WHAT A LONG, STRANGE TRIP IT'S BEEN:* DECONSTRUCTING LAW FROM LEGAL REALISM TO CRITICAL LEGAL STUDIES

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Lately it occurs to me
What a long, strange trip it's been.
The Grateful Dead

Introduction

"Those who cannot remember the past are condemned to fulfil it."[1] For the student of the history of American legal thought, there are strange and ominous echoes of the past in current debates. As Critical Legal Studies (C.L.S.) is condemned as "nihilistic", [2] memories of attacks on Legal Realism[3] surface. As Crits

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1 SANTAYANA, LIFE OF REASON, vol. 1 284 (C. Scribner's Sons 1905-06). In PHILOSOPHY OF HISTORY, Hegel remarked "[W]hat experience and history teach is this - that people and governments never have learned anything from history, or acted on principles deduced from it", at 6.

2 *See* Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).

3 *See* Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934).

demned as "nihilistic", [2] memories of attacks on Legal Realism[3] surface. As Crits are fired or denied tenure,[4] visions of the death of Realism at Yale[5] come again to mind.

What, then, is going on? Are we condemned to repeat history? The full answers to these and related questions are too complex to be given here. A brief review, however, will indicate that what is going on here is indeed a replay of the battles waged by the Realists so many years ago. The failures of the Realist project, which gave way to the liberal apologism of Hart and Sacks,[6] which then gave way to the liberal apologism of Ronald Dworkin[7] and Bruce Ackerman[8], have also given birth to the project we call Critical Legal Studies. Out of the critical failure of Realism has arisen the dialectical confrontation which now rages in American law schools.

One can begin to understand the vehemence of attacks on C.L.S.[9] not only by understanding the historical intellectual roots of the critical project of Realism but by seeing exactly what is at stake in the intellectual legacy of Legal Realism. For what is going on, and what has been going on for over fifty years, is a battle for the heart and soul of Law.

Legal Realism's Intellectual Legacy

The first days are the hardest days
The Grateful Dead

Let me diffuse one criticism of this project here and now. I readily admit that Realism is a complex body of thought, full of contradictions and divergences. This is a fact admitted by the Realists themselves[10] and is not one I wish to contest here. Rather I assert that out of the diversity of Realist theory and practice, come

2 *See* Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).
3 *See* Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934).
4 *See* Frug, *McCarthyism and Critical Legal Studies*, 22 HARV. C. R. - C. L. L. REV. 665 (1987).
5 *See* L. KALMAN, LEGAL REALISM AT YALE: 1927-1960 (U.N.C. Press 1986).
6 *See* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Harvard Law School tentative ed. 1958).
7 *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY (Harvard U. Press 1977). For a critique, see my *Truth and Hierarchy: Will the Circle By Unbroken* , 33 BUFFALO L. REV. 727 at 745 *et seq* (1984).
8 *See* B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (Harvard U. Press 1984). For critiques, see Tushnet, *The New Market Place of Ideas*, 79 NW. U.L. REV. 857 (1984) and my *Laverne and Shirley Meet the Constitution*, 22 OSGOODE HALL L.J. 783 (1985).
9 *See e.g.* Carrington, *supra* note 2. For a detailed analysis and discussion of these attacks, see Frug, *supra* note 4.
10 *See* Llewellyn, *Some Realism About Realism - Responding to Dean Pound*, 44 HARV. L. REV. 697 (1931).

two dominant themes, one a "pure" deconstructive project, to show the inherent contradictions of legal rules and doctrines[11]; the second, a more reconstructive practice, to put "law in context" i.e. to save law from nihilistic abandon by offering a more complex study of the sources of legal rules and of their effects in practice.[12]

In its first, "pure" deconstructive stage, Legal Realism directly challenged the hegemonic vision of law propounded by traditional legal doctrine. Under this view, law was seen as an immutable source of knowledge, bound up in a formalistic, rationalistic world-view. Under classical legal doctrine, law was engaged in "a rationalistic ordering of the whole legal universe".[13] By carefully examining the so-called legal "rules" offered up by the Formalists, the Realists sought to focus

> upon indeterminacy, contingency and contradiction to debunk the claims of liberty of contract discourse that law merely represents and facilitates pre-existing private will.[14]

This strand of Realism sought to challenge and to undermine the fundamental epistemological and ontological pretensions of classical, formalist legal doctrine. It attacked frontally and completely the "metaphysics of presence"[15], the subject/object dichotomy upon which formalist visions of the legal life-world depended for internal validity and existential self-image.

Yet, as Peller and others[16] point out, the "pure" deconstructive, "nihilist" strand faltered and failed only to be replaced by the second, "reformative" approach, the contextualization of law, which was then supplanted by new process-based theories.[17] Again, I would not quibble with the assertion that this strand of Realism and its process heirs backed away from the necessary implications of the "deconstructive" branch, and simply reversed the subject/object dichotomy by a privileged fetishism of "context".[18] The reasons for the intellectual failures of the Realist project are myriad. They can range from an intellectual cowardice, to a study

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11 *See* Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 802 (1935); *see also* K. LLEWELLYN, THE COMMON LAW TRADITION (Little, Brown 1960).

12 *See* Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979); Kalman, *supra* note 5. My analysis here owes a great debt to Gary Peller's work. *See,The Metaphysics of American Law*, 73 CALIF. L. REV. 1151(1985).

13 Kennedy, *Toward An Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. IN LAW AND SOC 3 (1980).

14 Peller, *supra* note 12, at 1222.

15 *Id.*

16 *Id.*, and Schlegel, *supra* note 12.

17 *Supra* notes 6-8.

18 *See* Peller, *supra* note 12: "The realist practice, at least as incorporated into mainstream legal discourse, did not alter this categorization of the social world into subjects and objective social structures. Realism merely flipped the order of the terms so that objective social structures (or "contexts"), were viewed as prior to and constitutive of subjective practices. Realism projected a transcendental object, outside of the subject, as the source of subjectivity", at 1154.

of the ideological power of process-based appeals to "universal, democratic" American values,[19] to a fetishism of individuals,[20] to a retreat to rationality in the face of the irrationalities of Fascism and Stalinism.[21] I think that each of these factors played some role in the demise of Realism. I also believe that each continues to play a role in debates inside and outside C.L.S. today on the "nihilism" question. In the final analysis, however, each appears to be merely a symptom of the more generalized disease, one which I would identify as the psycho-existential horror (*La Nause*) of the pure relativism which is (mistakenly) seen as the inevitable result of the Realist deconstruction. In the next section, I will offer some speculative musings about the C.L.S. project as intellectual heir to Realism. If indeed, "we are all realists now",[22] why are the attacks on C.L.S. so persistent and so vehement?

Critical Legal Studies and the Realist Deconstructive Urge

Just when life looks like easy street
There is danger at your door
The Grateful Dead

If, as is commonly accepted,[23] C.L.S. is the logical heir to Realism and "we are all realists now", what is all the fuss about anyway? If all we are doing is 'an

19 *See* Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229 (1987) for an insightful analysis of this point. As he says, the real questions to be asked of process-based appeals to universal normativity are: "What happens if one simply unpresupposes the world of harmony and shared interests and replaces it with one of conflict, domination, and hierarchy? When shared values are offered by winners to rationalize the plight of perennial losers, their presuppositions offer little solace", at 1234.

20 In the end, I think this is the fate of Schlegel's interesting local, hermeneutic history of Realism. *See* Schlegel, *The Ten Thousand Dollar Question*, 41 STAN. L. REV. 435 (1989) and discussion *infra*, note 35 and accompanying text.

21 *See* Kalman, *supra* note 5, and Schlegel, *supra* note 12.

22 W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 382 (Weidenfeld & Nicholson 1973).

23 *See, e.g.*, Livingston, *"Round and Round The Bramble Bush": From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669 (1982); Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1981); Gordon, *Critical Legal Studies as a Teaching Method, Against the Background of the Intellectual Politics of Modern Legal Education in the United States*, 1 LEGAL EDUC. REV. 59 (1989).

attempt to keep the Realist project going in the context of a legal world in which "we are all realists now" by exploring the "politics" of the "law is politics" assertion,'[24] why are we being fired, denied tenure and generally vilified?

The reason, while complex in its manifested symptomology, is quite straightforward. What C.L.S. does, in its best moments,[25] is, indeed, to challenge the "politics" of "law is politics". Where the Realists stopped at explicating the indeterminacy of "law", C.L.S. does the same to "politics". The reason for the vehement response to the critical project is that, while "post-Realists" could, with the intellectual support of "reconstructive" Realism, find solace in "process" (i.e. politics), post-critical scholars have no place to turn. After Llewellyn *et al* Law is gone; after Kennedy *et al*, Politics is gone.

It is exactly at this point that the snarling dogs of liberal legalism turn to bite back at C.L.S.. "We might", they say, "be willing to accept the indeterminacy of Law (after all, we *are* all realists now). But when you say that Politics is indeterminate, that's going to far. You're all just nihilists. You have no place in law schools".[26] The attentive reader, or student of the history of American legal thought, will here have a flash of *deja vu*, for these are the charges levelled against the Realists so many years ago. And the penalties are the same - kill the messenger, kick her out, silence her. But there is, I think, a fundamental difference now. While the anti-Realists could retreat to "democratic ideals", the anti-Crits cannot, in good faith, do so. Rather, in a bizarre psycho-existential move of blatant "bad faith",[27] they are reverting to Law as the sacred icon. If the Realists backed away from pure

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24 *See* Peller, *supra* note 12.

25 *See, e.g.*, Freeman, *supra* note 19; Freeman and Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFFALO L. REV. 237 (1987); Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985). For my own attempt, see *What's Love Got To Do With It? Critical Legal Studies, Feminist Discourse and the Ethic of Solidarity*, 11 HARV. WOMEN'S L.J. 53 (1988).

26 *See* Carrington, *supra* note 2.

27 J.P. SARTRE, BEING AND NOTHINGNESS (Washington Square Press 1953). I have offered the following description of *bad faith*. "In existential philosophy, bad faith is the ever present possibility of man's (sic) ability for self-denial of his true existential nature. In a situation of bad faith, the individual denies, through a whole series of conscious and unconscious maneuvers, his "real" state of being. There are two possible interpretations of the effect which bad faith must or can have on our daily lives and our political practice. In the ontological-positive view, bad faith is a real possibility and ever-present threat which can be overcome through transcendence (*Aufhebung*). Thus it is a positive and surmountable motor force to *Praxis*. In the phenomenological-negative view, bad faith is the inevitable fate of human existence. 'If bad faith is possible, it is because it is an immediate, permanent threat to every project of the human being; it is because consciousness conceals in its very being a permanent risk of bad faith' (*Id.* at 116). In a society where we must live as disembodied, apparently fully-encoded machines, bad faith is experienced as inevitable. Our political and practical struggles consist of constant attempts to finesse or trump the experience of bad faith." *The Day the Music Died: The Civil Law Tradition From a Critical Legal Studies Perspective*, 32 LOYOLA L. REV. 861 (1987), note 8 at 864.

deconstruction because of the horrors of Stalinism and Fascism, defenders of the faith must also recoil in the face of the internment of Japanese Americans, McCarthyism, Vietnam, Watergate, Iran-Contra etc. etc. In the face of the blatant and fundamental contradictions of American politics, supporters of liberal hegemony are now engaging in a bizarre psychological regression to the days of yore, to the days of certainty, the Rule of Law and Original Intent.[28] We are not, after all, all realists now. Instead we have returned to the days when a man was a man, America stood tall and the Law was the Law.

Thus, argue the anti-Crits, C.L.S. has no place in law schools because it is nihilistic, it is anti-law.[29] It is at this level that the real intellectual legacy of Realism and the cogency of C.L.S. is at stake. We must return to the days of old when Law actually presented itself as an epistemological project, as a unique and fundamentally independent source of knowledge about the world. The politics of the "law is politics" truism is once again the politics of Law and its epistemological status. The C.L.S. claim to a place in the academy becomes, in effect, on the negative side, a claim against this "new formalism". On the positive side, it is a claim to the intellectual and political validity of "nihilism" or "anti-law".[30] It is the claim that instead of teaching Law, we must begin, again, as did the Realists, to teach ~~Law~~.[31]

Rather than a purely negative retreat into "relativism", "it's all politics", "law is bullshit", C.L.S. attempts to write ~~Law~~, ~~Politics~~ and ~~Bullshit~~ under erasure ie it attempts a micro-analysis of the power relations[32] which create knowledge. It does not deny Law or Politics or even Bullshit. Rather, it seeks to undermine any

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28 For a detailed analysis of these phenomena, *see* Gabel, *The Mass Psychology of the New Federalism: How the Burger Court's Political Imagery Legitimizes the Privatization of Everyday Life* 52 GEO. WASH. L. REV. 263 (1984) and *Founding Father Knows Best*, 36 BUFFALO L. REV. 227 (1987). The resurgence of "Formalism" demonstrates quite clearly the battle for intellectual hegemony which continues to trouble post-Realist liberal theory about Law. As the corruption of "process" and "democratic values" becomes more self-evident, as the intellectual artifacts which attach liberalism to the world of politics are deconstructed, the need for new anchors becomes clear as a *political* necessity. From this need for an ideological order, come the justificatory propaganda of "law and economics". *See* Tushnet, *supra* note 23 and Konefsky, Mensch and Schlegel, *In Memoriam: The Intellectual Legacy of Lon Fuller*, 30 BUFFALO L. REV. 263 (1981). According to these Buffalo contracts teachers, the decision to change Fuller's BASIC CONTRACT LAW casebook so that *Remedies* was removed from the beginning and replaced by *Formation*, is indicative of the ideological battle waged by post-Realist liberals. Fuller's original decision to place the *Remedies* section at the beginning "came to signify the digestion of realism in the academy", at 263. The new editor's decision to revert to a more traditional *Formation* introduction "readily captures the neoconceptualist, market orientation of much current contract law scholarship", at 264. At the very place where law students are inculcated into the secret knowledge of the guild, first-year *Contract Law*, the ideological conflict and corruption of liberalism are at the fore.

29 *See* Carrington, *supra* note 2.

30 For a complete discussion of this position, see Levinson, *Professing Law: Commitment of Faith or Detached Analysis*, 31 ST LOUIS U.L. REV. 3 (1986). For a discussion of the validity of "nihilism" (or trashing) *see* Freeman, *supra* note 19, and *The Politics of Truth: On Sugarman's LEGALITY, IDEOLOGY AND THE STATE*, (1986) AM. BAR F. RES. J. 829 (1986) especially at note 32 at 840.

31 *See* J. DERRIDA, OF GRAMMATOLOGY (Johns Hopkins U. Press 1976). To write Law under erasure is to counter-act *graphically* the metaphysics of presence. It is to at once recognize that all deconstructive attempts must "designate rigorously their intimate relationship to the machine whose deconstruction they permit", at 14, while at the same time denying the epistemological conjunction of being and presence upon which formalist renderings of the universe depend.

32 *See* Freeman, *supra* note 19.

transcendent claim to epistemological or ontological *a priorism* which they might raise. It does not, as its critics suggest, revert to "pure relativism", rather it questions and deconstructs "pure relativism", just as it questions and deconstructs ~~Law~~, ~~Politics~~ and ~~Bullshit~~. By recognizing and seeking to understand (or experience) social constructions of knowledge/power, C.L.S. does indeed engage in a hermeneutic practice, a practice which is not purely relativistic, but which, rather, is highly contextualized and traditional.[33] While rejecting crude instrumentalism, C.L.S. must and does, acknowledge the weight of ideology in the construction of tradition.[34]

I think that one can neither understand the demise of Realism nor the current strategy of C.L.S., in terms of "relativism" as invoked by our opponents, nor in terms of "hermeneutics" as invoked by our supporters.[35] When Schlegel attempts to reduce the demise of Realism to

> Time passed; people passed; ideas passed. ... Starting with a definition, as is so normal for anyone dealing with intellectual history, it is easy to assume continuity of meaning and thus to miss changes in the cast of characters that might suggest that ideas had taken on a new emphasis or meaning.[36]

he misses the point of "tradition" and hermeneutic practices and falls victim to a fethishised, individualistic relativism, as dangerous as the relativism of a critically ill liberalism. The function of ideology, the way in which it is hegemonically propagated and received in our daily practices is much more phenomenologically complex[37] than Schlegel appears to realize. The symbiotic relationship between individuals and hermeneutic or ideological practices within the institutional life-world of the legal academy is more sophisticated than asking the chicken and egg-like question "Did things change because the people changed or did the people change because things changed"? The very nature of tradition or ideology or hermeneutics or hegemony makes this question experientially and politically irrelevant. In our lived experience of these phenomena, in the perception and construction of an "institutional *ethos*" within a law school, or an intellectual movement such as Legal Realism or Critical Legal Studies, something like the Arrow theorem[38] appears to operate. There *is* an institutional *ethos* which transcends or precedes or infects the individual constituents and which is embodied at once in none of them (us) or all of them (us).

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33 *See* H. G. GADAMER, TRUTH AND METHOD (Continuum 1975). *See also* my *Truth and Hierarchy*, *supra* note 7, and Schlegel, *supra* note 20.

34 *See* Freeman, *supra* note 19, and Kennedy, *Toward A Critical Phenomenology of Judging*, in THE RULE OF LAW: IDEAL OR IDEOLOGY (A. Hutchinson P. Monahan eds. Carswell 1987).

35 *See* Schlegel, *supra* note 20.

36 *Id.* at 469.

37 Indeed, here Schlegel seems almost to revert to a naive Foucauldian analysis which relies on the anti-Foucauldian "individual". *See* M. FOUCAULT, POWER/KNOWLEDGE (Pantheon 1980); THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (Vintage 1970). For a critique, *see* Rorty, *Habermas and Lyotard on Postmodernity*, 4 PRAXIS INT'L. 32 (1984) and my *Truth and Hierarchy*, *supra* note 7, at 770 *et.seq.*

38 *See* K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (Yale U. Press 1963).

Thoughts in lieu of a conclusion

Sometimes your cards aren't worth a damn
If you don't lay 'em down
The Grateful Dead

Legal Realism faced the Formalist enemy and faded from the challenge. Critical Legal Studies faces the same enemy, slightly better equipped and now more determined than ever. Legal Realism faced its opponents with the tools of deconstruction and failed when it sought to privilege politics. Critical Legal Studies confronts its foes with deconstruction and can succeed only if it privileges neither politics nor law. Rather it must write both ~~Law~~ and ~~Politics~~ under erasure and substitute the text of lived experience not as an ontological or epistemological category, nor as a reified object, but as a concrete reality. It must substitute truth for bullshit, life for frozen lifeless form.

The enemy is, of course, ever vigilant. It has rearmed and retooled itself with a revitalised Formalism. The two primary objectives of the C.L.S. project within the law school, where our primary battles are fought, are (1) the final deconstruction of epistemological or ontological status claims, the erasure of ~~Law~~ and (2) the deconstruction of the institutional edifice of the law school, the erasure of ~~legal education~~.

On the first front, we now confront not only the epistemological enemy of the Law as Truth, but the fetishised commodification of Truth itself. Thus, like butchers, we are reduced to the demands of our consumers for finer cuts of law.

> The relationship of the suppliers and users of knowledge to the knowledge they supply and use is now tending, and will increasingly tend, to assume the form already taken by the relationship of commodity producers and consumers to the commodities they produce and consume - that is, the form of value.[39]

This is a familiar phenomenon to law teachers - the demands from the legal profession to produce "real lawyers" by teaching "real law" and the concomitant demands of our students to turn them into "real lawyers" by teaching them "real law". Again, however, this is merely a concrete manifestation of the larger problem we seek to deconstruct - the claim to epistemological *a priori* status of Law. "Real law" is simply law before ~~Law~~. We must devise strategies to resist this pull of "market forces", we must denounce our role as commercial butchers and serve only Free-range Law.

The second object of struggle, intimately connected with the first, is the law school. Our deconstructive efforts are met with resistance at every turn because

> an institution differs from a conversation in that it always requires supplementary constraints for statements to be declared admissible within its bounds. The constraints function to filter discursive potentials, interrupting possible connec-

39 J.F. LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE 4 (U. Minnesota Press 1984).

> tions in the communication networks: there are things that should not be said. They also privilege certain classes of statements (sometimes only one) whose predominance characterizes the discourse of the particular institution: there are things that should be said, and there are ways of saying them.[40]

The institutional, traditional, hermeneutic, ideological constraints which face us are familiar - "real" scholarship, "real" teaching, tenure etc. And again, we know that these are simply concrete political manifestations of the epistemological claims of Law. The privilege and status of the Law school are wholly dependant on the validity claims of ~~Law~~ and the *a priori* foundationalism of Law is enforced by the institutional power/knowledge of the law school. The only project which is defensible, the only hope we have of avoiding the failures of Realism, the only hope for a better future is the project of re-writing Law and inscribing experience in its place. The only project is to substitute truth for bullshit.

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40 *Id.* at 17.