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A Note on the Aporias of Critical Constitutionalism

ANTHONY CHASE

In principle, the question chiefly boils down to an estimation of what is usually called constitutional illusions . . . . The court is an organ of power. The liberals sometimes forget this, but it is a sin for a Marxist to do so. Where, then, is the power? . . . It is ridiculous even to speak of 'the courts'. It is not a question of 'courts', but of an episode in the civil war.

— Vladimir Lenin

Civil liberties and human rights are precarious everywhere today, not only in the Soviet bloc and Communist China but also in much of the Third World and in military regimes like those of Chile and South Korea. Only a small portion of the Planet enjoys a Bill of Rights.

— I.F. Stone

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1. V.I. LENIN, The Question of the Bolshevik Leaders Appearing in Court, 25 V.I. LENIN: COLLECTED WORKS 176, 176 (1964) (Lenin wrote this statement in July, 1917). Lenin is only one of many 20th-century lawyers whose significant legal and political theories have yet to make an impression upon the work of American legal scholars, "critical" or otherwise. On Lenin's legal education and early professional life, see R. THEEN, LENIN (1973): It was not until May 1891 that the authorities granted [Lenin] permission to take the examination in jurisprudence as an external student at Saint Petersburg University — examinations he passed with flying colors a few days before his sister Olga, then a student in the capital, died of typhus. In November 1891, Lenin obtained his law degree magna cum laude and soon after was admitted to the bar. He began his practice of law with the firm of A.N. Khardin, a liberal, in Samara, and in the fall of 1893 became associated with the firm of M.F. Volkenstein, also a liberal, in Saint Petersburg. Id. at 64 (footnote omitted). For important correctives to Theen's misinterpretation of Lenin's politics, see G. COLE, A HISTORY OF SOCIALIST THOUGHT: COMMUNISM AND SOCIAL DEMOCRACY, 1914-1931 (1969); N. HARDING, LENIN'S POLITICAL THOUGHT (1983); D. LANE, LENINISM: SOCIOLOGICAL INTERPRETATION (1981); M. LIEBMAN, LENINISM UNDER LENIN (B. Pierce, trans. 1975); R. MEDVEDEV, LENINISM AND WESTERN SOCIALISM (A. Briggs trans. 1981).

2. Stone, Wedded By Hate, 244 NATION 492, 493 (1987). Lenin's suggestion that neither constitutionalism nor the role of courts can be understood independently from "civil war" (which had already become an international political conflict in Lenin's day), and Stone's placement of the Bill of Rights in a world context, reflect an approach to the study of law and legal institutions radically rejected by Critical Legal Studies (CLS). Stanford law professor Robert Gordon, suggests that "CLS is at bottom a kind of local politics." Gordon, Critical Legal Studies, 10 LEGAL STUD. F. 335, 335 (1986). CLS, Gordon concludes:

has developed a little collection of rhetorics and analytic moves designed to cope with
Yale giveth and, apparently, Yale taketh away. Having dramatically facilitated the rise to prominence (if not power) of Critical Legal Studies (CLS) in the early 1980s through its publication of a thirty-page, small print CLS bibliography, the Yale Law Journal reported in 1986 that "the credibility of the (CLS) movement has slipped." Indeed, like some very local and specific problems. These moves have mostly developed out of dialogues and arguments not with other people on the left, but with liberals in the legal-intellectual mainstream. A good deal of the published CLS work has been concerned with criticizing mainstream scholarship and legal doctrine. Id. at 336. The difference between Gordon, on the one hand, and Lenin and Stone, on the other, is that the latter challenge the notion that one can adequately understand questions of doctrine, judicial politics, or constitutionalism within a narrowly parochial, or as Gordon would say, "local," context.

3. Husson, Expanding the Legal Vocabulary: The Challenge Posed by Deconstruction and Defense of Law, 95 YALE L.J. 969, 969 (1986) (reflecting the general identification of contemporary CLS with deconstruction in law—an identification made by scholars both in and out of the critical camp). In spite of the obvious hostility to CLS by some professors at top-ranked law schools who see CLS in terms of its fashionability—its credibility being dependent on its capacity to remain "in vogue"—Husson does not explore the "commodification" of CLS as one possible source of its alleged rise and fall. On the business cycle in the academic marketplace or, more generally, the commodification of intellectual and cultural practice, see S. Aronson, Hype (1983); R. Debray, Teachers, Writers, Celebrities: The Intellectuals of Modern France (1986); D. Silverman, Selling Culture: Bloomingdale's, Diana Vreeland, and the New Aristocracy of Taste in Reagan's America (1986); J. Stein & G. Plimpton, Edie: An American Biography (1982). With respect to deconstruction as it cuts across academic boundaries, see Corradi, D'Amico & Piccone, Introduction to Squaring the Hexagon: Special Issue on French Politics and Culture, 67 TELOS 3, 6 (1986).

Yet, strangely enough, this advocacy of a sophisticated nothingness seemingly bothers no one. It sustains academic careers and fills blank pages with blank thoughts. It also continues to influence humanities departments in American universities. In Philosophy, Sociology and English Departments the names of Derrida, Lacan, Foucault, Barthes, De Certeau, Lyotard are probably as commonly heard today as they were unheard of barely a decade ago. There appears to be a pattern, set by the previous examples of existentialism and structuralism, in which these fads enter, cause a confused furor and then quickly pass away.

Id.

It is extremely interesting, in the context of the Corradi, D'Amico & Piccone critique, to recall the early fascination with existentialism in general, and Sartre in particular, revealed by key critical legal scholars like Peter Gabel and Duncan Kennedy. Having apparently transcended the Sartrean phase, CLS has now arrived at deconstructionist maturity, at least so it would seem from the perspective of Georgetown law professor Mark Tushnet:

The renunciation of the theoretical dimension of the initial project of CLS helps explain an otherwise curious characteristic of recent critical legal scholarship. Although it devotes a great deal of attention to phenomena that occurred in the past, much of the work is relentlessly ahistorical. It focuses synchronically on particular moments in the past or offers a sort of comparative statics, but never gives a diachronic account of transformation over time. I believe that this ahistoricism is linked to the critique of social theory, because diachronic accounts explicitly or implicitly rely on social theory to give them coherence . . . . Having renounced social theory, CLS is barred/precluded from using these standard traditions of historical writing—thus its characteristic ahistoricism.
Humpty Dumpty, CLS has seemed to suffer a great fall, and all the king's horses and all the king's men (as well as untold pages and footnotes in U.S. law school reviews) have failed to put CLS together again.

Why should this be so? The present state of CLS constitutional theory reveals the central problem with CLS as a whole. To be sure, CLS (like "law and economics") has given primary focus to analysis of private doctrinal law, and thus neither the study of public law in general, nor constitutional law in particular, have greatly preoccupied critical legal scholars. Nevertheless, a recent debate between two main wings of CLS constitutional thought does effectively get at the main problem which plagues the general enterprise of critical legal studies.

The CLS approach I refer to as "literary criticism" is clearly identified by Peter Gabel in his ongoing argument with Mark Tushnet:

Tushnet's point is that the liberals' position is just as wrong as Meese's because there is no such thing as a correct method of interpretation that can properly determine the outcomes of cases. He shows that the intent of the framers' view can be used to legitimize not only conservative results, but liberal results as well, and that the liberal notion of principled adjudication informed by an enlightened, modern ideal of justice—although it has been used to justify liberal outcomes—could, with a little conceptual finesse, be

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We need only retrieve Sartre's own views on the discoveries the structuralists or, later, deconstructionists would make, to measure how far CLS has come from an earlier involvement with existentialist, let alone existentialist-Marxist, ideas:

What Foucault gives us, as Kanters has seen very well, is a geology: the series of successive strata that form our "soul." Each of these strata defines the possible condition of a certain type of thought which triumphed during a certain period. But Foucault does not tell us what would be most interesting: how each thought is constructed out of these conditions, or how men pass from one thought to another. To do that, he would have to interpose praxis, therefore history: and that is precisely what he denies. Certainly his perspective remains historical. He distinguishes epochs, a before and after. But he replaces cinema with a magic lantern, movement by a succession of immobilities. The success of his book is proof enough that it was anticipated. But true original thought is never expected. Foucault gives the people what they needed: an eclectic synthesis in which Robbe-Grillet, structuralism [sic] linguistics, Lacan, and Tel Quel are systematically utilized to demonstrate the impossibility of historical reflection.

Behind history, of course, it is Marxism which is attacked. The task is to come up with a new ideology: the latest barrier that the bourgeoisie once again can erect against Marx.

Sartre, Replies to Structuralism: An Interview, 9 Telos 110, 110 (D'Amico trans. 1971).

invoked in the service of conservative ends.\textsuperscript{5}

Thus, the approach to law of literary criticism simply represents the now-famous CLS gift for "trashing" liberal legalism, the systematic methodology employed by CLS to show the indeterminacy of liberal legal argumentation as well as the failure of legal logic to adequately explain policy positions or results reached by different judges and courts. Tushnet's frequent contributions to the elaboration of this critique within the constitutional field have made him a leading figure within the literary criticism wing of CLS.\textsuperscript{6}

What are the intellectual sources and ideological resonances of this approach? Gabel asserts:

In alliance with the deconstructionist work of Jacques Derrida and the related work of Michel Foucault on the multiple ways that "official" forms of knowledge tend to crush people's self-confidence and sense of self-activity, this strand of critical legal scholarship means to expose "the law" as basically a lot of posturing baloney, and to empower people to think and feel for themselves.\textsuperscript{7}

Nothing is more striking about the literary criticism approach than the unwillingness or inability of its practitioners to provide concrete historical and sociological studies of instances where the "self-confidence" or "self-activity" of radical social movements (whether in the Americas, Europe, Africa, Asia, or the Middle East) have actually been "crushed," not by arduous working conditions or impoverization, not by the inability of civil society to impose civil rights and liberties against state power, not by police surveillance or death squads, not by famine or inadequate public health services, not by the dull necessity of economic reproduction, not by armed invasions, prison and torture cells, or "surgical air strikes" against villages and cities, but, rather extraordinarily, by the central target of CLS critique: appellate judicial reasoning in the liberal mode.\textsuperscript{8}

\begin{itemize}
  \item Gabel, \textit{supra} note 4, at 41.
  \item Although literary criticism seems to me an appropriate label for the kind of legal theory I intend to criticize—a theory which examines \textit{text} to the virtual exclusion of \textit{context}—it remains important to point out that there exists a strong tradition of literary scholarship in which the relation between text and context is provided paramount status. \textit{See, e.g.}, T. BENNET & J. WOOLACOTT, \textit{BOND AND BEYOND: THE POLITICAL CAREER OF A POPULAR HERO} (1987); R. WILLIAMS, \textit{MARXISM AND LITERATURE} (1977); Chase, \textit{Toward a Legal Theory of Popular Culture}, 1986 Wis. L. REV. 527, 527 n.1 (citation to a wide range of works within the field of literary and art criticism which take context seriously and, in a number of instances, constitute widely respected contributions to social theory itself).
  \item Gabel, \textit{supra} note 4, at 41.
  \item For classic works of social theory that emphasize both material and cultural aspects of histor-
\end{itemize}
rhetoric of judges in (apparently) maintaining empires, civilizations, and the fabric of societies, has made CLS a unique form of social theory (if one may call it that), in existence hardly anywhere outside of the cloistered legal academy.\footnote{Having renounced social theory and its original intellectual project, as Tushnet asserts, \textit{supra} note 3, I think that it is only as a form of \textit{anti-theory} that CLS may any longer be classified as "social theory" at all. It is interesting here to compare comments on "anti-theorists" made by Alan Carling in his analysis of an emerging analytic Marxism:}

\begin{quote}
To the extent that a name is important, I would prefer the term \textit{rational-choice Marxism} to collect the new work under a single heading . . . . In the most schematic terms, the result is the subversion of a received dichotomy between social pattern and individual choice . . . .

This approach is liable to prove as unsettling for those Marxists who have come close to the denial of individual choice as it will be for \textit{those anti-Marxists (or Marxist anti-theorists) who have come close to the denial of fundamental social pattern.}
\end{quote}

Against what intellectual practice is CLS "literary criticism" designed as a response? Confronted with the central assertions of 1920s and 1930s American Legal Realism, according to Tushnet, most law professors "usually nod in agreement, but then continue to produce large quantities of doctrinal analysis attempting to demonstrate which solution is most consistent with the fundamental structure of torts or contracts or the theory of the Constitution." Confronted with this mainstream stack of law review articles, CLS professors in the literary criticism wing usually shake their heads in disagreement with mainstream practice, but then continue to produce large quantities of doctrinal analysis attempting to demonstrate that no solution is consistent with the "fundamental structure" of torts or contracts or the theory of the Constitution. Mainstream scholarship and CLS work produce virtually indistinguishable piles of articles and reprints from reviews, both using the same material in their footnotes, the one a negative of the other's positive photographic print. Both mainstream and CLS law review authors use, in effect, the same "camera"—the same machinery for viewing—and, as French filmmaker Jean-Luc Godard pointed out, it is impossible to make radical films on a reactionary editing table. The CLS literary criticism school has simply taken over the Hollywood/Williston editing table tenure-track scholarship form—with inevitable results.

From a different perspective within the minority constitutional law interest of CLS, Gabel asserts:

[W]e can see that there is a limitation to the form of criticism that Tushnet puts forward, and, in fact, to the entire "deconstructionist" enterprise. This

Further placing analytic or rational-choice Marxism in opposition to CLS, Carling adds: "It thus seems possible to sum up this whole change of perspective in one phrase: the reinstatement of the subject." Id. at 28. All forms of deconstruction have devoted themselves, of course, to a "dispersal of the subject." See also Whitebook, Saving the Subject: Modernity and the Problem of the Autonomous Individual, 50 Telos 79 (1981-82); Wolin, Modernism v. Postmodernism, 62 Telos 9 (1984-85); Chase, Book Review, 60 N.Y.U.L. Rev. 304, 325 n.104 (1985).


Again, it comes down to a simple economic gimmick that all by itself bears out a whole ideology. If that's how they manufacture editing-tables, it's because three-fours of the people editing film edit this way. Nobody's ever told the manufacturers to do it differently. I use editing as an example, but the same kinds of thing turn up everywhere else. If you're trying to make revolutionary movies on a reactionary editing-table, you're going to run into trouble. That's what I told Pasolini....

limitation is that a critique demonstrating the indeterminacy and essential irrelevance of interpretive method in relation to judicial results cannot account for the meaning of the debate over method itself . . . 12

What alternative does Gabel propose to deconstruction? What is needed, he suggests, is "a critical method that goes beyond the detached, analytical skepticism of deconstruction, to one that seeks to grasp and unveil the social meaning of Meese's world view itself as an aspect of the New Right's effort to fashion a lasting ideological hegemony." 3

There are two extremely important aspects to Gabel's approach, an approach to which I refer as "micro-techniques of power criticism." First, Gabel retains distinctions between Left and Right, a differentiation that originated, of course, during the French Revolution and has structured world political confrontation ever since. 4 Second, Gabel organizes his critique of constitutional law as a form of "ideology-critique," specifically focusing on relatively less visible mechanisms of social reproduction, utilizing what he calls a "socio-psychoanalytic theory of alienation." 5

I am quite sympathetic to the first aspect of Gabel's approach, that

12. Gabel, supra note 4, at 41-42. On the now common identification of CLS with the "deconstructionist enterprise," see Husson, supra note 3; Clark, Philosophies at War in Law Schools, Insight, Sept. 29, 1986, at 52. As Clark notes, "[T]he movement has two basic intellectual parents. One is the legal realism movement . . . . The other progenitor of critical legal studies is the deconstructionism so prevalent in contemporary European philosophy." Id. Susan Tiefenbrun also helps explain "why the CLS scholars have adopted the post-structuralist theories of Jacques Derrida, Michel Foucault, and Roland Barthes . . . ." Tiefenbrun, Legal Semiotics, 5 CARDOZO ARTS & ENT. L.J. 89, 153 (1986).

13. Gabel, supra note 4, at 42.


is, the retention of categories drawn from the real world of politics (such as those of Left and Right), categories that are very rapidly either abandoned by avant-garde deconstructionists,\(^\text{16}\) or that are revalued in such a

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I used Kovel's book in a law and psychiatry seminar and the results were intriguing. I am not sure why this literature remains terra incognita, at least for the deconstructionists, unless (once again) it appears contaminated by politics, social theory, history, or Marxism, or maybe it is simply too concrete and too useful in approaching actual social reality. Of course, this observation does not apply to the feminist theory and practice emerging in contemporary legal education, but I am not sure what value feminists perceive in taking over the burden of CLS philosophy and method.

16. On the abandonment of political categories such as Left and Right within deconstruction generally, see P. Anderson, In the Tracks of Historical Materialism (1983); J. Merquior, From Prague to Paris: A Critique of Structuralist and Post-Structuralist Thought (1986); Jameson, Postmodernism, or the Cultural Logic of Late Capitalism, 146 New Left Rev. 53 (1984); van Rossum, supra note 14.


According to [Harvard Law Professor Gerald] Frug, if CLS was to embody a movement of any sort it would be academic, not political. A "CLS position" on any given political issue can't exist because scholars who perform critical analyses have a wide range of views. Frug sees no necessary connection between the use of intellectual methodologies such as structuralism and any particular political stance. Although he acknowledged that those currently performing critical legal analysis tend to be somewhere "on the left," he believes this will change. He analogized CLS to the Legal Realist Movement. In the past, the Legal Realists have been New Deal liberals, whereas today the "biggest" Legal Realists are in the conservative Reagan Justice Department.

Id.

If it is Frug's purpose here to predict that CLS members will be moving into the Reagan or post-Reagan Right, then his comments should have been included infra note 17. See also Reidinger, Civil War in the Ivy, A.B.A. J., Nov. 1, 1986, at 64.

[It] is not at all clear that CLS has a leftist or any other political bias. "It's an oppositional movement," says [Georgetown Law Professor Mark] Tushnet. "Given the present state of American politics it must be on the left. But there is little inherently leftist about it. If there were a CLS utopia there would be a CLS critique of it."

Id. at 67. This is a fascinating comment that leaves plenty of room for interpretation.

On the one hand, Tushnet seems to suggest that a coherent politics might conceivably change when national borders were crossed. For example, a single individual would (to be consistent) need to fight on the left in the U.S., on the right in the Soviet Union, perhaps serve as a Neo-Nazi in East Germany, as a member of the TUC in Britain, an advocate of the return of the Shah in Iran, etc. Simply to be in opposition hardly explains the essential nature of one's opposition. The point Tushnet misses is that the reasons for being in the left opposition in the U.S. are precisely the same for being in the left opposition in the Soviet Union. See A Soviet Left-Wing Activist Speaks, 1 New Politics 160, (New Series: Summer, 1987).

Stalinists had managed to make most intellectuals anti-socialist. But at the same time, right-wing dissidents and emigres showed that their own so-called solutions were even more totalitarian and Stalinist than official Stalinism . . . . There existed a need to develop basic principles for new left-wing thought in the Soviet Union . . . .

Id.

But what I think Tushnet is really getting at is the CLS notion that, for example, only anti-theory
way that the American Right and United States imperialism are seen as beacons of light for human freedom. Gabel will have none of this and it is reasonable to describe his "micro-techniques of power criticism" as, still, a form of political (rather than merely literary) theory. On the other hand, I am less sympathetic to the microscopic analysis of power relations in society where such analysis tends to wholly displace what we might call "macro-power theory" (even "political science") or, simply, what most Marxists refer to as "the theory of the state." is radical theory, or that political distinctions like Left and Right should be consigned to the dustbin. Since, of course, the entire world today is animated by historic struggles that emerged from the Enlightenment and the French Revolution (which CLS sees as no longer significant or contemporary), CLS is actually consigning itself to the roadside of irrelevance. See, e.g., Grunzweig, Nader Founds Harvard Watch, HARV. L. REc., Nov. 21, 1986, at 1. Nader, the stakes have risen: "We have pollution, corporate crime, and the arms race. We also have a sellers' market for corporate law firm jobs. At the same time, the numbers (of lawyers) taking (jobs in) public interest law are declining . . . ." When asked whether recent controversies over CLS and tenure issues are indicative of internal growth at HLS, Nader deemed such discussion "hot debate in a remote oven." Id. at 7. It is just that very remoteness, however, which CLS now cultivates as a post-political movement in legal theory.

17. See, e.g., T. Moi, SEXUAL/TEXTUAL POLITICS: FEMINIST LITERARY THEORY 168 (1985) (symbolizing the rights of passage of a generation of post-structuralists). It is no secret that [Julia] Kristeva's early commitment to Marxism, mixed with various Maoist and anarchist influences, has given way to a new scepticism towards political engagement. Rejecting in the late 1970s her early idealization of Mao's China, she suddenly revealed an alarming fascination with the libertarian possibilities of American-style late capitalism. Id. CLS has been right on the track of European deconstruction, albeit about a decade behind, for a number of years. After quoting from the "deconstructionist position" advanced at a recent academic conference in the U.S., Richard Wolin adds:

"This quote is so priceless that I hesitate to defile it with commentary. I will therefore merely cite the response to these ideas by Russel Berman, who observed, with the best one-liner of the conference: "If the axis of the original avant-garde was New York-Paris-Berlin, the axis of the postmodernist avant-garde seems to be New Haven-Santiago-Johannesburg." Wolin, The Bankruptcy of Left-Wing Kulturkritik: The "After the Avant-Garde" Conference, 63 TELOS 168, 171 (1985) (Berman was not referring to the Yale Law School's relation to the avant-garde since, as is well known, that institution has remained relatively untouched by critical deconstruction. See Fiss, The Death of the Law, 72 CORNELL L. REV. 1, 2 (1986)).

My reasons for this lack of enthusiasm for scholarly omission of any coherent theory of the state from critical legal studies are underscored by Boaventura de Sousa Santos, who argues that:

[F]irstly, the conception of a plurality of legal systems within the same political space could lead to a relative neglect of the state law as a central form of law in our societies; secondly, once the concept of law was disengaged from the concept of the state, the identification of a plurality of laws would know no limit with the result that, if law is everywhere, it is nowhere.19

Thus, the overemphasis upon “micro-techniques of power criticism” has these likely consequences: (1) legal agencies and institutions are seen primarily, or even exclusively, as “carriers of ideology” whose impact on social movement is indirect (at best), rather than being seen as material elements of social reality with a direct impact on social change;20 (2) one of the two most important tasks for law professors in corporate-liberal societies, the development of a legal theory of the capitalist state and of politics (the other task being development of a legal theory of the capitalist economy),21 is effectively ignored in behalf of increasingly bizarre and tangential forays into esoteric modelling of power’s microtechnology or its system of relays;22 (3) the fear de Sousa Santos expressed is realized: if power is everywhere, then it ends up being nowhere, and legal scholars (once again), like the fool in Lear’s crumbling throne room, abet power’s visceral escape from accountability. In other words, power is allowed to escape the intellectual grasp of what Lenin described as the concrete analysis of a concrete situation.23

In an account presumably far removed from a CLS reading list, cer-

22. On this tendency in contemporary theory, see P. Anderson, supra note 16; P. Anderson, CONSIDERATIONS ON WESTERN MARXISM (1976) [hereinafter CONSIDERATIONS].
23. “An interpretation of fascism as the essence behind the phenomena, as the ‘truth of’ modern [capitalist] society, can never achieve the central aim of Marxist analysis, what Lenin called the
tainly outside the scope of CLS interests, Richard Wolin speaks directly to the present conjuncture of CLS and politics:

[T]he exclusivity of Foucault's focus on micro-techniques of power as the form of social action par excellence in the modern world, renders him oblivious to countervailing tendencies in the sphere of human rights, civil liberties, and productive capacities that establish strong precedents for concrete historical alternatives to the existing continuum of domination. As a direct consequence of his systematic insensitivity to countervailing tendencies embodied in the Enlightenment legacy, Foucault must, at the point where the carceral monolith becomes insupportable from the standpoint of his own progressive political sensibilities, find recourse in an irrationalist Nietzschean 'leap' to extricate himself from the theoretical cul de sac in which he finds his position immobilized.24

24. Wolin, Foucault's Aesthetic Decisionism, 67 TELOS 71, 86 (1986). Wolin is quite correct to observe how Foucault has underestimated or else simply ignored "countervailing tendencies" to domination—such as human rights and civil liberties. See Chase, American Legal Education Since 1885: The Case of the Missing Modern, 30 N.Y.L. SCH. L. REV. 519, 525 n.25 (1985). CLS has often ignored the progressive politics of human rights and civil liberties struggles in a way similar to that of Foucault.

The nature of legal rights has long been a subject of interest to legal scholars and activists. Recently, dialogue on the issue has intensified, provoked by numerous critiques of liberal rights, particularly by Critical Legal Studies (CLS) scholars. These recent critiques have tended to view rights claims and rights consciousness as distinct from and frequently opposed to politics, and as an obstacle to the political growth and development of social movement groups.

Schneider, The Dialectic of Rights and Politics: Perspectives from the Women's Movement, 61 N.Y.U. L. REV. 589, 590 (1986) (footnotes omitted). Schneider's powerful essay fails to point out that, at least several years ago, there existed CLS writing that took a position on rights diametrically opposed to the position that she attributes to CLS. See, e.g., Chase, A Challenge to Workers' Rights, supra, note 20; Chase, The Left on Rights: An Introduction, supra note 18; Chase, supra note 7 (reviewing T. CAMPBELL, supra note 21, and M. GIBSON, WORKERS' RIGHTS (1983)). However, it now seems futile to try to correct this particular record and, to be sure, in no way are the quite extraordinary insights of a range of authors (including Schneider) deflected from their purpose simply because there is rarely acknowledgement that, at one time, there may have been more debate in CLS on key issues than there would appear to be today. In addition to Schneider's essay, there is a range of critiques of CLS, each exemplary in its own way. See Brosnan, Serious But Not Critical, 60

Another impressive, recent essay suggests that CLS, or at least that CLS professor Mark Tushnet:

- is wrong, however, in generalizing from the undeniable fact that rights statements are, as statements, empty, to the proposition that they are meaningless in concrete settings. He is right in arraigning recent judicial and legislative decisions and in recognizing that the representatives of state power increasingly are shedding the mantle of ostensible neutrality. He is wrong in suggesting that advocates, groups associated for social change, and even law professors are doing useless and even misleading work by formulating theories of rights in the context of capitalist social relations.

Tigar, Crime Talk, Rights Talk, and Double-Talk, 65 TEX. L. REV. 101, 120 (1985). In other words, Tigar is ready to agree that, by themselves, propositions about rights (like all legal statements) have no necessary political content or significance. But to agree to that is simply to acknowledge the obvious—what Richard Fallon has recently described as "the Humpty Dumpty claim that anyone can use words however she chooses . . . ." Fallon, A Constructivist Coherence Theory of Constitutional Interpretation, 100 HARV. L. REV. 1189, 1265 n.303 (1987).

Tigar’s essential point is that once you get beyond the stage of merely observing the inherent indeterminacy of law (as a form of language), it then becomes absolutely necessary to situate the particular legal assertions in their “concrete settings” to ascertain their meaning—that is, their politics. But CLS is “barred/precluded” from using social theory or history and is thus prevented from being able to situate anything in its concrete setting or social context. The rejection of social theory comes at a high price. See Tushnet, supra note 3. On the importance of historical knowledge and reasons for embracing, rather than rejecting, such knowledge, see G. COHEN, KARL MARX’S THEORY OF HISTORY: A DEFENSE (1978); R. ROSELLINI, LA PRISE DU POUVOIR PAR LOUIS XIV (1966) (premier visual statement of the methodology of historical materialism); W. WILLIAMS, HISTORY AS A WAY OF LEARNING (1973). It comes as no surprise that Professor Tigar would subject rights to an evaluation inside history and within a concrete setting, retrieving in the process law’s fundamentally social context. See M. TIGAR & M. LEVY, supra note 21.

Perhaps the most striking feature of a methodology employing the concrete analysis of a concrete situation is the difficulty of predicting just what results may emerge. Consider, for example, E. LACLAU & C. MOUFFE, supra note 18, at 61-62:

In the first case the crisis of the liberal-democratic State, and the emergence of radical-popular ideologies of the Right, challenged the conception of democratic rights and freedoms as “bourgeois” by nature; and, at the same time, the anti-fascist struggle created a popular and democratic mass subjectivity which could potentially be fused with a socialist identity . . . . A number of formulas—ranging from Mao’s “new democracy” to Togliatti’s “progressive democracy” and “national tasks of the working class”—attempted to locate themselves on a terrain that was difficult to define theoretically within Marxist parameters . . . . [F]rom China to Vietnam or Cuba, the popular mass identity was other and broader than class identity. The structural split between “masses” and “class”, which we saw insinuating itself from the very beginning of the Leninist tradition, here produced the totality of its effects.

Id. Laclau and Moffe contribute to the process of resituating legal rights and forms within their concrete settings—social and historical—and realize the extent to which such forms (“democratic rights and freedoms”) may have a life of their own, a life that cannot be pinned down to one, unchanging, social structure or economic system. Id. See also Mouzelis, Marxism or Post-Marxism?
time to time, certainly within the context of a dry-as-blotting-paper discipline like American legal scholarship (not to mention legal education). As Louis Aragon once suggested, it may take a few incendiary devices to awaken the sleepy streets of an apathetic town. But what has happened, unfortunately, is that for most American law students and teachers, all that is left today of CLS is its array of champion "Nietzschean leapers," and like a fireworks display on the Fourth of July, when it is over, it is over. One may retain, for a while, a dazzling image painted against the retina, but it eventually goes dark, and that is hardly a substitute for locating, in life, "concrete historical alternatives to the existing continuum of domination," and it rather obviously has nothing to do with left-wing politics or the genuine excitement and moment of three-dimensional participation in history. It remains a great mystery why CLS was willing to settle for so little.

167 NEW LEFT REV. 107 (Jan./Feb. 1988). Lenin himself never simply equated democracy with capitalism:

> The necessary link between the economic premises of the bourgeoisie and its demands for political democracy or the rule of law, which—even if only partially—was established in the great French Revolution on the ruins of feudal absolutism, has grown looser.

> . . . [T]he "necessary link" uniting capitalist development to democracy must reveal itself to be a complete illusion. "In any case," said Lenin, "political democracy—even if it is in theory normal for so-called pure capitalism—is only one of the possible forms of the superstructure over capitalism. The facts themselves prove that both capitalism and imperialism develop under and in turn subjugate any political forms."

G. LUCKÁCS, LENIN: A STUDY ON THE UNITY OF HIS THOUGHT 20 (N. Jacobs trans. 1970). Ronald Reagan, the late director of the CIA, William Casey, the National Security Council and Lt. Col. Oliver North have provided Lenin's analysis with a stunning contemporary illustration. See Hoffman, Reagan's Underworld, THE N.Y. REV. BOOKS, May 7, 1987 at 9. Thus, while Harvard historian Stanley Hoffman is documenting (via the Tower Commission Report) domestic and international illegality by the Reagan gang, and Harvard Law Professor Abram Chayes is representing the people of Nicaragua in the World Court as part of their successful effort to subject the United States to the rule of law, the critical legal scholars are rejecting social theory and the utility of human rights in one, broad, deconstructionist stroke. It is history itself from which CLS has knowingly been severed—the kind of mistake Lenin did not make.


27. See supra note 24 and accompanying text.

28. In fairness, of course, it must be acknowledged that, for several years, CLS has been placed under considerable political pressure by anti-intellectual forces within American legal education, a situation that eventually provoked comment even by the President of the American Association of Law Schools. See Chase, What Should a Law Teacher Believe?, supra note 20. At the same time, it must be noted that the depoliticization of CLS has been inspired by tenured CLS professors with comfortable positions at prestigious universities. I have heard it suggested that leaders of CLS turned away from political commitment in their writing to, perhaps, insulate junior faculty with tenure trials ahead, etc., but I am inclined to believe that the "fear of politics" or "fear of history" was
In the event that this discussion of the perplexities of critical constitutionalism seems too abstract or else too dependent upon the jargon of social theory, perhaps a concluding illustration drawn from a separate discipline will render my main point with greater clarity. The Vietnam War, surely one of the more significant conflicts of the 20th century, is the subject of an outstanding research project conducted by historian Gabriel Kolko. Kolko's *Anatomy of a War* is truly one of the finest studies ever made of any war, anywhere. Now let us substitute the subject of Kolko's research (the Vietnam War) for the subject of CLS constitutionalism (the separated powers of the U.S. government and their regulation through constitutional law and process), and then compare the two wings of the CLS debate identified above.

Members of the literary criticism wing of CLS (and, no doubt, most mainstream U.S. law professors as well) would try to come to terms with the Vietnam War experience by examining ("deconstructing" in the case of CLS) a variety of "texts" produced, so to speak, by the War. For example, scholars would analyze letters written home by soldiers at the front, the personal diaries of field commanders, perhaps novels written about the War, or perhaps even the Pentagon Papers, as part of a search for style and meaning. Any written documents that might be considered the "literature of war" (cf., the "literature of law") would be acceptable subject matter in an effort to explain the Vietnam War.

On the other hand, the "micro-techniques of power criticism" approach would take a very different angle on the Vietnam War. These scholars would reject the analytic aloofness of those consumed by narrow disagreements over theories of textual interpretation. The micro-techniques of power criticism tries to get at power—and its technical organization and deployment—not simply at a shadow, perhaps cast across the face of some document. But turning up the magnification on their own microscope to such a high degree that they pass right through the great middle zone of intellectual work called "the theory of the state," the micro-techniques devotees quickly find themselves trapped within the intimate and cellular level of power's structure, where all relations suddenly loom larger than life.

What would be their appropriate analogical relation to the terrain of Vietnam scholarship? The great French historian, Marc Bloch, wrote:

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However necessary they may be, the most constant and general antecedents remain merely implicit. What military historian would dream of ranking among the causes of a victory that gravitation which accounts for the trajectory of the shells, or the physiological organization of the human body without which the projectiles would have no fatal consequences? Thus, the location reserved within the study of war for the micro-technicians would be the analysis of such microscopically visible forces as gravity and human physiology.

On the one hand, does Kolko write about the written “texts” produced by the war experience? Does he confine himself to the “deconstruction” of letters written home during a lull in the fighting? No he does not. Then again, does Kolko organize his analysis around the paramount status of gravity and physiology in shaping the Vietnamese struggle? Of course he does not. The true subjects of Kolko's book are just what they should be: the heroic struggle of the people of Vietnam in response to a seemingly endless series of foreign invasions of their homeland, the revolutionary history of the Vietnamese Communist Party, the class structure and decision-making process of the U.S. state apparatus (particularly in the executive branch of government), and the ultimate limits upon economic and military policies pursued by capitalism on a world scale.

Thus, Kolko faces his subject quite directly, and he brilliantly balances the various components of his social, historical, and economic analysis of the politics of Vietnam's resistance to American aggression. Comparatively speaking, the critical legal scholars have been (at best) only peeking at their subject—the nature of law and legal institutions in constitutional states—from behind side doors, capturing no more than a fleeting glance at state power before retreating further into the wings of the theatre of university discourse.

Even popular political weeklies often focus more sharply upon the nature of the forces brought to bear upon the state within which constitutional systems operate than does CLS. To take just one recent example, after surveying the political contradictions that plagued administrations from Truman's through those of Nixon and Carter, Norman Birnbaum (writing in The Nation), adds:

Three profound problems are inextricably linked to the politics of American empire. The first is that the degree of public mobilization needed to sustain it is impossible to attain. Our public is intelligent enough to be war

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weary by anticipation. The second is that the world increasingly resists domination — or even its poor substitute, manipulation . . . . We come to the third problem: the politics of empire limits, where it does not simply negate the practice of American democracy. Our empire has secreted an elite that, whatever its inner conflicts, lives not for ideas but as imperial rentiers. It is, in effect, a gigantic and omnipresent lobby which has arrogated to itself the task of defining the national interest. It never defines it, of course, in ways that would diminish its own influence, income or power. The crisis of the Reagan presidency is more than a crisis of its foreign and military policies. It is the practically inevitable result of the monopolization of decision, and of the production of opinion, by an apparatus of bureaucrats, self-designed experts, the military, the politicians captive to it and the publicists who serve it . . . . No doubt, the attempt — stretching over generations — to extend American economic power in the world is fundamental. 31

Having presented themselves to the law school world and beyond as “critical” intellectuals, the CLS scholars have not only ignored the examination of class and elite shaping of national security policy from the Cold War, Vietnam, and Watergate through the “Iran-Contra Affair” (seemingly believing that appellate federal courts were somehow more significant legal agencies than the executive branch with its security bureaucracy, military departments, intelligence forces, and so on) but have even failed to raise central questions about how constitutional law gets generated through social movements with some hope of placing limitations upon the ability of the state to serve private or corporate interests as against those of the public. The frequent characterization of CLS professors as 1960s hippies or radicals who have gotten tenure in the law school could not be farther off the mark. 32 As Nation magazine journalist Alex

31. Birnbaum, The Politics of Empire, THE NATION 9, 11 (Jan. 10, 1987). Two features of Birnbaum’s approach radically separate him from CLS: (1) his retention of the concept of fundamental social pattern, and (2) his retention of the concept of individual choice, neither of which characterize CLS. See supra note 9. Birnbaum confronts the agencies of the U.S. government in terms of how they function in the world, not in terms of the language their lawyers or legal staffs generate for consumption by depositories for federal documents and university deconstructionists. He attempts to read social pattern from historical conduct. In addition, he conceives the makers of national policy as living men and women who not only can make mistakes—that is, act in ways that do not serve their own interests as a class or elite—but who remain volitional creatures whose choices can be studied. Thus, Birnbaum compels us to look at both social pattern and individual choice in examining how legal agencies or instruments of the government generate policy. This approach is about as far as you can get from the legal theory of CLS. See also P. JOSEPH, CRACKS IN THE EMPIRE: STATE POLITICS IN THE VIETNAM WAR (1981); Cammack, Comment: Resurgent Democracy: Threat and Promise, 157 NEW LEFT REV. 121 (1986); Cohen & Rogers, The Worst and the Dumbest: Perspectives on the Reagan Era, 38 MONTHLY REV. 42 (1987).

32. It is my impression that most leading CLS scholars were either too old or too young in the period of critical resistance to the Vietnam War, about 1967-72, to have been undergraduate college students involved in groups like Students for a Democratic Society. There were very few elementary
Cockburn recently observed:

There was a time, before the development of protest against the war in Vietnam, when the U.S. government would have felt no need for secrecy in the kind of arms and money deals that are now arousing such indignation. Giving arms to the Iranian army and to the contras would have been standard operating procedure. The anti-war movement of the mid to late 60's induced the restrictions, legal and political, under which administrations since 1972 have chafed. Without the peace movement of the 60's there would have been no Boland Amendment for North and his sponsors to circumvent and thus land themselves in soup; no domestic opposition to U.S. involvement in Central America sufficiently potent to have forced the Reagan gang into one illegal expedient after another.33

But CLS is no more interested in examining the social process through which constitutional law and institutions are created by oppositional groups (from one generation of which CLS itself is presumed to have emerged) than it is in examining the social process through which the legal institutions of constitutional states are deployed throughout the capitalist world system.34 The important thing, however, is not the failure of CLS to take up the challenge of redefining the study of constitutional law and legal institutions but, rather, that readers of essays like this one, readers such as yourself, become and remain committed to such a project, even if it is abandoned by the orthodox and the avant-garde alike.
