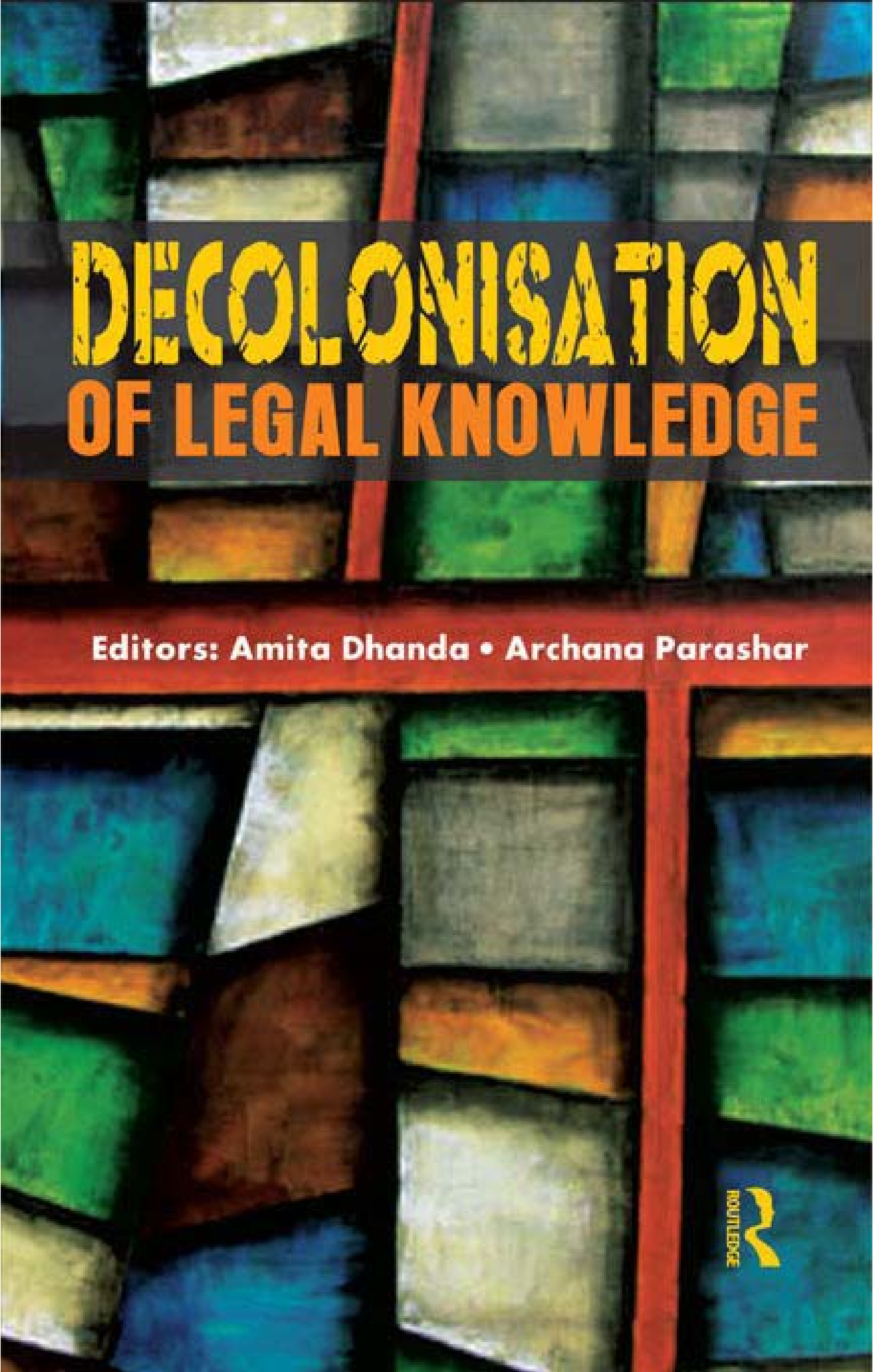
DECOLONISATION
OF LEGAL KNOWLEDGE
Editors: Amita Dhanda • Archana Parashar
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For
Dr Damayanti Parashar
who has inspired us
by being herself

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Amita Dhanda
Archana Parashar

Introduction

Decolonisation of Knowledge: Whose Responsibility?

Amita Dhanda and Archana Parashar

Critical theory has well and truly established itself in the academy as the contemporary form of critique. In doing so, it has not only destabilised the earlier ways of theorising, but made critique an inevitable part of every disciplinary field. Law is no exception to this trend and contemporary legal scholarship amply manifests this fascination with critical theory. While there is a lingering concern with the traditional ways of theorising about law, it is no doubt true that everyone has to take note of the critical writings in the discipline. However, it remains to be seen whether this turn to critical theory is an advance in the right direction. One specific consequence of this focus for legal analyses is that generally legal critical theorists are content with textual analyses and not overly bothered with issues concerning the transformative potential of law.

This project arose out of the conference on Critical Legal Theory (CLT) held in India. The venue for this event was significant for many reasons. However, the one especially pertinent reason was that the content, style and message of most of the scholarship in critical legal theory are not concerned with the issues of most immediate significance in Indian or other non-Western societies. Even though this is a crude generalisation, CLT is the scholarship of privilege. The fascination of most authors in this genre with language and literary theory takes precedence over dealing with institutions and mechanisms of social disadvantage — whether in the global or local context. We would include postcolonial theory in this genre as it is generally as esoteric as a lot of other critical theory. In this volume, we wish to initiate a dialogue that stretches the boundaries of critical legal theory

in a manner that makes all legal scholars recognise their institutional position and assume responsibility for the same. The starting premise for this project is that legal theory in general, and critical legal theory in particular, do not facilitate the identification of choices being made in the different facets of law — whether in the enacting, interpreting, administering or theorising of law. The authority of law is maintained by conceptually masking the choices being made (all the while), and it follows that the responsibility for making those choices does not become the focus of much legal scholarship. While the knowledge and power nexus is now well established, it is equally important to make explicit the nexus of power and responsibility. Legal scholars who theorise law have the power to constitute valid legal knowledge. Necessarily, they ought to take responsibility for the consequences that flow from their theories.

In the following sections, we will briefly explain the various usages of the term critical theory and our own use of the same. The aims and nature of critique are similarly disputed issues and any preferred usage needs to be explicitly justified. We argue for the critics' responsibility for the consequences of their ideas, and thereby hope to re-emphasise the role of individual choice in the construction of discourses about law and society. This in turn leads to a discussion of the transformative potential of critical legal theory. A brief explanation of each author's response to these issues concludes the article.

Critical Theory

The term 'critical theory' is most obviously associated with the thinkers of the Frankfurt School. While the theories and ideas under this rubric are very varied, it can be said that all these thinkers are responding to the inadequacies of extant ways of explaining the societal developments of post-war Europe and America. The common feature of all these authors is their leftist leaning in critiquing modernity — but this without the determinist or reductionist tendencies of orthodox Marxism.[1] Even though critical theory does not form a unified and monolithic whole, the authors engage simultaneously with orthodox Marxism and the conventional approaches to the social sciences. Critiquing both capitalism and Soviet socialism, they seek to find

[1] For an introduction to this vast field, see Wiggershaus (1994) and Held (1980).

more plausible paths of social development (Held 2004: 12). In doing so, the fundamentals of Cartesian thought about reason and the rational subject are questioned (Hoy and McCarthy 1994 a: 2). While this kind of questioning of modernist thought is the common starting point, there is less than agreement about the implications of such critique.[2]

According to Roger Cotterrell, the nature of critique in this writing is of a rather specific kind, which examines the very foundations of knowledge. Cotterrell refers to this kind of critical theory as 'theory of method' — that is, critique is the method by which it is revealed that the claims of truth in any knowledge are, after all, partial (Cotterrell 1995: 213). He goes on to argue that it is the responsibility of every scholar to engage in critique in this sense. David Rasmussen similarly argues that critical theory is a tool of reason which, when properly utilised, can change or transform the world. To that extent, it invokes the optimism of the 19th century: a critical theory can change society (Ramussen 1996: 11).

The umbrella term 'critical theory', however, covers many other strands of theory as well, and a common feature of all these strands seems to be a reliance on the constructed nature of knowledge. A pervasive development that attracts the label 'critical' in theory is what is loosely described as postmodern theory, and most of these thinkers are at least sceptical of the transformative potential of modernist thinking. Very often, this kind of theory is underpinned with a particular understanding of semiology and discourse analysis.[3] While this allows for understanding how 'knowledge' is constituted, another effect of such a focus is that most scholarship remains caught in the intricacies of linguistic analyses. Whether these critiques are described as cultural criticism or literary critique, they have shifted the focus of analysis away from material factors.

What are the characteristic features of postmodern theory, however, is a difficult question to answer. Jean-Francois Lyotard's *The Postmodern Condition* (1984) is the celebrated title that is credited with making the term 'postmodern' the pivot of much contemporary

[2] For an overview, see Honneth (2004).

[3] There is plenty of literature discussing these very issues, but in either case, the role of knowledge in the form of critical theory is under scrutiny. To that extent, critical theory of the Frankfurt School and postmodern leanings is similar.

theory. Lyotard challenged the legitimation of knowledge on the basis of meta-narratives of human liberation in enlightenment thought and the revolutionary tradition, as well as the prospective unity of all knowledge in Hegelianism (Selden and Widdowson 1993: 183–85). He instead argued for focusing on social heterogeneity, the local, provisional and pragmatic, thereby replacing the meta-narratives with '*petits recits*'.

Postmodern and poststructural analyses are, in turn, distinguished from each other.[4] The move to structuralism challenged the earlier view that language simply reflects a pre-existing reality. Poststructuralism, in turn, has developed specifically in response to the claims of structuralism — in particular, the claim of the existence of stable linguistic structures. Instead, these critics argue that rather than language being an impersonal system, it is always articulated with other systems. While empiricism clearly separates the subject and the object, the poststructural view is that subject and object are not so separable. They claim that all knowledge is formed from discourse that pre-exists the subject's experiences. Moreover, the subject itself is neither autonomous nor unified, but constituted in discourse (*ibid.*). Foucault is the most well-known proponent of this view of discourse, and the relationship between discourse and power.[5]

Another similarly influential development in the analysis of language is, of course, Derrida's view on deconstruction. Very briefly, Derrida is also challenging the structuralist view of language and the idea that it can unproblematically convey reality or truth. He uses the method of deconstruction to show how meaning is attributed to any term and is inherently unstable. The fact that meaning does not attach automatically should in turn alert us to the mechanisms used to create the claimed authority of knowledge (Derrida 1976).

For our purposes, not much is to be gained by making fine or final distinctions between these definitions of postmodernism and poststructuralism, and we accept the view which says that post-modernists focus more on cultural critique while poststructuralists focus more on method and epistemological matters (see Rosenan 1992: 3). The classification is a relative matter. What is more

[4] An alternative view is that postmodern includes poststructural and neo-pragmatism. The former emphasises the role of language, while the latter emphasises the social construction of knowledge. See Schanck (1992: 2514–17).

[5] For a general introduction see Rabinow (1986).

important for the present purpose is to ask how this kind of critique (designated from now on as postmodern/poststructural or PM/PS critique) is to be understood. Does it have the potential to perform the task of 'critique' as mentioned above, that is, to change society for the better? More specifically, in comparison with the Frankfurt School theory, it is pertinent to ask whether they are similar or different enterprises, since the label 'critical theory' is applied to all of them.

One view is that PM/PS writing is mostly a continuation of the critique of modernity (Huyssen 1984: 20, 38). If that view is to be accepted, it is possible to compare it to Frankfurt School critical theory. The purpose of comparison, of course, is to assess the transformative potential of such theories.[6] However, if as argued by some, postmodernism denotes a break with modernism, then the question arises whether it is possible to talk about creating or even aspiring to a fair society. This break with modernism primarily makes PM/PS theory incapable of postulating any foundations or any universal claims. It also follows that the possibility of claiming any position as better than another does not exist. This is sometimes described as the relativism inherent in PM/PS, and is at least an alarming consequence.[7] Whatever the consequences of this development for literary or social theory, it should certainly be a matter of concern in legal theory.[8]

Contemporary legal theory in its various manifestations has adopted a critical stance, be that of the Critical Legal Studies (CLS), postmodernism or deconstruction. The implications of these developments for the role of law in aspiring to a just society need to be discussed. And that brings us to the central issue of this volume: critique for what?[9] The earlier (maybe even naïve) faith in the enlightenment view that social revolution will follow the right ideas — or

[6] Habermas has himself engaged with the conservative implications of postmodern writings. See his 'Modernity versus Postmodernity', Bay Press (1984). See also Jay (1984), Hoy and McCarthy (1994b).

[7] For an introduction to these debates, see Schanck (1992: 2581–88).

[8] See for example, Bowman (2003) for some of the reasons why the transformative, radical or emancipatory potential of cultural studies is not realised.

[9] We take this question from the title of the book by Joel Pfister, *Critique for What? Cultural Studies, American Studies, Left Studies* (2006). We, however, differ from his emphasis on practice as against theory, as we will explain later.

the Marxist suggestion of the proletariat overthrowing exploitative capitalism — being no longer viable, the question arises whether the injustices of contemporary societies can be addressed. If social revolution is not conceptually possible, the question arises how one may aspire to transform a society for the better. These issues are, in turn, present in contemporary legal theory and, more pertinently, the implications of these developments for legal theory are our main focus. The first issue is whether theory matters and a subsequent issue would be what kind of theory is required.

Legal theory, as it is, has an ambiguous status in the discipline and there are various explanations for this which need not concern us here.[10] But when legal theory takes on the mantle of 'critical' theory, it becomes that much more marginalised.[11] The first issue that arises is whether it matters that critical legal theory is not the 'mainstream' view of law in the discipline. The basic assumption behind this question is the familiar binary of theory and practice, and the implicit criticism that theory serves no purpose in the practice of the profession. Rather than entering this debate, we assert that by now it is widely accepted that the two are interdependent.[12] Since any practice and any position is inevitably informed by certain assumptions, what is important is that those assumptions are articulated. If this premise is accepted, it follows that nothing is innocent of political and ideological valence (Ermarth 1992: 4). Similarly, whatever theoretical position one adopts is informed by value preferences, and it is incumbent upon the thinker to justify those preferences. Thus neither practice nor theory has the option of being neutral or value free. Therefore, instead of arguing about whether theory is relevant, we need to ask what kind of theory is desirable. Here, we suggest that theory as critique of knowledge is necessary because it brings forth the agency

[10] For a succinct explanation of how various turns in the development of legal theory have happened, see Norrie (1993).

[11] In legal scholarship, critical theory has more commonly been known as critical legal studies or CLS. While this descriptor is no longer widely used, the former CLS concerns are now present in the PM/PS style of analyses. Cotterrell says even though the issues of concern to the CLS scholars are the very issues discussed in critical theory of the Frankfurt School, there is no direct engagement with that literature (1995: 206). see also Caudill (1987: 287–98).

[12] But see also Bottomley (2000).

of the thinker. Recognition of this agency allows for arguing that the thinker is responsible for the consequences that follow from his or her ideas. Of course, legal thinking has always attached responsibility to the actions of the legal subject. But as Alan Norrie points out, the law's conception of all these terms remains partial and mystificatory (1993: 15). We need also to recognise the social dimension of individual agency, and that recognition could in turn transform our understanding of the implications of such agency.

As Ian Duncanson has said, there can be two ways of being critical: in the popular sense, it means engaging in the process of recognising faults, but a second way is to refuse to accept objects of knowledge as unproblematic (1993: 60, 66). It is in the latter sense of critique that the theoretical frameworks are questioned. The difference between knowledge and critique is that knowing implies the suspension of doubt, and the privileging of certain constructions over others. Critique, however, implies the provoking of doubts and the questioning of privileged constructions. The means by which accommodation is reached between these two indicates whether particular knowledge practices are democratic or undemocratic. Thus critique 'involves choosing a context in which to understand, interpret, and confer meaning, and explaining why it seems that one meaning "works" better than another, and for whom' (*ibid.*: 74–75).

It is this 'choice' of the context of critique that somehow gets obfuscated in much contemporary PM/PS legal theory. In particular, since the main focus of much PM/PS theory is on anti-foundational knowledge and against universalism, it becomes difficult, if not impossible, to postulate any directed social change. The insistence in PM/PS writing that they can only deconstruct contemporary usages thus serves the purpose of these writers, evading their responsibility for the consequences flowing from their ideas. This is because a theoretical stance that deflects attention from the context of the critique and the privileged position of the analyst denies the power of ideas to legitimise the status quo or, by the same token, to delegitimise it.

Critical legal scholarship, as a distinct development, came into existence before the PM/PS turn in legal theory. The early CLS writings were more in the nature of 'debunking', 'trashing' or 'showing the indeterminacy of' the mainstream claims about the nature of law.[13]

[13] For an overview of the developments in CLS, see Boyle (1992); Kelman (1987).

Most CLS scholars are explicitly or indirectly left leaning, and the implications of their critiques of law are that it falls short of being principled, general or predictable, among other things. It has been suggested that such critique seems to assume that these are achievable, and more importantly, desirable goals for legal knowledge (Fish 1993: 168–73). There is, however, another critique of CLS that they provide no alternative vision for law.[14] PM/PS critiques similarly deny the possibility of authoritative knowledge and thus of directed social change. In this regard, CLS and PM/PS legal critiques seem to have similar focus on deconstructing legal concepts, doctrine and self images. This turn to semiotics is where a lot of contemporary legal theory is, but the issue for us is whether this means that legal theorists may only 'deconstruct' an already existing legal reality, be it (the) judgments, legislation, legal doctrine or analytical concepts.

Duncan Kennedy's work is an apt example of the CLS writing. In his book, *A Critique of Adjudication: Fin de Siecle* (1997), he elaborates how judges are denied the option of admitting the influence of ideological and non-policy factors in reaching their decisions. He calls it the practice of 'denial' of their power by the judges. The judges are in this way engaged in legitimating the status quo. The point of this meticulous deconstruction of judicial activity, however, is not so much to change the style of judicial decisions and reasoning as to encourage the recognition of the control that decision-makers actually exercise.[15] We accept that such recognition of the power of decision-makers is an important step, but not enough in itself to change the practices under discussion.

Peter Goodrich takes issue with Kennedy and argues that he does no more than repeat the critique of reason, that is, examine the judicial arguments for their persuasiveness and logic (Goodrich 2001: 989). He further criticises Kennedy for not taking deconstruction seriously enough and argues that though the politics of writing is the subject matter of grammatology, while Kennedy discusses deconstruction, he 'neither places it in the context of grammatology nor understands it as a Nietzschean exercise in philological disruption'(*ibid.*). However,

[14] Cf. Fischl (1992) for the view that such questions about the reform agenda misunderstand the CLS project.

[15] See Jeremy Paul in the *Cardozo Law Review*, 2001. This volume contains a number of essays responding critically from various standpoints to Kennedy's argument.

even if Kennedy had done so, our concern remains that deconstruction over-emphasises the importance of academic readings of legal texts. This emphasis on semiotics allows these thinkers to make no serious effort at exploring the alternative possibilities of what adjudication could be. In fact, Stanley Fish's insistence that law is interpretation seems to suggest that whichever 'interpretation' finds acceptance becomes the 'law' (see Fish 1993). In a nuanced argument, Fish suggests that the doctrine of formalism does not manage to obviate the necessity of interpretation. Moreover, which interpretation is acceptable is not decided by reference to some universal moral principles, but is dependent on the rhetorical force of the argument. According to him, this 'rhetoricity' is not a bad thing at all because it invokes the conventions of legal interpretation. In other works he has developed the argument that judges are not free to give any interpretation but are constrained by the conventions of the judicial process as well as other legal institutions.[16] That is, whether an interpretation will be accepted is dependent on it conforming to the expectations of the relevant community rather than because it represents the truth.[17]

However, feminists have, for a long time now, argued that community standards so often invoked in law are the problem for women and other disadvantaged sections of society.[18] An understanding of judicial pronouncements as representing conventional beliefs leaves no room for criticising them, or for ensuring that 'progressive' interpretations are more acceptable than other interpretations (West 1987: 278). This PM/PS insistence on anti-foundational knowledge and against 'closure' implies that relativism can be the ally of conservatism, although it need not be (Benhabib 1996). Have we made much progress through enlightenment, critical theory and PM/PS, if the point we are reaching is that knowledge can be constituted wisely or not wisely? When critical theorists take the high moral ground that it is not possible to postulate the future shape of cultural practices, that may be

[16] See Fish (1989: 97–98). Critics of Fish abound in legal scholarship—for example, see Douzinas *et al*. (1991); Rosenfeld (1990: 1234–45).

[17] See Sunstein (1989: 463) for the argument that deconstruction in law usually fails to take adequate notice of interpretive norms and principles.

[18] See, for example, Catherine MacKinnon's critique of the obscenity of law as an adequate response to the harm of pornography for all women in her *Only Words* (1993).

so (see Spann 1984). But if the implication of the critique is that one can only describe what is happening, it becomes part of the problem. Moreover, it is contrary to the idea that the function of theory is to destabilise power (see Foucault and Deleuze 1977). Proceeding with this expectation that the function of theory is to destabilise power, it is possible to ask how far contemporary critical theory has the potential to do that.[19]

We wish to emphasise the context of choice and the cultural connotations of making the 'right choice'. J.M. Balkin has addressed this very issue in his writings and has argued that one can be just with deconstruction (1994).[20] He says that deconstruction has to be understood as a rhetorical practice that can be used for good or ill. Anyone engaging in deconstruction for a normative purpose chooses to say that there is a better way of looking at things. To the extent that deconstructive arguments are forms of rhetoric, the ethics of deconstruction also become very similar to the ethics of rhetoric. Both rhetoric and deconstruction can be used for good and bad purposes, and to that extent, each of us becomes responsible for the ways in which we use deconstruction. In this way, deconstruction can form part of the critical theory of law.

Cotterrell reminds us that even despite the fact that ideology and organisational interests are closely interrelated in a formalised, seemingly closed legal system, it is nevertheless the case that the individual actors (for example, lawyers, judges, lay citizens) think and communicate (Cotterrell 1995: 107–8). Zygmunt Bauman has made a similar argument, saying that postmodern thinking takes away the certainty of universal ethics, but at the same time, it makes each individual absolutely responsible for his or her choices and actions (1993).

And it is this agency of the individual that must be kept firmly in focus. The fact that ideas are thought and communicated by individuals and some gain wider acceptance than others means that knowledge is forever a matter of negotiation and persuasion. The individuals are, of course, not entirely free to decide how to act, what

[19] Cf. Norris (1990), who criticises the effort at redefinition as only intellectual labour performed at the level of ideas and which is not a real substitute for action.

[20] Also see Pierre Schlag, 'Le Hors de Texte, C'est Moi: The Politics of Form and the Domestication of Deconstruction' (1990).

goals to pursue etc. They are constrained or at least influenced by the prevailing systems of thought, discourse and societal structures. None of this is a new insight, but our aim here is to refocus on the context for every situation and shift it away from reifying discourse. We hope to thereby make critique accountable and the critics acknowledge their role in legitimising either the status quo or change. This is an important task as we believe that contemporary critical theory has become insular from the wider concerns of those who are at the margins of society, usually without a voice, relegated to being the 'other' — in short, the disadvantaged. The markers of disadvantage vary, but include race, gender, age, ability and sexuality, among other factors. All these bases of oppression have been analysed extensively, but the advent of PM/PS legal analyses has created a peculiar situation. On the one hand, it is on the insistence of PM/PS analyses that differences be recognised that legal theory is called upon to be inclusive of those on the margins of society. At the same time, the antipathy to 'closure' of definitions and analytical concepts also results in the valorisation of 'difference'. That is, difference comes to be celebrated for its own sake, and it seems no longer imperative to ask how the celebration of difference justifies relativism of the most debilitating kind. For example, the cultural or ethnic differences maintained in the name of pluralism can, and do, create problems for gender parity.[21]

These reactionary outcomes of PM/PS theory can be avoided if knowledge and responsibility are coupled together. In legal scholarship the necessity of such a link between knowledge and responsibility must be obvious: decolonisation of knowledge entails asking what follows from conceptualising legal concepts in a certain manner or in theorising law as irrelevant to the aims of social justice or non-oppression. For example, the violence of law analyses have shifted away the conventional focus from asking how law can regulate violence to showing how the very existence of law itself is violence (Sarat 2001). This is a very pertinent challenge to the mainstream understanding of law as the guarantor of fairness, order and even justice. However, the critiques that merely challenge the mainstream understanding but do no more, end up justifying the violence of law. For, the conclusion of such analyses that it could be no other way, itself, becomes

[21] See, for example, the debates about cultural pluralism and its effect on women in Cohen and Howard (1999). In India, these issues are most starkly present in debates about legislative reform of religious personal laws.

the legitimation of all contemporary inequities perpetuated via law. We wish to challenge the determinism of this kind of analysis and to do that by invoking the PM/PS insight that all knowledge is constituted by discourse and practice. It is, therefore, imperative that everyone carries the responsibility of being self-reflective about their role in creating and maintaining the contemporary social structures. If they turn out to be oppressive for some, then we cannot absolve ourselves of responsibility for that either. That is, critique must be responsible critique, otherwise it is a self-serving activity of intellectuals, who can presume that they can do nothing to change the world (Calinicos 1989: 170).

In her contribution, entitled 'Politics without a Movement', Frances Olsen severs connection between activism and the academy (2001). She finds 'present scholarly practices' to be 'neither necessary nor sufficient'. Consequently, Olsen finds the academy incapable of igniting activism. Such activism, she contends, will be triggered by grassroots movements and not scholarship, whether of the modern or the postmodern variety. Without entering into dispute with Olsen on the change-making capabilities of academics and activism, we note that, by confessing to the emancipatory powerlessness of academics, she absolves scholars from all social change responsibilities. It is with this absolution that we take issue. We do so because we perceive Olsen's argument as not modest, but self-serving. It is a scho-lastic plea-bargain whereby incapability to undertake more rigorous tasks is admitted to, so that only responsibilities of performing lesser tasks have to be assumed. Without such an admission, scholastic rigour would require persons in the academy to ponder on what they would need to do in order to change the reality they have unearthed.

This is because it is the individuals who make the collectivities, and if societies are to be fair and just, each one of us has to take re-sponsibility for that. The collectives of state, society or nation have been amply deconstructed, but it is time to ask whether the individual's role and agency have been unnecessarily under-theorised. This is not a call to revert to a golden age of enlightenment with the 'knowing subject' as the most important agent. Rather, it is to take seriously the claim that the subject and the object are mutually constitutive. It is with this aim that, in this volume, the agency and responsibility of each author takes centre stage in this collection of essays.

This collection of essays, with representative scholarship from different parts of the world, emanates from the belief that scholars have to assume responsibility for their views. Hence, theorising which severs connection with social justice is complicit with injustice. The methodology of deconstruction needs to be employed, not just to expose the socio-economic bias of existing choices, but to promote the making of more socially responsible choices. Consequently, every author in the collection has addressed, with self-reflexivity and agency, the significance of critical theory in the light of his or her understanding of the nature of legal knowledge. By taking a critical attitude to contemporary legal theories, as well as by asking the theorists to take responsibility for their views, this collection of essays constitutes an important step in realising the radical and progressive potential of critique.

This project for social justice is inaugurated by Michael Neocosmos, who questions the forced division between civil-political and socio-economic rights, by contending that freedom from oppression requires both political independence and economic development. He severs the largesse association that surrounds economic rights by holding that development, like the struggle for independence, has to be a political project. It is important to note that in this book we are dwelling on the relationship between power and responsibility, and not power and accountability — which means that we are not speaking of externally conferred power which has then to be externally monitored; rather, we are seeking a self-reflective acknowledgement by the various actors of the legal system of the power they possess, and an assumption of the responsibility that accompanies such power. And yet, as the contribution by Vijaya Nagarajan on regulatory agencies practically demonstrates, we are aware of the inextricable connection between accountability and responsibility, and how the two concepts flow from and fold into each other.

Neocosmos clears the ground for the assumption of this responsibility by demonstrating how and why the traditional wielders of power were unequal to the demands of economic emancipation. And to that end, he rules out both the state and the market. The state, in his opinion, cannot emancipate because of its managerialist ideology, whereby pre-existing emancipatory politics is converted into technical process. He brings home the futility of relying upon the state by pointing out how even the limited task of management has been subcontracted by the state to non-governmental organisations. The market

is ruled out because it can only emancipate the few, and emancipation has to be universal if it is to have any meaning.

Traditional human rights jurisprudence has presented human rights as empowering instruments in the hands of the citizen because they enable citizens to obtain accountability from the state. Neocosmos distinguishes between rights and human rights and sees the latter as non-emancipatory because they are controlled by the state. Human rights, he argues, are a state-controlled process of cooption, whereby the passive citizen is accorded the opportunity to enter the extant polity. There is no opportunity to transform or create new categories. For emancipation to in fact happen, citizens would need to devise their own lexicon. There is a power which is latent in the individual citizen, and such power was patently exercised during freedom struggles against the colonial state. However, after the overthrow of colonial rule, the individual citizen has adopted the visage of a passive citizen to partake of the rights accorded by the state and has lost the opportunity of emancipation.

Insofar as Neocosmos presents development as a political instead of an economic exercise, the demands of activist citizenship require that the citizen's engagement with the developmental processes be as activist as were the struggles for political independence. The Narmada Bachao Andolan and the agitations of various project displaced persons in India could be viewed as an illustrative effort to politicise economic development.[22] In Neocosmos, logic, it is necessary that this struggle remains a grassroots struggle — any effort to obtain leverage from other state institutions could prove counter-productive. This insight is confirmed by the manner in which the Indian Supreme Court made short shrift of the fundamental developmental issues raised by the Narmada Bachao Andolan in its petition to the same. Similar technicalising consequences have resulted in other petitions challenging developmental decisions before the Indian apex court. This happens to be the result, even though the Indian Supreme Court has been oft described as a crusader for social justice.

To escape the stranglehold of state-provided power, Neocosmos sees the need to build new categories. And such foundational activity,

[22] This movement, unlike the various movements mentioned by Neocosmos, is not seeking food, water or housing from the state; instead, it is asking the state to desist from pursuing such policies which are taking away from the people the livelihood they already possess.

he holds, cannot happen with soft-pedalling entitlements like freedom of opinion. Such assumption of responsibility happens as citizens assert their freedom to think. It is in the freedom of thought of the activist citizen that Neocosmos situates his project of economic emancipation. These political struggles for economic emancipation, like the struggles for political independence before them, may ride on no more than the justness of the cause. And yet, as the victories achieved in the struggle for political independence show, often just that belief in the rightness of the cause has proven more than sufficient.

The freedom of thought advocated by Neocosmos would accord citizens a right to create policy. Such a right to creation is required, as the right to participation suffers from several limitations which can be stated in seriatim as follows: one, the citizen is accorded no more than a reactive role and the space of response is limited as the terms of the debate have been settled by the original maker of the policy, that is, the state. Two, the courts view policy-making as the exclusive preserve of the state, hence, policy prompted rights deprivation is accorded little or no relief by the courts; instead, the state, in all its expanded manifestation, is given a free hand to do as it deems fit.

Neocosmos forges his emancipatory project as an integrated exercise of theory and practice, thought and action; Andreas Philippopoulos-Mihalopoulos, on the other hand, is of the opinion that the context can have limited influence on the legal system because, in his view, 'systems remain normatively closed entities, whose structure is determined within the systemic boundaries. . . The paradoxical combination of normative closure and cognitive openness is what enables the system to carry on being itself'. Law, he contends, 'remains law and does not succumb to functional de-differentiation because of the presence of, say, an overpowering economic system or an asphyxiating political system'. Philippopoulos-Mihalopoulos, autopoietic leanings cause him to view the legal system, along with other systems, as self-referential. Consequently, any learning from the other is through 'patient internalised eavesdropping'. And this 'slow and fragmented awareness of the others' manner of operation' excludes an aggressive social change agenda for law, considering that 'power is not to be found between systems or between society and its absences but within each system'.

Frances Olsen has taken the view that, 'activism trumps theory at important times. Inactivism can also have an effect on theory, not

unlike trumping it' (Olsen 2001: 1111). While she allows that movements may have benefited from academia, she sees little possibility of theory giving birth to a new activism. She, however, does see greater likelihood of grassroots activism giving rise to a new activism in academia. Philippopoulos-Mihalopoulos, however, accords both theory and practice a similarity of status and influence in the creation of utopias. A utopia, he holds, is 'not the ideal society but simply the representation of the ideal of each utopist'. This utopia he situates at the border of theory and practice, which reveals the limits of each side from within. Philippopoulos-Mihalopoulos posits that utopias are those individual projections which the individual believes are good for the collective. It is the responsibility, according to Philippopoulos-Mihalopoulos, of both the theorist and the activist to draw a line that distinguishes between the individual and the collective side of the dream, so as to prevent it from becoming a tautological nightmare.

A number of articles in this volume are concerned with the role of theory in the enterprise of social change and emancipation. They also forge a more direct connection between the theoretical proposition and the corresponding practice. In comparison, Philippopoulos-Mihalopoulos, as the decided 'other' of the volume, sets up only an oblique relationship between theory and practice, whereby they influence through the chance collision but convergence can only happen at a finishing line which is neither theory nor practice. More importantly, while he rules out direct influence, he accords a significant space to the insurrectionary presence, or what he terms the 'invited absence'. And since he does not allow for inter-systemic communication, the seeds for change are sown by this invited absence — the point being that a system can be changed from the inside, not just by that which is present, but also by that which is absent.

Roger Cotterrell, commenting on the development of legal autopoiesis, concedes that the theory was of assistance 'to explain the causes of failure to shape society through law … or to account for the unpredictability and unintended effects of legal action' (1995: 106). At the same time, Cotterrell finds it significant that the autopoiesis theorists — Teubner more clearly than Luhmann — have recognised that 'the achievement of self-referentiality or system closure in law is a relative and even problematic matter'. Consequently, Cotterrell suggests that 'it is appropriate to talk of the tendency to autopoietic system reproduction and closure rather than its achievement' (*ibid.*). And in accord with the premise of theoretical responsibility developed in this volume, Cotterrell warns that 'autopoietic metaphors may

be dangerous to the extent that they portray a world over which individuals have not only lost control but in relation to which they might absolve themselves of responsibility, so it seems, for autonomous action' (*ibid*.: 108).

And this absolution would be all the more problematic keeping in view the expansive breadth of legal knowledge. This wide reach is captured by Andreas Philippopoulos-Mihalopoulos when he says that legal knowledge is a form, and 'As a form, legal knowledge contains everything that is to be contained within an observation of law: the text, the interpretation, the practice, the theory, the history, the decision, the repercussions'.

Several articles in this volume accord with this definition of legal knowledge. Thus, while Parashar examines the repercussions of judicial interpretations, Vijaya Nagarajan and Radha Arun focus attention on regulatory practice and administrative decision; Gbenga Oduntan and Sharron FitzGerald examine the relationship between theory and interpretation in the creation of texts of international law, and Dhanda dwells on the practice of legal education.

However, Andreas Philippopoulos-Mihalopoulos further holds that legal knowledge in 'its implosive plurality cannot become operable' and, hence, holds that 'legal knowledge cannot operate unless divided', a perception evidently not shared by many of the other contributors who have undertaken their analysis of legal knowledge in all its forms. Notably, Malcolm Voyce, in his analysis of the matrimonial settlements awarded to rural women, can be seen as looking at text, interpretation, theory, practice, history and repercussions.

Voyce undertakes this expansive version of legal text because he, unlike Andreas, adopts a genealogical approach, which 'seeks to establish what combination of circumstances in dispersed and unconnected fields of social activity combine . . . to give rise to . . . a particular composition of texts'. He has used this approach to show how ideas of economic productivity and sexuality 'folded together' to give rise to what he terms 'sexualised economics'. He 'acknowledges that the disciplines that the law captures are themselves subject to their own discursive process of formation' and goes on to track the cultural context of economics. However, what is significant for this volume is that he demonstrates how the ideas of economics and sexuality got transplanted into judicial discourse, and influenced judges making settlements of farm property upon divorce. It is important to note that Voyce is not driven by the need to expose adjudicative bias;

instead, he is prompted by the need to enable understanding of how a skewed or a biased perspective develops, by tracing the lineages of ideas. Such scholastic aid to adjudicators and others supports self-reflexive remedial steps.

The need to extend scholastic assistance to judicial self-realisation is advocated by Parashar, who expresses impatience with both traditional and critical theories of judicial process. After interminable debates surrounding whether or not judges make law, traditional theorists concede to the law-making obligations of judges, but stress that the reasoned exercise of this power prevents its illegitimate exercise. The critical scholars have lifted the veil of judicial reasoning to show that it is judicial politics, rather than legislative law, that informs the making of judicial choices. Both schools of thought, Parashar opines, fail to be concerned with the effect of judicial decisions on the people at large. Nor do they impel judges to make more socially just choices. Such choices, in her view, will only be made if theorists on judicial process openly acknowledge that judges have the power to choose and, consequently, are responsible for the choices they make. Any theoretical fuzziness will, in the words of Michael Neocosmos, technicalise but not emancipate.

Radha Arun confirms Parashar's insight of personal responsibility when she confesses that she found it difficult to face the tax assessee with an unfair decision. However, unlike Parashar, she does not rely on self-reflection to usher attitude change in administrators. She demonstrates the limitation of the accountability model, whereby, the dishonest official can, in Baxi's words, 'fly now and pay later', but the independent and fair official is at the mercy of the system. Her article provides a concrete illustration of the autopoietic conception of law that Andreas endorses insofar as she shows how the revenue raising requirement of the tax system closes all other influences on it. In further acknowledgement of self-referentiality, she asks for the legislative design of the tax system to alter, in order to make for a more people receptive tax administrative system. In the nature of the change required, Radha Arun agrees with Neocosmos and asks not for more accountability of the administrators, but for more power to the citizens. She does not, unlike Neocosmos, ponder on the procedure by which the citizens should obtain this power, but is *ad idem* with him when she holds that change will only come when the triggers of power and responsibility are with the citizen rather than the state.

The relationship between people's struggle for rights and human rights can be viewed as either dichotomous or continuous. Both forms of address are to be found in this collection. If Neocosmos has adopted the dichotomous route, Vijaya Nagarajan takes the continuum line. Her essay details how neoliberal policies have reposed arbitral power in regulatory institutions, and then explores the various pathways by which these institutions may be responsible to the people. She puts down human rights informed administration, funded people's participation and associational people's participation as possible routes. She sees each of these methods as intersecting with the other, and is of the view that people resort to oppositional politics only when there are no negotiation spaces open within the system. Such spaces are provided by human rights jurisprudence and people's participation procedures. It is only when those spaces are closed that people feel impelled to more foundationally challenge the system.

While Vijaya Nagarajan feels the human rights discourse opens up negotiating space for civil society, Sharron Fitzgerald holds it to be a disempowering of the beneficiaries. This may be because while Nagarajan is examining the constituencies interacting with economic regulatory institutions, Fitzgerald is concerned with state responses to the problem of female migration and trafficking. The difference in the bargaining power of the two groups influences the utility of the human rights discourse to each of them. Fitzgerald highlights the adverse consequences of liberal human rights jurisprudence for excluded groups in order to bring home to theorists (though she especially refers to feminists) the diverse constituencies of their theories and analyses. A theoretical position or critical analysis which disempowers the constituency for whom it is made needs to be revisited, reflected upon and reconsidered. In view of the intimate link between theory and practice, Fitzgerald makes a case for theorists to situate their theories, not in the rare climes of their ivory towers, but in the ground realities of women's lives.

Voyce, like Fitzgerald, shows how ideology can be an instrument for denying women their legitimate rights. Fitzgerald locates the ideology in feminist scholarship, while Voyce finds it in judicial reasoning. Fitzgerald brings to the fore the problem of women who conspire in their own trafficking, and thereby confirms Nussbaum's insight that an adaptive preference is a preference. Voyce's analysis concretely illustrates Parashar's assertion that legal reasoning offers no protection

against unjust decisions, and that while deconstructing the political biases of judicial decisions, it is important to move beyond such critiques, so that the social injustice of such decisions can be exposed and remedied.

Patricia Williams has taken issue with the critics' debunking of rights by pointing out that such debunking can only emanate from persons of privilege — that rights accord an important protection to persons at the margins of society would be recognised by critics if the theorising did not emanate from tenured white men in the academia. This process of the constitution of law and construction of knowledge is focused upon by Gbenga as he unpeels the layers surrounding international law, to expose its First World bias and control. This First World control is exacerbated by the fact that scholarship challenging such construction of international law also remains buried in publications and journals which are restricted in their circulation, and hence, these ideas of interrogation also remain limited in their dissemination.

Peter Goodrich, in a review of Duncan Kennedy's *Critique,* narrates his experience of exclusion by insinuation and asks the critical gaze to be turned on 'the everyday life of institutional practice. The casual conversations, the names that are dropped, the telephoned recommendations or emailed disavowals, the reviews of manuscripts, the formal references, let alone the teaching and mentoring relationships, are the lifeblood, of the quotidian academy' (Goodrich 2001: 977–78).

It is pertinent to note that the Goodrich–Kennedy spat was a dispute between two men of privilege; it thus saw the light of the day and provided grist to the analytical mill. It even caused Goodrich to contend that the everyday life of the academy merits 'the same degree of scrutiny as the formal and more consciously staged representations of political positions that fill the agendas of critical conferences and the pages of critical literature' (*ibid.*: 978). We agree, but wonder whether a similar space to interrogate and lament would be provided when these procedures of exclusion were practiced on the excluded.

It could be contended that the days of exclusion are long over, and promotion of diversity and inclusion is the declared and practiced policy of renowned First World publication establishments. Even if we do not wish to dismiss these policies as tokenistic, they do operate

on an 'add Third World and stir mode'.[23] As well as the allocation of the more global analytical pieces to scholars situated in the First World. If the experience of Third World scholars is restricted to the Third World, then First World scholars are similarly situationally constrained — but their contributions are not titled mental health dilemmas of developed countries or some such region restrictive title. It seems as if the mandate of acting locally and thinking globally is limited in its application to First World scholars, while thought of Third World thinkers requires to be disseminated in First World forums, sealed and labelled 'for Third World consumption only'. Gbenga Oduntan, who is an African scholar based in the First World, narrates, with the aid of live examples, how First World power controls the construction of so called universal knowledge. This construction is a concerted activity of disseminating the approved and suppressing or ousting the disapproved body of thought. Thus, in a manner of speaking, Gbenga extends Noam Chomsky's categorisation of worthy and unworthy victims subsisting in news dissemination to the realm of knowledge creation, whereby knowledge barons decide what body of thought will or will not enter the corpus of international legal knowledge.

The power and responsibility discourse in this volume encompasses the idea feeders of the system. Consequently, while Dhanda examines the role of the individual teacher, Francesca Dominello dwells on the politics of representation in films and the mass media. Dominello takes 'the view that the hyperreal world in which we live still enables the discourses of those in power to dominate'. She does not, however, view such domination to be closed and final, and hence holds that 'within the hyperreal there is still potential to create the space in which to subvert these discourses'. She explores these possibilities with a close analysis of the cinematic presentation of Spider-Man. This presentation she examines to ask whether the larger than life image of Spider-Man will make people 'too complacent about the resort to illegal or extra-legal tactics in "the war against terror", and simultaneously too hostile to any attempt to maintain legal constraints on such tactics'. The movie, she points out, does attempt to introduce constraint through the persona of wise Uncle Ben, who

[23] Something similar to what MacKinnon termed as 'add women and stir'; see MacKinnon (1993).

chastises the newly empowered Parker by pointing out that the ability to destroy does not give the right to destroy, as 'with great power comes great responsibility'.

Dominello's article also raises pertinent questions around media responsibility which are especially relevant today as it is increasingly found that media trials are starting to almost displace real ones. The power of the media has come to the fore in several guises. And this power has been for both good and evil. Thus, in India, while investigative journalism has played vigilante and provided evidentiary basis to judicial activism, the same media has also demonised persons categorised as terrorists, short-circuited fair process safeguards, and virtually brought them to the gallows (Haksar 2007). A largely sympathetic press, both in India and Australia, allowed Dr Mohammad Hanif to escape being tarred without trial. While providing information is the primary duty of the mass media, questions still remain on the procedures of accessing information. Thus, is the use of spy cameras and traps an acceptable technique to smoke out corrupt officials and politicians, or, as with Spider-Man, is it important to ask whether the fact that it can be done makes it right for the media to do it?

The theme of responsible exercise of power in this volume of essays has been primarily pursued by examining the variant structures of power. Dhanda makes a departure from this predominant concern with the structural by focusing attention on the singular. Thus, her essay on legal education focuses on the role of the individual law teacher in promoting and fostering the responsible exercise of power. Dhanda does not deny the systemic constraints on the individual player; what she challenges is an exclusive preoccupation with such constraints. It is her contention that such an exclusive preoccupation with systemic constraints exacerbates their restrictive power and blocks otherwise available open spaces. She explores where those spaces exist for the individual law teacher in the legal education system.

We propose that the methods of critical theory ought to be employed, not just to expose the socio-economic bias of existing choices, but also to bring out the element of choice in adopting theoretical positions. And by taking a critical attitude to contemporary legal theories, as well as by asking the theorists to take responsibility for their views, this collection of essays constitutes an important step in realising the radical and progressive potential of critique.