

**Cornel West, “Reassessing the Critical Legal Studies Movement,”**  
*Loyola Law Review* 34 (1988): 265-275.

*Much of Western European history conditions us to see human differences in simplistic opposition to each other: dominant/ subordinate, good/bad, up/down, superior/inferior. In a society where the good is defined in terms of profit rather than in terms of human need, there must always be some group of people who, through systematized oppression, can be made to feel surplus, to occupy the place of the dehumanized inferior. Within this society, that group is made up of black and third world people, working class people, older people and women.*

*Institutionalized rejection of difference is an absolute necessity in a profit economy which needs outsiders as surplus people. As members of such an economy, we have all been programmed to respond to the human differences between us with fear and loathing and to handle that difference in one of three ways: ignore it, and if that is not possible, copy it if we think it is dominant, or destroy it if we think it is subordinate. But we have no patterns for relating across our human differences as equals. As a result, those differences have been misnamed and misused in the service of separation and confusion.*

Audre Lorde, *Sister Outsider*<sup>1</sup>

A spectre is haunting American legal education—the spectre of critical legal studies. This rapidly expanding reform movement within elite institutions of legal pedagogy is principally a significant response to the crisis of purpose among law professors and students. Like liberation theologians in seminaries, social medicine proponents in medical schools, radical deconstructionists in university literature departments, and opposition postmodern critics in the arts, critical legal theorists fundamentally question the dominant and usually liberal paradigms prevalent and pervasive in American culture and society. This thorough questioning is not primarily a constructive attempt to put forward a conception of a new legal and social order. Rather, it is a pronounced disclosure of the inconsistencies, incoherences, silences, and blindness of legal formalists, legal positivists, and legal realists in the liberal tradition. Critical legal studies is more a concerted attack and assault on the

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<sup>1</sup> A. LOURDE, *SISTER OUTSIDER* (1984).

legitimacy and authority of pedagogical strategies in law schools than a comprehensive announcement of what a credible and realizable new society and legal system would look like.

In this essay, I shall situate the critical legal studies movement within the context of the larger crisis of purpose among intellectuals and academicians in contemporary American society. I will examine the critical legal studies movement as a significant and insightful, though flawed, response to this crisis of purpose. Then I shall suggest how the critical legal studies movement can become a more effective prophetic force in our time.

Allen Bloom's best-seller, *The Closing of the American Mind*<sup>2</sup>—a nostalgic and, for some, a seductive depiction of the decline and decay of the elitist, highbrow, classical humanist tradition in institutions of higher education—and Russell Jacoby's *The Last Intellectuals*<sup>3</sup>—a sentimental requiem for leftist public intellectuals—are both emblematic symptoms of the larger crisis of purpose in the academy."<sup>4</sup> For Bloom, critical legal studies would be viewed as an attempt to highlight the racism, patriarchy, and class skewed character of the classical tradition that he defends. Critical legal studies for Bloom would be simply another instance of what he calls the "Nietzschenization of the American left"—his way of describing the American left as an irrational movement.<sup>5</sup> For Jacoby, critical legal studies constitutes an example of academic leftists who refuse to intervene into the larger public conversation concerning the destiny of the country. Yet both Bloom and Jacoby are silent on the

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<sup>2</sup> A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987)

<sup>3</sup> R. JACOBY, *THE LAST INTELLECTUALS* (1987)

<sup>4</sup> These texts are written from different vantage points—Bloom being a Strausian, Jacoby being a neo- or even post-Marxist.

<sup>5</sup> For Bloom, looking at the critical legal studies movement through the lens of Leo Strauss and his own creative appropriation of the work of Strauss, critical legal studies would be simply this Nietzscheanized left—highly irrational, cantankerous, and rebellious but without real intellectual substance and content.

major challenge of academic left subcultures like critical legal studies: the complex operations of power enacted in the styles and standards, values and sensibilities, moods and manners, grids of seeing and structures of feelings, into which students are socialized and acculturated.

Critical legal theorists focus on the kinds of dispositions and the forms of discourse: but where do they gain their legitimacy? What makes them more acceptable than other kinds of styles, other kinds of grids, other kinds of structures of feelings<sup>6</sup> in the culture of critical discourse?

Based in part on the pioneering work of Michel Foucault,<sup>7</sup> oppositional intellectuals, including critical legal theorists, are not simply contesting prevailing paradigms in the academy, they are also investigating the historical origins and social functions of the kinds of standards and criteria used to evaluate paradigms, arguments, and perspectives in the culture of critical discourse. They must be able to construct a genealogy of the culture of critical discourse itself: when it emerges, what justifies the kind of standards invoked, and how those standards have changed over time. They are not merely displacing prevailing paradigms with new ones, but are raising deeper questions about the very standards and criteria themselves. These investigations highlight the often concealed ideological assumptions, the exclusions of certain styles of argument,<sup>8</sup> and the arbitrary character of the concrete results (as embodied in curricula and enshrined in exemplary legal scholarship). This kind of

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<sup>6</sup> By structures of feelings, I refer to the very intermediate levels of the existence in the culture of critical discourse. This "structure of feelings" is a term from the late Raymond Williams. Williams was trying to describe a mode of being in a culture which is different from that which one had experienced before entry into this culture of critical discourse in the academy. See, e.g., R. WILLIAMS, *MODERN TRAGEDY* (1966).

<sup>7</sup> See M. FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1977); Foucault, *The Subject and Power*, 8 *CRITICAL INQUIRY* (1982); FOUCAULT, *Truth and Power*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977* (1980).

<sup>8</sup> An example is that propositional forms have more status as opposed to narrative forms, and the issue then becomes why stories have less status than propositional forms of argument. Oppositional intellectuals question where that value originates.

intellectual interrogation is, in many ways, unprecedented in the academy because it not only criticizes paradigms, arguments, and perspectives but, more pointedly, it calls into question the very grounds upon which acceptable paradigms, good arguments, and legitimate perspectives are judged. This radical questioning views the present institutional arrangements of legal scholarship and education, along with their mediated link to the liberal status quo, as themselves impediments to the production of new perspectives and paradigms which are worthy of acceptance.

In short, academic left subcultures such as critical legal studies put forward metaphilosophical and meta-institutional inquiries that cast suspicion on the capacity of the academy to satisfy the conditions required for undistorted dialogue and uncoerced intellectual exchange. This incapacity exists precisely because of the ways in which the culture of critical discourse is already implicated in the ideological battles raging in society-at-large, ensconced in the political struggles of the day and partisan in these battles and struggles. These metaphilosophical and meta-institutional inquiries are primarily attempts to show how the forms of rationality dominant in the academy—and regulating of the practices of most academicians—are value-laden, ideologically-loaded, and historically contingent. In this way, critical legal theorists highlight the arbitrary content and character of the standards, styles, curriculum, concepts (for example, rules of law), and conclusions of legal scholarship and education.

Like Foucault, critical legal theorists examine diverse and multiple "micro-physics of power"—Foucault's term for the ways in which societies preserve themselves partly by encouraging intellectuals to be unmindful of how they are socialized and acculturated into the prevailing "regimes

of truth."<sup>9</sup> They overlook and ignore the ways in which the prevailing culture of critical discourse remains uncritical about itself, the ways in which the very invoking of relentless criticism, and how, in fact, the predominant quest for truth remains untruthful about itself. A first step toward a more thorough critique and a more truthful quest for truth is to accent the way dominant discourses construct regulative identities, forms of argument, modes of presentation, and ideological outlooks that preclude taking seriously alternative, and especially oppositional, identities, types of argumentation, and political perspectives held by those viewed as other, alien, marginal, and unconventional. This unprecedented kind of critique of the culture of critical discourse in the academy promotes a full-fledged historicist orientation and an explicit encounter with social theory. By historicist orientation, I mean the provisional, tentative, and revisable character of formulations that reflect the state of political and ideological conflict in society at a particular moment.<sup>10</sup> By an explicit encounter with social theory, I mean the particular understandings of the structural constraints—those of the state, economy, and culture- that shape and are shaped by legal practices. Needless to say, the critical legal studies movement focuses on how the undeniable realities of class exploitation, racial subjugation, patriarchal domination, and homophobic marginalization affect the making and enforcement of legal sanctions. Until now, legal discourse has not really focused on these issues. In the name of criticism, it has remained silent about objects that require serious critical investigation—the way in which the law has been shaped by Jim Crowism, the way it has been

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<sup>9</sup> "Regimes of truth" are the various ways in which distinctions between true and false, and legitimate and illegitimate are put forward, and ways in which these regimes of truth themselves have to be legitimate. Of course, one must then ask the next question: Who is going to legitimate the legitimators? This is ultimately, for critical legal studies, a political question.

<sup>10</sup> For example, the reason that a greater number of women attend law school today as opposed to previously reflects the larger political and ideological struggles that have transpired since the 1960s.

shaped by patriarchal forms of relations both in the private sphere and in the public sphere, and the way it has been shaped by the marginalization of gays and lesbians and so forth.

In the past, legal formalism and legal positivism have resisted the serious challenge of this kind of historicist and theoretical focus. Legal realism—that powerful pragmatic perspective inaugurated by Oliver Holmes and enacted in the works of Felix Cohen and others<sup>11</sup>—took an important step in this historicist and theoretical direction. Yet its amorphous notion of "experience" remained confined to immediate problems and practical solutions rather than structural deficiencies and fundamental transformative possibilities of society. In this way, critical legal studies goes far beyond earlier attempts to highlight the contingent character of the law. Academic left subcultures like critical legal studies tend to respond to the crisis of purpose among intellectuals by projecting the role of social critic within critical discourse. Such a role requires that one be equipped with not only a sense of history, but also with a broad knowledge of history—especially the new social histories that focus on those on the underside of traditional views of history. To be a social critic in legal discourse also requires that one be well-grounded in the classical and oppositional traditions of social theory—Marx, Weber, Durkheim, Simmel, Lukàcs, De Beauvoir, Du Bois, Parsons, Gouldner, Habermas, and others. And, of course, one must be well-versed in the past and present forms of legal discourse.

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<sup>11</sup> See, e.g., Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Llewellyn, *A Realistic Jurisprudence*, 30 COLUM. L. REV. 431 (1930).

I find the notion of legal scholar as social critic—best seen in the works of the late Robert Cover<sup>12</sup>—to be highly attractive. Yet to be a sophisticated and effective social critic requires intellectual and existential sources that fall far outside those provided by a typical elite undergraduate education and law school training. The major flaws of most of the work done by critical legal studies can be attributed to this truncated education and training. I shall examine briefly three basic flaws in the critical legal studies movement: the first is a dominant tendency to "trash" liberalism;<sup>13</sup> the second, a refusal to come to terms with tradition as both an impediment and impetus to social change; and the third, cultural distance from nonacademic prophetic and progressive organized efforts to transform American culture and society.

I have never fully understood the animosity and hostility toward liberalism displayed in much of the writings of critical legal theorists.<sup>14</sup> I find many of their criticisms of liberalism persuasive—such as the ways in which the language of impartiality, objective due process, and value-free procedure hides and conceals partisan operations of power and elite forms of social victimization. Yet the hostility may itself conceal a deeper existential dimension of the critical legal studies movement: namely, the degree to which it is a revolt against the liberalism of elite law schools. To put it more pointedly, most first-generation critical legal theorists are rebellious students of major liberal legal thinkers. And, like all such affairs, the central object of critique implicitly

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<sup>12</sup> The work of Robert Cover, a former professor of law at Yale University, was not simply interdisciplinary but de-disciplinizing. The very notion of "interdisciplinary" assumes that there are still such things as disciplines against which one traverses. De-disciplinizing assumes that one moves toward a problematic view and pulls from whatever sources are instructive, whether those sources be Marx, Old Testament studies, Judaic theology, popular culture, Kafka, Proust, or whatever.

<sup>13</sup> By "trashing" liberalism, I mean to delegitimize and demystify it and to describe it as just a cover for power.

<sup>14</sup> See, for example, the works of Duncan Kennedy, David Trubeck, and Mark Tushnet.

affects the very critique itself. My hunch is that one discernible effect is to fan and fuel, accentuate and exaggerate the ideological distance between the fathers and the progeny.

This distance has now become a rather nasty point of contention and confrontation due to the political polarization between the critical legal scholars and their critics in many law schools. What was once a rather mild Oedipus family romance has turned into a Clausewitzian affair, given the fierce struggle over tenure slots, administrative power, curriculum, and influence. The "trashing" of liberalism has played a noteworthy role in this escalating battle. On the other hand, serious conflict and contestation is inevitable between those who question the very rules of the game and those who claim that this interrogation itself is a rejection of the noble ends and aims of legal education.<sup>15</sup> In this sense, academic left subcultures of any sort are critical of the liberal academy. On the other hand, to "trash" liberalism as a political ideology in the modern world is to overlook its revolutionary beginnings and opposition potential—despite its dominant versions and uses to preserve the status quo. To ignore the ambitious legacy of liberalism and thereby downplay its grand achievements is to be not only historically forgetful but also politically naive. It is not only to throw the baby out with the bath water, but also to pull the rug from under the very feet of those who are struggling for prophetic social change.<sup>16</sup> Crucial aspects of liberalism inform and inspire much of the oppositional left activities here and around the world. To see solely the ways in which dominant versions of liberalism domesticate and dilute such oppositional activities is to view liberalism in too

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<sup>15</sup> For example, Richard Posner, Robert Bork, and others view critical legal studies as calling into question the very ends of Western civilization and the ends of traditional legal education. Thus, they conclude it ought to be pushed outside the academy completely.

<sup>16</sup> While liberalism in America is associated with the status quo, in South Africa, for example, it is still a revolutionary ideology.



monolithic and homogeneous a manner.<sup>17</sup> Unlike the powerful yet unpersuasive antiliberal perspectives of Alasdair MacIntyre<sup>18</sup> and the insightful yet unclear postliberal viewpoints of many critical legal theorists, I simply cannot conceive of an intellectually compelling, morally desirable, and practically realizable prophetic social vision, strategy, and program that does not take certain achievements of liberalism as a starting point. Reconceptualization of political obligation, participatory citizenship, and redistribution of wealth by civil and legal means indeed are required in a revising of this liberal starting point—yet this constitutes a radical democratic interpretation of liberalism, not a total discarding of it. In this sense, liberalism is an unfinished project arrested by relatively unaccountable corporate power, a passive and depoliticized citizenry, and a cultural conservatism of racism, patriarchy, homophobia, and narrow patriotism or neonationalism. In other words, leftist oppositional thought and practice should build on the best of liberalism, yet transform liberalism in a more democratic and egalitarian manner.

In his recent book, *Whose Justice? Which Rationality?*, Alasdair MacIntyre<sup>19</sup> laments the fact that "the contemporary debates within modern political systems are almost exclusively between conservative liberals, liberal liberals, and radical liberals. There is little place in such political systems for the criticism of the system itself, that is, for putting liberalism in question."<sup>20</sup> Yet after his

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<sup>17</sup> One danger in "trashing" liberalism is that it discourages historical analysis of liberalism's various forms. For example, although John Dewey was a democratic socialist for sixty-five of his ninety-two years, many think of him as just a liberal. His works, *The Public and Its Problems and Liberalism and Social Action*, go unread. See J. DEWEY, *THE PUBLIC AND ITS PROBLEM* (1927); J. DEWEY, *LIBERALISM AND SOCIAL ACTION* (1935). The political danger in "trashing" liberalism is that for people attempting to free themselves from institutional and structural forms of evil, liberalism might be a valuable resource they can invoke.

<sup>18</sup> See, e.g., A. MACINTYRE, *AFTER VIRTUE* (1981).

<sup>19</sup> A. MacIntyre, *Whose Justice? Which Rationality?* (soon to be published).

<sup>20</sup> *Id.* at 392

interesting and insightful reconstruction of the conceptions of practical rationality that inform the notions of justice in the Aristotelian, Augustinian, Thomistic, and Humean traditions, Macintyre provides us with no clue as to what a constructive antiliberal proposal for justice would be like. Similarly, much of the provocative and penetrating criticisms of liberalism put forward by critical legal theorists gives us little sense of what a desirable postliberal society would look like. The recent trilogy of Roberto Unger, *Politics Toward a Reconstructive Social Theory*,<sup>21</sup> indeed attempts to meet this challenge—and it is not surprising that he dubs his project a "superliberal" one which tries to capture the utopian, experimental, and democratic impulse that informed the early stages of liberal thought and practice.<sup>22</sup>

The second criticism of critical legal studies is its refusal to acknowledge the equivocal character of tradition. The powerful demystifying and deconstructive strategies of critical legal theorists tend to promote and encourage enlightenment attitudes toward tradition—that is, the notion that tradition is to be exclusively identified with ignorance and intolerance, prejudice and parochialism, dogmatism and docility. Yet as Hans-Georg Gadamer,<sup>23</sup> Edward Shils,<sup>24</sup> Antonio Gramsci,<sup>25</sup> and Raymond Williams<sup>26</sup> have shown, tradition can also be a source for insight and intelligence, rationality and resistance, critique and contestation. Partly owing to the available options in legal education, critical legal theorists tend to respond to liberalism's hegemony in the

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<sup>21</sup> R. UNGER, *POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987).

<sup>22</sup> This represents a major shift from his earlier work, especially *Knowledge and Politics*, in which he "trashed" liberalism. See R. UNGER, *KNOWLEDGE AND POLITICS* (1984).

<sup>23</sup> H. GADAMER, *TRUTH AND METHOD* (1976).

<sup>24</sup> E. SHILS, *TRADITION* (1981)

<sup>25</sup> A. GRAMSCI, *THE MODERN PRINCE AND OTHER WRITINGS* (1957); A. GRAMSCI, *LETTERS FROM PRISON* (1973).

<sup>26</sup> See R. Williams, *supra* note 6

academy by disclosing the various exclusions of the liberal traditions rather than reconstructing the creative ways in which oppressed and marginalized persons have forged traditions of resistance by appropriating aspects of liberalism for democratic and egalitarian ends. These appropriations not only force us to acknowledge the dynamic, malleable, and revisable character of a diverse liberal tradition, they also compel us to accent the way in which this tradition is fused with other oppositional traditions such as civil republican, communitarian, and democratic socialist traditions of subaltern peoples. In this regard, the relative silence of critical legal theorists regarding the constructive attempts of serious left thinkers in oppositional traditions—as opposed to the deconstruction of the canonical texts of the white liberal fathers—is quite revealing.<sup>27</sup> Needless to say, both activities are needed—yet a balance is required.

This imbalance is related to my third criticism: the paucity of sustained reflection by critical legal theorists regarding strategies and tactics for effective social change in the larger culture and society. By remaining captive to an implicit Foucaultian outlook—namely, enacting resistance in the form of incisive genealogies of the emergence of partisan and power—concealing liberal legal discourses that purport to be impartial, objective, and fair—critical legal thinkers usually have little to say about how this resistance can be linked to struggles for social change outside of the academy. As Foucaultian "specific intellectuals" who rest content with contesting the prevailing "regimes of truth" within their academic context, critical legal theorists do not specify how their significant

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<sup>27</sup> For example, while Malcolm X talked about Afro-Americans being victims of American democracy, just as the indigenous peoples of this country were victims of American democracy, the arguments that he put forth over and against America were nonetheless democratic arguments. This oppositional tradition is oftentimes ignored because it adds something else. It begins with "my condition, my culture which has been devalued and degraded" and so forth; it then links this into a discourse appropriated in part from the dominant tradition and systems. Of course, Martin Luther King, Jr., was a master at this movement, invoking both the very ideals of the country that victimized him and those with whom he was concerned.

effects of pedagogical reform are related to progressive activities of struggling peoples in nonacademic contexts. My claim is simply that the relative neglect of interest in and the interrogation of traditions of resistance of subaltern peoples encourages a lack of concern about and attention to strategies of social change beyond the academy. Note that I am not describing the intentions and aspirations of the critical legal studies movement, but rather the dominant practices of most of its figures.

My criticisms of this movement—put forward in a spirit of intellectual sympathy and political support—reflect a disenchantment with its Foucaultian orientation. These criticisms can be met best by a broadening of this orientation into a Gramscian perspective.<sup>28</sup> Such a perspective requires that critical legal theorists become public intellectuals—that is, thinkers who make significant interventions into the larger conversation that bears more directly on the destiny of American society. For too long critical legal theorists have put forward primarily academic critiques of the academy—critiques that further extend the authority of the academy while they attempt to delegitimize the academy. The paradoxical effects of these critiques inscribe the critical legal studies movement more deeply within the limits of the very academic styles and ethos it purports to change. There surely is some significance to these critiques, yet they remain highly limited without elaboration of their implications in the public sphere of intellectual exchange. Such an elaboration would result in the emergence of visible critical legal studies figures comparable to Noam Chomsky or Edward Said<sup>29</sup>—that is, figures who put forward views with which the larger society would have to reckon.

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<sup>28</sup> See A. Gramsci, *supra* note 25. Antonio Gramsci ranks among the most significant cultural theorists in the early part of the twentieth century. He produced a great deal of his writing while in Mussolini's prisons in Italy.

<sup>29</sup> See E. SAID, *THE WORLD, THE TEXT, AND THE CRITIC* (1983).

A Gramscian perspective also would require that critical legal studies attempt to become more grounded in the progressive sectors of the black, Latino, feminist, gay, lesbian, and trade union resistance efforts. This attempt to become more organic with traditions of resistance should be a mutually critical and empowering process. My hunch and hope is that one significant result of this process is that the critical legal studies movement will become more conscious of race and gender bias, homophobia, and nonacademic political struggle (as well as more appreciative of the oppositional potential of the liberal tradition) and that progressive black, Latino, feminist, gay, lesbian, and trade union groups will become more cognizant of demystifying, deconstructive, and class strategies of thought and action. This kind of mutual learning and solidarity building facilitates the shedding of intellectual parochialism and the overcoming of political isolation—a plight and predicament shared by most progressive groups and academic left subcultures like the critical legal studies movement.

In conclusion, a Gramscian perspective is more easily enunciated than enacted, and the implicit Foucaultian orientation of most critical legal studies figures impedes such an enactment. Furthermore, the vast depoliticization of the American populace and the minimal financial resources for creating and sustaining mobilizing and organizing efforts contribute to the unlikelihood of the emergence of insurgent progressive social movements. Yet the prevailing desperation and even desolation of the American left—both in and out of the academy—is no excuse for isolation and insularity. Rather, it makes even more imperative efforts regulated by a Gramscian perspective.

The critical legal studies movement is one sign of hope in a period of widespread narrow conservatism, nationalism, cynicism, and defeatism. But its intellectual and political potential remains truncated as long as it refuses to make a Gramscian leap into an unpredictable future.