basic Problems in the Making and Application of Law* (unpublished) (introducing concept of 'institutional settlement'); see also Herbert Wechsler 'Toward Neutral Principles of Constitutional Law' (1959) 73 *Harv. LR* 1 (judiciary must defer to legislative initiatives unless it can be guided by principles neutral to competing interests). For an extended analysis of 'process theory' see Gary Peller 'Neutral Principles in the 1950's' (1988) 21 *J. Law Reform* 561.

they involve political or policy judgments. Hutchinson parodies this type of judicial reasoning with his mock judgment by Prudential J, who calls for legislative reform but refuses to change the common law to include a positive duty to rescue. Critical scholarship calls into question the validity of the distinction between law and politics that works to maintain a claim of institutional deference. Prudential J's refusal to interpret the common law as including a positive duty to rescue, while seemingly a decision which does not take a side in the dispute and merely defers to the appropriate institution for reform, represses the fact that the judiciary itself created the common law that excludes a positive duty to rescue. Institutional deference is but one example of how normative instrumentalism often takes for granted and deems legitimate the background distribution of entitlements by advocating that the judiciary refuse to act on certain questions on the basis of relative institutional competence.⁷¹

Finally, by seeing law in purely instrumental terms, normative instrumentalism blinds itself to law's constitutive dimension. To use the language of law and economics, legal discourse is as much a site for the formation of preferences as it is for the satisfaction of preferences. The categories used to describe individual, economic, social, and political events participate in the constitution of the meaning of those events.⁷² Future events are then viewed and organized through the lens of those pre-existing narratives, their meanings fixed, and interpretations that deviate from the normative universe created by the production and reproduction of legal narratives are treated as invalid. The successful invocation of an argument based on institutional competence or institutional deference, for example, brings about or realizes a certain state of affairs that retrospectively justifies the argument's invocation. Normative instrumentalism, in other words, fails to acknowledge that the instrument creates as well as satisfies the norm.

71 See also Bakan 'Constitutional Arguments,' *supra* note 65, at 179–85 (judicial restraint arguments assume a principled way of determining when deference is appropriate; that priority ought to be given to democratic process over other values; and that democratic institutions are democratic). See also J. Skelly Wright 'The Judicial Right and the Rhetoric of Restraint: A Defense of Judicial Activism in an Age of Conservative Judges' (1987) 14 *Hastings Const. LQ* 487; and Paul Brest 'Constitutional Interpretation' (1986) 1 *Encyclopedia of the American Constitution* 464.

72 See Peter Gabel 'The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves' (1984) 62 *Tex. LR* 1563, at 1564 ('when we realize that we routinely speak these ideas and images to each other ... we can begin to form an understanding of how the law is actually constitutive of our social existence'). See also Karl E. Klare 'Law-Making as Praxis' (1979) 40 *Telos* 123; and Mark Tushnet 'Marxism as Metaphor' (1983) 68 *Cornell LR* 281 (book review).

To scholars who see their role as normative instrumentalists, critical scholarship demands a broadening of the scope of legitimate legal inquiry. What are imagined to be constraints upon the extent of legal reform, such as the relative institutional competence of the institution involved in a dispute, ought themselves to be seen as part of the problem.⁷³ In Hutchinson's view a large part of the problem with contemporary legal scholarship lies with seeing the judiciary as part of the solution. Hutchinson presents the argument that the instrumentalist ought to be concerned instead with fostering new forms of participatory democracy. The act of narrative, of imposing meaning on a text – in short, interpretation itself – is the crucial moment in the formation of meaning. Opportunities for the mobilization of meaning ought to be organized democratically, so that individuals can participate equally in narrative construction. According to Hutchinson, the act of judging involves the imperial imposition of a narrative on individuals and groups without their active participation and therefore ought to be resisted. As the first part of this essay illustrated, much of *Dwelling on the Threshold* is concerned with debunking claims of judicial objectivity and judicial legitimacy that serve to shield judicial actions from critical scrutiny. Hutchinson's cavalier treatment of Dworkin's attempt to construct a theory of law that would serve to legitimate the judicial act, for example, is in part an attempt to discredit scholarship not committed to the democratic ideal. In Hutchinson's view, the illegitimacy of the judicial act is the negative companion to the positive program of participatory democracy. Yet, as suggested previously, the first two themes informing *Dwelling on the Threshold* suggest the transformation, not the abandonment, of the judicial role. To the extent that democratic narrative can be fostered through judicial acts,⁷⁴ Hutchinson's repeated insistence that the judiciary and law are inherently antidemocratic sounds hollow. To borrow from Dworkin's typology, Hutchinson is right to suggest that the integrity of law does not rest on the extent to which it transcends conventionalism and pragmatism and enters the citadel of principle. He falters, however, by failing to grasp that law's integrity lies instead in the extent to which it fosters new forms of democratic narrative.

⁷³ See, for example, Dominick LaCapra *Rethinking Intellectual History* (Ithaca: Cornell University Press 1983) 35 ('in treating the relation of texts to contexts, what is often taken as a solution to the problem should be reformulated and investigated as a real problem in itself').

⁷⁴ See, for example, Susan Mann 'The Universe and the Library: A Critique of James Boyd White as Writer and Reader' (1989) 41 *Stan. LR* 959, at 1008 (proposing an interpretive convention which deems illegitimate the impulse in constitutional discourse toward silencing others).

Conclusion

Dwelling on the Threshold thus participates in a developing body of critical scholarship that speaks to progressive legal scholars in Canada in a variety of ways. To scholars schooled in historical materialism, contemporary critical scholarship challenges the view that the economic form is logically and historically prior to the legal form. To those schooled in normative instrumentalism, Hutchinson argues that legal solutions are part of the problem and that efforts ought to be directed towards the democratization of Canadian life. Yet if we are to subscribe to the first two themes informing *Dwelling on the Threshold*, and I believe we should, then we are given both a reason for believing in the transformative potential of legal discourse and a criterion for judging legal outcomes. If narrative action simultaneously empowers certain modes of action and forecloses others, then the law and the legal form can be a useful vehicle for and expression of democratic reform. That the judiciary is legitimate only if its decisions further the democratic impulse means that we can accord legitimacy to those judgments and judicial acts that further the cause of democracy and criticize those that frustrate the cause. It may well be that the judiciary more often than not reaches conclusions inimical to the democratic vision that emerges from Hutchinson's vision of human personality, but that does not mean that progressive scholars ought to abandon the judicial forum as a site for social change. It means only that there is much work to be done.