A GUIDE TO CRITICAL LEGAL STUDIES

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Introduction

The invitation to the first annual Conference on Critical Legal Studies in 1977 gave little hint as to what the organizers thought "critical legal studies" (CLS) was or might become.[1] In a sense I suppose this was perfectly natural, since only those organizers long associated with the empiricist, generally politically reformist Law and Society movement[2] had done much of their work yet. It seems that the organizers were simply seeking to *locate* those people working either at law schools or in closely related academic settings (legal sociology, legal anthropology) with a certain vaguely perceived, general political or cultural predisposition and a relatively better defined relationship to ordinary legal academic life. At the general level they sought something akin to New Leftists, in an obviously inexact sense: people on the left at least relatively skeptical of the State Socialist regimes (although many were undoubtedly more or less sympathetic with revolutionaries arguably seeking to establish such regimes), egalitarian, in a more far-reaching sense than those committed to tax-and-transfer-based income redistribution, culturally radical, or at least unsympathetic to the furious New Right assaults on permissiveness. In terms of the cultural politics of the law schools, the people the organizers were seeking were those appalled by the routine Socratic discussions of appellate court decisions, repelled by their sterility and thorough disconnection from actual social life (their mainstream fellow teachers seemed barely to care or notice whether either arguments or case results had any impact on actual practice); repelled by the supposition that neutral and apolitical *legal* reasoning could resolve charged controversies; impatient with the idea that people freed by Rigor from a stereotypically feminized or infantilized pre-professional sentimentality must ultimately share some sober centrist ideals; put off by the hierarchical classroom style in which phony priests first crush and then bless each new group of initiates.

By the time I began this book in the fall of 1984, there had been nine large national meetings of this once tiny Conference; innumerable "summer camps" and workshops where newcomers and founders alike argue obsessively over the usual issues that have puzzled those on the academic left since the cruder Marxisms have gone out of vogue; a popular book, *The Politics of Law*,[3] published collaboratively with the National Lawyers Guild, the best-known organization of left practitioners; an increasingly lengthy underground bibliography of CLS work that would soon be only as "underground" as anything else published in the *Yale Law Journal;*[4] and a hefty symposium on the movement in the *Stanford Law Review.*[5] Yet it was still a fair question whether anyone knew what "critical legal studies" meant.

In this book I present a summary and a self-critical assessment of certain recurring themes in CLS writing on law and legal discourse that have emerged in the early years of the movement. Mine will be a rather "academic" account of what I perceive to be the most basic claims, largely about the structure and meaning of standard legal discourse, made repeatedly by certain early participants in the Conference, but I by no means suggest that I can capture the essence of all the work that has been done by people who have identified themselves with this organization (come to meetings, put themselves on a mailing list, engaged heavily in the incestuous mutual citation practices toward which "schools" of academic lawyers tend), much less identify the essence of what a "critical theory" of law might be in a more general sense. Many people associated with the movement would surely disagree with the substantive ideas I attribute to Critics generally and even with my view of the meaning of the particular works I identify as central or definitive.

Nor do I claim that anyone in particular imagined, recognized, or would now agree that his or her work was a piece of the structured jigsaw puzzle I have now assembled; it may simply be instructive to read what I see as the key early CLS works with this account in mind.

The essential picture I propose is that of a movement attempting to identify the crucial structural characteristics of mainstream legal thought as examples of something called "liberalism." While some CLS writers try to define what they mean by liberalism at considerable length (the first part of Roberto Unger's *Knowledge and Politics*[6] is arguably an extremely extended definition of liberalism from the perspective of a "total critic"), more often "liberalism" is little more than a very loose term for the dominant postfeudal beliefs held across all but the left and right fringes of the political spectrum. There is little regard for the

distinctions that often preoccupy people who hardly consider themselves allies, much less indistinguishable; for example, people who think of themselves as deontological rights theorists and those who are openly utilitarian are linked; anarchic libertarians and New Deal apologists are treated as forming a school because, CLS proponents believe, they share certain fundamental attitudes and rhetorical styles that overwhelm their undeniably real differences.

The descriptive portrait of mainstream liberal thought that I present is a picture of a system of thought that is simultaneously beset by internal *contradiction* (not by "competing concerns" artfully balanced until a wise equilibrium is reached, but by irreducible, irremediable, irresolvable conflict) and by systematic *repression* of the presence of these contradictions. I will argue that a standard four-part critical method has been used again and again, whether consciously or not.

First, the Critics attempted to identify a contradiction in liberal legal thought, a set of paired rhetorical arguments that both resolve cases in opposite, incompatible ways and correspond to distinct visions of human nature and human fulfillment. Chapters 1 through 3 of this book give a detailed review of three central contradictions in liberal thought that have been identified in the CLS writing: (1) the contradiction between a commitment to mechanically applicable rules as the appropriate form for resolving disputes (thought to be associated in complex ways with the political tradition of self-reliance and individualism) and a commitment to situation-sensitive, ad hoc standards (thought to correspond to a commitment to sharing and altruism); (2) the contradiction between a commitment to the traditional liberal notion that values or desires are arbitrary, subjective, individual, and individuating while facts or reason are objective and universal *and* a commitment to the ideal that we can "know" social and ethical truths objectively (through objective knowledge of true human nature) or to the hope that one can transcend the usual distinction between subjective and objective in seeking moral truth; and (3) the contradiction between a commitment to an intentionalistic discourse, in which human action is seen as the product of a self-determining individual will, and determinist discourse, in which the activity of nominal subjects merits neither respect nor condemnation because it is simply deemed the expected outcome of existing structures.

Second, the Critics tried to demonstrate that each of the contradictions is utterly pervasive in legal controversy, even in cases where practice is so settled that we nearly invariably forget that the repressed contradictory impulse *could* govern the decision at issue. These impulses are

ready to destabilize settled practice should we ever be forced to articulate or ground that practice. There are, in short, no easy cases, though there may be ones whose outcomes are perfectly predictable.

Third, Critics have attempted to show that mainstream thought invariably treats one term in each set of contradictory impulses as *privileged* in three distinct senses. The privileged term is presumptively entitled as a normative matter to govern disputes; it is simply assumed, as a descriptive matter, to govern the bulk of situations; and most subtly, but perhaps most significantly, departures from the purportedly dominant norm, even if they are obviously frequent, are treated as *exceptional,* in need of special justification, a bit chaotic. In essence, my argument is that liberal legal discourse most strongly purports to be committed to and to exceptionalize departures from both individualism and the Rule of Law. It is also committed to the idea that subjective value choices are the only arbiter of the good, at least in the abstract sense that the general theory of law and the state is one in which the state seeks not to further particular life plans but to facilitate people's fulfilling diverse plans (although it would be misleading to believe that all liberal thinkers *presume* that the correct answer to a legal problem is the one consistent with the notion that values are subjective, in the same way they presume that the rule form should govern). Liberalism also privileges an intentionalist discourse that both presumes to be able to explain why we can legitimately reward and blame in the vast bulk of cases and purports to provide a reasonable description of the so-called private world (that governed by contract rather than state action beyond enforcement of contract), which is presumptively deemed to reflect the uncoerced intentions of individuals. Finally, liberalism privileges an uncritical respect for the announced choices of subjects—uncritical both in the sense that the subject is viewed as unambivalent enough that we need not scrutinize particular choices for consistency with a broader life plan and in the sense that pure paternalism, the possibility that the subject has simply chosen badly, is ruled out.

Fourth, the Critics note that, closely examined, the "privileged" impulses describe the program of a remarkably right-wing, quasilibertarian order. I draw several implications from this recognition, though I believe that in this regard I differ considerably from many, if not all, of the CLS authors whose work I shall be discussing. One purely descriptive implication that I have long drawn affects my own agenda in my own critical writing and is undoubtedly an important bias for the reader to note in dealing with my interpretation of CLS: I believe that liberalism

is culturally and intellectually self-confident only in its right-wing libertarian form, because libertarianism is in one sense simply the *summary* of the privileged positions in liberal thought. My strong belief is that people who call themselves liberals can most comfortably explain their attachment to a society based on the privileged poles I have just noted, but that they are remarkably inarticulate and uncomfortable explaining their often powerful nonlibertarian impulses. One way for left-liberal law teachers to test this proposition, (which I don't doubt they will instinctively bristle at) is to ask themselves whether they find it easiest to bully students in their Socratic mode when playing either libertarian or right-wing legal economist, and not in advocating their own left-liberal beliefs. Thus, I do not believe that I, or other CLS practitioners, have by any means been attacking straw men, even when the positions we analyze, in their purest forms, are not the mainstream positions but somewhat more extreme ones. Another implication I draw is that one of the foremost, if unintentional, political accomplishments of CLS has been to arm left liberals against more politically conservative ones; by resuscitating the unprivileged positions, by noting the degree to which they remain pervasive in the face of complex efforts to repress their presence, CLS adherents may demonstrate that the left liberal's instincts are better grounded in the cultural tradition of liberalism in which they operate than they sometimes seem aware of themselves. (I say this knowing full well that many CLS spokespersons, most notably Duncan Kennedy, focus nearly all their explicit attacks on left liberals, not right-wing libertarians.)[7] I actually believe that the avowedly left-of-liberal CLS lawyers may often best serve decidedly liberal programs for a perfectly coherent reason: CLS adherents find themselves in roughly the same relationship to their *actual* political beliefs as left liberals are to theirs. That is, they have all learned to argue confidently for a position one step to the right of their actual position. CLS proponents have, in a sense, developed a coherent and self-confident left-liberal discourse that the left liberals have not yet devised, just as the left liberal is able to argue coherently only for a formally egalitarian individualistic liberalism, tempered by a far clearer vision than that of his conservative brethren of the massive interventions needed to equalize opportunity and the need to reconcile essentially contradictory pulls toward either meritocracy or equal opportunity on the one hand and nonintervention on the other. Arguments for their *actual* vision seem far vaguer and more unfocused, more apt to be captured in moments of thick description, or in stories that could as easily be fiction as description, than in

general theory. Commitments to "community," "unalienated relatedness," "abolition of illegitimate hierarchy," and so on, could scarcely be animated by those vague, contentless slogans. Unger argued in his summary of critical legal theory[8] that the substantive CLS program was a "super-liberal" one, that it bore roughly the same relationship to the welfare state that the welfare state bore to laissez-faire capitalism. I am far more certain that its justifying rhetoric bears that relationship than that its ultimate world vision does.

I continue my account of liberal legal ideology in Chapter 4 with a description of the relationship between CLS and the Law and Economics movement that has been so prominent in American law schools over the past decade. I hope to show both how Law and Economics has implicitly adopted a theory of the state and legality fundamentally consistent with the views I have described as the privileged liberal positions, suppressing any recognition of internal contradiction. I shall then trace some of the critiques of the central normative propositions in law and economics that have been made by the CLS authors. In Chapter 5 I reiterate some of the attacks CLS authors have made on the politically conservative institutional biases of Law and Economics scholars (for example their suppositions about the beneficence of private property or competitive markets). This chapter, which largely traces relatively technical disputes within the economics tradition, is, in a sense, the most peripheral to my overall account of the unique Critical posture, though I think that in the political context of American legal education in the 1970s and 1980s little Critical work has been more clearly significant.

I conclude my account of the Critical picture of liberal ideology with a relatively fragmentary discussion of the Legal Process school (Chapter 6), with a discussion of the proposition that the fundamental political choices we must make are ones involving the allocation of decision-making authority, whether between courts and legislatures or between central and local government. Critical Legal Studies insights will be applied to show that both the typical adulation of traditional democratic institutions and the suspicion of both uncontrolled and inadequately activist courts are more troublesome within the liberal tradition than the process-fixated theorists suggest. I shall also review the rather sketchy CLS attacks on the traditional picture of both the virtues of federalism and the relationship of substantive federalist concerns to federal court issues.

I shall then discuss history. First I shall detail the Critics' efforts to identify and critique the way their mainstream colleagues use history in

solidifying their normative positions: ways in which the mainstream legalists alternatively attempt to use history to derive current practice by reference to the supposed command of some privileged, Golden Age historical figures (like the Founding Fathers), ignore history utterly by asserting the possibility of an uncontingent ahistorical legalism, or derive concrete results by "getting on history's bandwagon," by attempting to discover the teleological laws of progressive motion, which the prudent observer can help accelerate by recognizing (Chapter 7). I shall then attempt, in a more cursory fashion, to criticize some of the early CLS histories (particularly those that attempted to distinguish feudal from liberal capitalist societies), using the insights the Critics themselves gained in dealing with the work of more mainstream legal historians.

Finally, in Chapters 8 and 9 I explore developing Critical views on the "role of law." CLS writers have distanced themselves from traditional social-functionalist thought by questioning the supposition that societies are united, not divided, by questioning the extent to which particular legal responses are necessary to advance any identified interest, by emphasizing the degree to which the legal system should be seen as relatively autonomous. But they have gone even further than that in transforming the terms of a debate over the role of law, a debate that invariably assumes that what is at issue is the degree to which some superstructural, peripheral law does or does not impede or advance some basic, separate society's needs or wants. CLS theorists have devoted a great deal of their efforts to demonstrating that law and society are inseparable or interpenetrating and arguing that traditional pictures of the relationship between law and society that ignore that point almost invariably make law seem both more important than it is (in supposing that particular structures require particular rules) and less important than it is (in ignoring its basic constitutive nature).

I shall also describe in more detail CLS work that sees law as a major rhetorical apparatus used to justify the (occasional) exercises of explicit state force that always lurk behind routine assignments of hierarchical position and prerogative. In this regard I suppose that what I will be discussing is something akin to "legitimation," though my claim is that the CLS movement has basically adopted a more down-to-earth view of the role of legal rhetoric in influencing thought than have most who would describe themselves as legitimation theorists. Most important, I shall claim that legal rhetoric often obscures the presence of the contradictions I have been referring to and that a whole panoply of legal rhetorical devices frequently makes it difficult to think certain thoughts—

thoughts, I shall argue, that depart from a rather complacent world view in which our ends are met as best they can unless we distort the beneficent workings of the private world through collectivist utopian meddling.

It is important to emphasize that this account of the Critical Legal Studies movement is by no means the only conceivable one. It might be helpful, then, to describe briefly what this book is *not,* to mention just a few of the possible narrative points of view that readers reasonably familiar with CLS might wrongly expect me to present.

To take but one example, it is not immediately apparent why one would choose to recount the history of Critical Legal Studies as *intellectual* history at all, rather than, say, institutional or local political history. To the limited degree that people outside the law schools have heard of Critical Legal Studies, it is almost surely because a startling degree of mass media attention has been paid to the battle at the Harvard Law School between its large CLS faction and the "others."[9] This heated battle has almost certainly *not* been largely about either grandiose academic claims (for example the degree to which Kennedy, a CLS proponent, is correct to assert that the history of legal discourse is the history of shifting efforts to paper over or suppress a painful "fundamental contradiction" in our attitudes about the self in a world of others we both need and fear)[10] or more particular controversies between CLS revisionists and their mainstream colleagues (such as whether Karl Klare is correct that the Supreme Court suppressed interpretations of the Wagner Act that emphasized worker control and antihierarchical role leveling).[11] I leave it to others to try to detail (or debate) what the "real" source of this intense conflict has been,[12] whether conspiratorial political ambitions by Critics, paranoia and intolerance on the right, or the academic equivalent of table manners.

I should note, though, that a difficulty with the rather dry, academic perspective I offer on CLS, one that ignores intrainstitutional conflicts, is that it does a very poor job accounting for the wrath and fury the opponents feel for the movement, particularly since few of these opponents have ever seriously addressed any CLS work at all. People who are generally ideologically predisposed to tolerance and pluralistic diversity have urged the law schools to start purging the CLS faction without ever having offered a word of substantive critique. Paul Carrington, the dean of the Duke Law School, who has never attacked in print any particular CLS work, wrote the following, purportedly in

reference to ideas expressed by Unger in his article on the CLS movement:

> Some of our colleagues may be heard to say, law is a mere deception by which the powerful weaken the resistance of the powerless . . .
>
> The professionalism and intellectual courage of lawyers does not require rejection of Legal Realism and its lesson that who decides also matters. What it cannot abide is the embrace of nihilism and its lesson that who decides is everything, and principle nothing but cosmetic . . . In an honest effort to proclaim a need for revolution, nihilist teachers are more likely to train crooks than radicals. [Thus] . . . the nihilist . . . has an ethical duty to depart the law school.
>
> This is a hard dictum within a university whose traditions favor the inclusion in house of all honestly held ideas, beliefs, and values. When, however, the University accepted responsibility for training professionals, it also accepted a duty to constrain teaching that knowingly dispirits students.[13]

One could also, conceivably, tell the story of CLS in a way that ignores both the bulk of its actual law-focused academic contributions and its institutional role at the law schools. Critical *legal* theory might simply be seen as yet one rather minor outpost of critical theory more generally. The predominant task would be to try to place the Conference in a *broader* perspective, to see the work as adopting certain characteristic positions that are expressed in the debates that rage in left academic circles on Neomarxism, structuralist Marxism, post-structuralism, the Frankfurt school, and so on.[14] Certainly, many of the issues that were grist for these debates have a "legal" slant to them: Is what is so charmingly called the state apparatus wholly superstructural or at least semi-autonomous from the base, from (production-based) class relations? How significant is explicit force compared to cultural hegemony, compared to the "legitimacy" of existing power relationships in containing challenges to existing institutions of power? How deeply involved is the state in the force venture? the legitimation venture? Even the less obviously "legal" philosophical agenda of those who "do" social theory, which can perhaps best be summed up as hinging on the appropriate attitude to take toward the liberal's nomadic, amoral Cartesian subject, has clearly had an influence on CLS. Many writers in CLS have simply rehashed these debates for new audiences, and some have arguably integrated these works successfully into their writing about law.

It is undoubtedly true that many of the concerns about the significance

of legitimating ideologies and the utility of delegitimation as a political weapon that have animated Western radicals to question their traditional orthodoxies have been of interest to the people who worked within the Conference.[15] Indeed, traditional leftist lawyers and legal academics often condemn CLS adherents as hopeless idealists, preoccupied with the empty words and sham ideas that those exercising authority use to explain their conduct.[16] In part, this attack simply replicates an apparently wholly theoretical debate common on the left between those who believe that law (and culture more generally) are superstructural and those who believe it to be central. In part, though, it is actually a stand-in for a battle over class and cultural style. The CLS focus on case law and ideology is seen by many traditional leftists as reflective of a distasteful desire among elite school law professors to "stay clean" in the libraries, to avoid either dirty academic work (gathering data about how the law actually functions on the shop floor or in the Legal Aid office) or the even dirtier organizing work with those who are privileged in traditional Marxist thought as our political saviors, the proletariat. Revisionist leftists, though, within or outside CLS, have all learned to take ideology quite seriously (and legal rhetoric would certainly qualify as significant ideology), so perhaps CLS is indeed just revisionist Marxism writ small.[17]

Once again, a focus on Western Marxism, in which CLS appears as a minor instance, may be quite appropriate, and I am slightly bothered that I must virtually ignore the ways in which CLS is derivative of other social theory. It would probably be disingenuous, though, to say that I am *deeply* bothered by having to ignore connections to more general social theory, even though I would welcome more work on the connections between CLS and other revisionist work. I actually believe that most efforts by leftist lawyers to rework social theory have failed to engage adequately the *details* of legal argument or practice, and that what is most interesting and innovative in CLS is not the restatement of generalizations about legitimation or the relative autonomy of law but the more detailed, focused accounts of what lawyers and the law influenced do and say. Still, the CLS theorists do, after all, face the same day-to-day political questions that face everyone on the left in the advanced capitalist countries, and my account might make their work seem more internal to the legal academy than it might actually be.

But there is yet one more significant picture that presents the work as wholly internal to the world of legal academics, a continuation of a struggle that has overtly dominated American academic legal discussion

in this century. CLS might well seem to be the latest revival of an anti-Formalist, Legal Realist movement at law schools that have historically vacillated between "conceptualists" believing in both the autonomy and scientific purity of judicial legal discourse and policy-oriented scholars who felt that legal discourse was just economics, psychology, or politics applied to disputes processed by courts, agencies that (more or less) wield only certain forms of state power.[18]

It is actually quite difficult to define anything one calls conceptualism or Formalism in a way.that does not covertly disparage its adherents, make them sound like a rather compulsive and self-deluding bunch.[19] Traditional Realist definitions of what is usually dubbed the "arid Formalist" conception of legal argument focus on the alleged tendency of Formalists to decide cases based on imagined transcendental qualities or intelligible essences of the concepts or words we must define in framing a dispute. Thus, in trying to decide whether a defendant ought to be subject to a court's jurisdiction, the Realist's ideal-typical Formalist asks whether the defendant is somehow metaphysically "present," or subject to the court's "power."[20] In trying to decide whether a promise (covenant) from a landholder to his neighbors runs to (binds) subsequent purchasers of the land, the Formalist asks whether the promise "touches and concerns" the land.[21] Realist critics claim that none of these questions can be answered without making strictly consequentialist calculations. In the first case, one must tote up the gains in convenience to plaintiffs versus the inconvenience and prejudice to defendants;[22] in the second, one must try to save the often prohibitive costs of renogotiating desirable contracts while not imposing unwanted contracts on people.[23]

Of course no Formalist ever really views herself or himself as ruminating on the abstract meaning of words and concepts. The Formalist believes that the Realist is far too ad hoc—both that all high-order controversies can be deduced by reference to the demands of a rather short list of principles, and that the working rules or operating procedures of the legal system should themselves be easily mechanically applied to raw facts without the need to rely on a great deal of subtle judgment, with only open-textured standards to guide the decision maker (for example a decision rule to enforce only "reasonable" contracts). But the Formalist is not likely to believe that the short list of principles is contentless or abstract, little more than a verbal game. At least in the modern context, no one at the law schools ever calls himself a conceptualist or Formalist (much less an arid one), though the term is frequently bandied about as a derisive description.