2008

Drawing Back from the Abyss, or Lessons Learned from Count von Count

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Because I once wrote about American Legal Realism and simultaneously participated in the Conference on Critical Legal Studies, I am regularly asked to comment on the relationship between the two. I usually decline as most of the askers have some ax they wish me to join in grinding. However, the inauguration of this new journal, participating in the critical ether common to both movements, plus your guest editor's generous offer to allow me to speak about whatever I wish, have unaccountably freed me to make the following observation. Critical Legal Studies (CLS) died exactly as Realism did. Each, when looking over the abyss of its own critique, drew back in horror.

Before exploring this aspect of the intellectual relationship between Realism and CLS, it is important to note a significant difference between the two movements. Realism, unlike CLS, captured the State. The Depression occurred while the Realists were active, and the electoral triumph of Roosevelt's New Deal provided a receptive outlet for Realist ideas about law and administrative government. In this way, though Realism began as a movement of legal academics who were responding to a formalist jurisprudence of the late Nineteenth and early Twentieth Centuries, it did not remain only an academic movement. In contrast, CLS began as a movement of legal academics who were responding to the jurisprudence called "legal process," and remained an academic movement because this country continued the conservative electoral turn it began in 1968. Thus, the politics that underlie Realism became a part of public discourse, while the politics that underlie CLS remained academic. This is not to say that CLS's politics were unimportant, at least to most of the movement's participants, but only that the more significant legacy of CLS has been its anti-disciplinarity, its claim that the standard

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methods of analysis that underpin legal scholarship did not then, and do not now, produce determinate solutions to legal questions. With that difference understood, I turn to the similarity in the academic demise of both movements.

Duncan Kennedy once said to me that American Legal Realism disappeared like water poured into sand . . . after the event was over, the ground was just a little bit damp. The same thing could be said about CLS. If we are all Realists now, in the sense that we all can see through doctrine to underlying social practices, we are also all Crits now, in the sense that we all can see structures of privilege and domination in any branch of law. At the least, Realism and CLS offer tools for use by any law schooled person when and where and for what purpose such a person wishes to deploy them. Yet the Realist movement, like the CLS movement, is dead. How can both of these things – life and death – simultaneously be true?

Life is easy to explain. Law is unsystematically, but relentlessly parasitic on its past. As Faulkner said in *The Reivers*, "Nothing is ever lost. It's all too valuable." As a people of law and lawyers, whatever we have said or done is available for others to attempt to use at a later time and for later purposes. Realism, and by a parity of reasoning, CLS, will be alive so long as law-trained individuals can and do use its distinctive critical tools in the course of, and as support for, the arguments they choose to make.

Death is less easy. To begin with, one needs to understand that law as we know it, though regularly described as protection for the People from the depredations of the State, is better understood as protection for the middle classes (sometimes rendered as the *bourgeoisie*) from the assertions to primacy of the upper classes, and the claims to social and economic participation of the lower. The upper classes embody the cultural affirmation of their claims and so don't need law to assert them; theirs is a position of social and economic power. The middle classes use law to moderate these claims, which are mostly for immunity from middle class norms of fair-play. The lower classes lack cultural affirmation of their claims and so wish law to affirm them; theirs is a position of social and economic need. The middle classes use law to cabin these claims, which are mostly for access to middle class assets.

Thus reliant on law, the middle classes use the ideology of the rule of law to establish their lack of self-interest in the formulation of the rules of law that they treasure as talismans for

protection from bad dreams, dreams of rapacious princes or angry mobs. The rules, the middle classes say, apply uniformly to, and so protect, all of the State's citizens. In the Nineteenth Century, this claim of disinterest was supported with the formalist's assertion that the content of the rules of law was logically entailed from a limited set of legal principles. In the last half of the Twentieth Century this claim was supported with the legal process school's assertion that the content of the rules of law was substantively entailed from a limited set of legal policies.

The Realists, largely from a position as political liberals, attacked the formalist's claim of disinterest by demonstrating, to their satisfaction at least, that legal decisions were not logically entailed from the set of legal principles. Indeed, the Realists asserted that judges reached their decisions by using precedents selectively, and actively shaped those that they used to reach decisions that might have been otherwise. All such efforts sought to obscure the values that led to, and were ultimately served by, their decisions. We Crits, largely from positions to the left of political liberalism, attacked the legal process scholars' claim of disinterest by demonstrating, to our satisfaction at least, that legal decisions were not substantively entailed from a set of legal policies. Indeed, we Crits asserted that judges always had available to them contradictory policies that could be used to justify decisions that might have been otherwise. Again, such efforts sought to obscure the values that led to, and were ultimately served by, their decisions.

There was, however, a problem in each of these critiques, a problem that cut to the quick for the Realists and us Crits. Most people do not become law professors because the job is more plausible than sleeping in a cardboard box. They become law professors because they love law, or perhaps the idea of law, or at least the possibility of law. They desire to be among the elect who may bear witness to the truth of law's potential as a principle of government. In a very real sense, they want to bring about better law, law that will both fulfill its role as arbiter of equality among citizens and secure substantive justice for all, each an aspect of, and so implicit in, the notion of the rule of law. For the Realists, this desire was substantively directed toward expanding the middle classes to include the upper portion of the working class. For us Crits, it was toward expanding the middle classes still further to include, not just more of the working class, but also women and people of color as well.

Unfortunately, the separate critiques of law offered at different times by both the Realists and us Crits made it very difficult to ground either group's claims about equality or substantive justice. If it was not logical entailment from legal principle that assured equality or substantive justice, what was it? If it was not entailment from legal policy that assured equality or substantive justice, what was it? There was a terrible abyss here that a quite well-intentioned, vigorously pursued critique had opened.

Given the abyss that each group of scholars had separately opened up, it is not wholly surprising that each was separately called "nihilist" by defenders of the existing middle classes. And, each group vigorously denied the charge, knowing full well the strongly held values that animated its critique. So, the question presented for each was how to continue to affirm critique and simultaneously to establish a ground on the basis of which each might argue for the reform of law that was implicit in its values.

Here, different scholars followed different paths. Among the Realists, some gave up scholarship and instead became judges or administrators, securing for themselves the possibility of self-actualizing their value commitments. For the rest, the career of Karl Llewellyn offers the best summary of other disciplinary possibilities on the basis of which to continue critique and ground reform. After offering a strong critique in his lectures for law students called *The Bramble Bush*, Llewellyn tried social science research in an unfinished set of pieces on divorce. He then turned to institutional economics/sociology in a piece on the Constitution. Next, he moved to historical studies in several pieces on the law of sales. Thereafter, he tried social theory in an unfinished work called *Law In Our Society*. Finally, he softened his original critique significantly in *The Common Law Tradition*, a work in which he combined his chastened critique with a faith both in the immanence of the rules of law in the social milieu and in a particular style of judging that he called the "Grand Style."

No one among us Crits had a run at trying alternative groundings for reform like Llewellyn's. Only one was able to try self-actualization by accepting the offer of a judgeship. A few simply ignored the problem and kept on working. Several stuck with the historical studies that were a first love. Some took shelter in the assertion that group identity provided sufficient grounding. Duncan Kennedy, in many ways our fearless leader, though to my knowledge he still has not even temporarily swapped jobs with a

janitor, kept pushing various species of critique, only to follow Llewellyn and offer a surprisingly chastened version of it in *A Critique of Adjudication – Fin du Siecle*, a book that also affirmed many possible groundings.

In some ways mine is a very sad story, a story about the strength of principle and the failure of nerve, an unwillingness to jump into an obvious abyss, as Kierkegaard would have all humans do, for fear that doing so would endanger the strong commitment to a substantive vision of what law might become. Curiously, though the Realists had no one to help them make this leap of faith, we Crits might have learned from our children. They know of Sesame Street's Count von Count and what he taught – Counting never stops. One simply has to go forward in the hope that from the counting, one may finally learn something, if only the next number.

Kant, the man who formalized critique, may have thought otherwise, but as best as can be known, critique, like counting, never stops, though after a long time, it may seem to leave behind little but a thin gruel. Still, it should be understood that if we accept Kierkegaard's wager, and turn the sharp knife of critique on our own preferred reforms of law with the same rigor that we turn that knife on the rules that the defenders of the current status quo believe protect the middle classes, our most cherished values will not be any more vulnerable than theirs. If we who trumpet critique today believe that the values that we fight to have instantiated in law are better than the current alternative, then we ought to be willing to fight for them, recognizing that neither we nor our opponents have a better way to ground our preferences than the sum of the arguments that we can offer, shabby as they may be, after critique has rent the garments in which we dress them. The later works of the late Alan Freeman, one of my Crit friends, point in this direction. Alan, who wrote about the wisdom of Dr. Seuss, knew about Count von Count as well. Perhaps we ought to try to follow his lead. A fair fight. No trump cards. If we are so bright . . . well, better not go there.