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A Hurried Perspective on the Critical Legal Studies Movement: The Marx Brothers Assault the Citadel

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A HURRIED PERSPECTIVE ON THE CRITICAL LEGAL STUDIES MOVEMENT: THE MARX BROTHERS ASSAULT THE CITADEL

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It is clear to me that this year's symposium is the main event for which the previous two meetings were preparatory sparring matches. On those occasions, we took on the flyweights of the left, the enervated and dazed liberals, and according to my tally we scored TKO's both times. This weekend, we are pitted against the burly heavyweights of the left, the critical legal studies movement[1] and its coterie of more or less radical leftist scholars. I trust we have all done our roadwork and sharpened up our timing on whatever punching bags are locally available. So let us come out fighting and endeavor to strike a few blows for liberty, which is our cause.

I will pose, and subsequently attempt to answer, the following questions: Just what sort of people are we confronting? Where did they come from and why are they coming at this particular time? And finally, how can we conservatives most effectively join ranks and confront them?

The title I have chosen for this talk suggests that although most of the people associated with the critical legal studies (hereinafter CLS) movement derive their principal inspiration from that prince among Nineteenth-Century windbags, Karl, they cannot be wholly understood without at least passing reference to those princes among Twentieth-Century comics, the brothers Groucho, Chico, and Harpo.[2] The CLS crowd shares the general humorlessness of the left. Their stridency and heavy-handedness prevent them from attaining anything like the wit of the Marx brothers, but in some of their writings there is a Groucho-like propensity for ridiculing the conventions of bourgeois norms, something that has always gone down very

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1. *See generally* Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983).

2. The Marx Brothers were theatrical comics prominent during the 1920s, '30s and '40s for their combination of vaudeville, burlesque, and satire, and were best known for their films *Animal Crackers* (1930), *Duck Soup* (1933), *A Night at the Opera* (1935), and *A Day at the Races* (1937). *See* A. EYLES, THE MARX BROTHERS: THEIR WORLD OF COMEDY (1966).

well with the privileged scions of the bourgeoisie. Consider, for example, the following excerpts from the *Lizard* (this is from an article entitled *Cultural Terrorism and the Faculty Cocktail Party*):[3]

> The law faculty cocktail party—a trivial occasion, exchange pleasantries then leave—nothing to do with you. But there's more to it. It's a political event—a fantasy of community. It's like people waiting for a bus with people who have been waiting for the same bus for years, and still just saying good morning . . . . The group ritual, the rules. Rules assigning costumes. We're dressed alike because we're a shared project, group self-recognition distinct from the bartender's serving jacket. Proper forks—conversations shot through with fork selection— don't use curse words, not here, at the production of group identity. Stylized group interaction right down to what's said. Hard to remember anything particular. The weather. Sports. Bullshit about teaching, not serious—that would be work, or politics. Just enough to ensure the exclusion of the other. Like most of the women there with faculty husbands . . . . On a spectrum of parties ranging from artist parties and black folks' parties to astronauts' parties, the faculty cocktail party is real close to how astronauts must party. No music, no conversation where any emotion is at stake, this is the head, not the body, this group is rational, scientific, not passionate and physical, manager, not worker; the fantasy of community built on the identification as scientists so the parties project rationality through and through, even "socially" because you can't imagine brain surgeons getting sweaty on the dance floor, it's the law/politics distinction. Fear and loathing of the mob and sexuality. This is cultural terrorism. Civility here means accepting the structure in which civility occurs. Turning law schools into genuine places for community means smashing all this stuff. In every crevice. Academic freedom cannot coexist with social rape.

You will probably find the quality of this pointed satire something short of Swiftian. What humor there is in it is not what the fevered author intended. Not all, however, is sophomoric fun and games with the CLS crowd. For those of you who may be unacquainted with the characteristic CLS mindset and mode of expression, let me give you brief excerpts from two of the

3. The *Lizard* is a broadside issued by the "True Left Faction" of the CLS movement devoted to reporting on various doings at the most recent annual meeting of the Association of American Law Schools.

more earnest effusions. The first is from an essay entitled *Torts* by Richard L. Abel:

> It would be a mistake to interpret legal phenomena solely in terms of their instrumental effect upon materials conditions. Tort law is also significant in the reproduction of bourgeois ideology. The fault concept upon which that law was built reinforces a central element of bourgeois ideology: individualism. Predicating liability upon the defendant's fault and denying recovery because of the victim's fault perfectly express the bourgeois belief that each person controls his or her fate. And, indeed, the bourgeoisie experience this control in their own lives—in their work, their consumption, and their environment—an experience epitomized in the contemporary *sauve qui peut* obsession with personal physical, mental, and emotional well-being . . . . Tort law offers symbolic support for inequality as well. By compensating owners for property damage, it upholds the notion of private property and its concomitant, *i.e.*, that a person's worth, as a tort plaintiff, is proportional to the value of the property he owns. By preserving the income streams of those who suffer physical injury, and of their dependents, tort law affirms the legitimacy of the existing income distribution.[4]

I take it that the author expects his readers to be scandalized by the nefarious spectacle of plaintiffs suing for property damage and recovering compensation for the value of the property damaged. What else, one might ask, should the measure of recovery be? Intended to incite equal indignation are the following contentions from an essay by Peter Gabel and Jay M. Feinman:

> The recent rise of right-wing forces in the United States has been brought about in large part through the shaping and manipulation of collective fantasies. Among the most powerful of these fantasies is a resurgence of what one might call the utopian imagery of freedom of contract. As Reagan "lifts the government off of our backs," we are told that we all will once again be able to stand as free and equal individuals ready to take whatever action serves our respective self-interests. The image conveys a sudden release of personal power, as if it had only been "government" that had been obstructing the realization of our individual desires. At the same time, the image also conveys a new feeling of social solidarity, a feeling that once that obstruction is removed, we Americans will return to a time when a deal was a deal, when

4. Abel, *Torts*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 185, 194 (D. Kairys ed. 1982).

> as plain-speaking people we could hammer out our collective destiny through firm handshakes enforceable in a court of law. For this resurgent ideology to enjoy a temporary measure of success, it makes no difference that it is based upon a lie. The truth is that those of us living in the United States today cannot actually achieve our desire for increased personal power, for freedom, and for genuine social connection and equality so long as we are trapped within ubiquitous hierarchies that leave us feeling powerless, alienated from one another, and stupefied by the routines of everyday activities.[5]

The excerpts are, I think, fairly representative samples of what passes for scholarship among CLS devotees, though the best of them are not always given to such leaden, moth-eaten, Marxist boilerplate. In fact, apart from their shared antipathy toward American law and society, it is difficult to distill much that united the sublime if impenetrable abstractions of Roberto Unger,[6] the erudite if tendentious historicism of Morton Horwitz,[7] the sometimes ingratiating hoydenism a la Chairman Mao of Duncan Kennedy,[8] and the strident doublethink of others who will go unnamed lest I be accused of resorting to the arguments *ad hominem* or *ad feminam*.

The works of most CLS authors boil down to an oscillation between, or amalgamation of, the shopworn staples of left liberalism and the moldy tenets of Marxism. A characteristic motif is a peremptory dismissal of all liberal reforms as "mere tinkering" with a legal and social order that is malignant root and branch. Inveighing against individualism, which they often refer to as "privatism," they nevertheless profess concern for civil rights and civil liberties. They are naturally dismissive of property rights, tending to view them as means for maintaining structures of domination and illicit hierarchies.

The Marxist borrowings of the CLS movement tend to savor more of the early, Hegelian, utopian Marx; the Marx so assiduously magnified by Sidney Hook[9] and other social democrats in

5. Gabel & Feinman, *Contract Law as Ideology*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 172 (D. Kairys ed. 1982).

6. *See generally* Unger, *supra* note 1.

7. *See generally* Horwitz, *The Historical Contingency of the Role of History*, 90 YALE L. J. 1057 (1981).

8. *See generally* D. KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION HIERARCHY: A POLEMIC AGAINST THE SYSTEM (1983).

9. *See generally* S. HOOK, REVOLUTION REFORM AND SOCIAL JUSTICE: STUDIES IN THE THEORY AND PRACTICE OF MARXISM (1975).

their poignant effort to salvage him from his Leninist reincarnation; the pre-*Manifesto* Marx who waxed lyrical in *The German Ideology* about how everyone in the post-revolutionary millenium would be a fisherman in the morning, a hunter in the afternoon, a critic after dinner, and a cattle-raiser at night (or, as Duncan Kennedy would have it, a law professor in the morning and a janitor in the afternoon). Of course, all of this was repudiated as romantic nonsense by Marx himself when he later got down to cases about the necessity for the liquidation of the bourgeoisie.

Although leftists existed in the legal academy long before the recent emergence of the CLS movement, there were probably never more than an isolated handful at any one time. CLSers, however, differ from their predecessors in several important respects. First, traditional leftist lawyers and law teachers tended to focus their attention almost exclusively on public law issues. The CLS scholars, by contrast, are at least as attentive to private as to public law. In fact, one hallmark of their work is their general rejection of the conventional distinction between the private and the public spheres.[10] More particularly they insist that American law, in addition to being racist, sexist, and basically not nice, is but a seamless web of repressive rules and fraudulent methodological sleight of hand, oppressive to all except the few standing at or near the apex of the hierarchical structures which they claim pervade American society. No rule or doctrine, however trivial or technical, escapes their baleful scrutiny for long. I do not know whether articles entitled *Last Clear Chance and Capitalist Expropriation* or *Keeping Women in their Place: The Doctrine of Relation-Back of Amendments of Pleadings as a Tool of Patriarchal Repression* have yet appeared, but if not, we probably do not have long to wait.[11]

A second obvious difference is that the CLS movement constitutes a remarkably compact generational cohort. With few exceptions, it is composed of anti-war, student radicals who, fifteen years after their halcyon days, are now accoutered with tenure and other perquisites of a system they affect to despise. Their acceptance by this system seems only to have heightened

10. *See generally* Mnookin, *The Public/Private Distinction: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429 (1982).

11. *See* D. KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY (1983); Abel, *A Socialist Approach to Risk*, 41 MD. L. REV. 695 (1982); Abel, *Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, 15 L. & SOC. REV. 631 (1982).

their "status anxiety"[12] about demonstrating that they have not been co-opted by the success-oriented, that they remain pure of heart and reflexively anti-American.

Thus, their publicly reported political views remain almost ludicrously tendentious. One would expect to find more balance and fair-mindedness in Kremlin propagandists. They are like auditors who take account only of liabilities and debits, while totally ignoring offsetting assets and credits. In excoriating the United States for its reactionary alliances, they harp endlessly on Chile and El Salvador, but never mention the unstinting military and economic support our country has given Israel, which in the kibbutzim, has probably come closer than any other state to achieving the kind of egalitarian community the CLS crowd is always prattling about. The nearly incredible political irresponsibility of these people is largely due to the fact that the vast majority of them have spent their entire post-adolescent lives in an academy presided over by endlessly apologetic, no-enemies-on-the-left liberals with whom regularly traducing the United States is a sure means of attracting a serious and fawning following.

There is at least one other important factor which helps to account for the emergence of the CLS movement over the past decade. Changes in the academic job market have lured into law teaching people whose intellectual style and temperament distinguish them sharply from those who traditionally entered this field. In the past, nearly everyone who went to law school did so with the aspiration of becoming a practicing lawyer, or perhaps a businessman or government official. Law professors generally regarded themselves as lawyers who happened to teach, and retained a close sense of identification with the profession throughout their academic careers. Their scholarship was largely directed toward the needs and interests of practicing lawyers and judges. Even the most casual perusal of contemporary law journal literature, particularly that of journals and reviews affiliated with the most prestigious universities, will reveal how much this has changed.

About fifteen years ago, university faculty positions in the humanities and social sciences started becoming extremely scarce. At about the same time, applications to American law schools

12. *See* L. TRILLING, BEYOND CULTURE: ESSAYS ON LITERATURE AND LEARNING (1965).

began to soar, making positions on law faculties plentiful. Many individuals originally bent on a teaching career in history, philosophy, sociology, or literature went to law school to fulfill their academic inclinations as law professors.

There is, of course, nothing sinister about this. In fact, the law school world has been vastly enriched by the influx of people well versed in other disciplines. They have been substantially responsible for one of the most fruitful recent developments in legal education: the proliferation of sound and rewarding interdisciplinary courses. Not all members of this new breed of law professors were or are political leftists, nor are they by any means invariably associated with the CLS movement.

Many of them are, however, steeped in what Lionel Trilling some decades ago called the "adversary culture" of American intellectuals,[13] a cast of mind and attitude often shared by academics in the humanities and social sciences, who think of themselves as intellectuals in the European sense. They display, almost in the manner of the livery of their vocational guild, an attitude of contempt and moral superiority toward the "business culture" of the United States, toward commerce, technology, and entrepreneurship, and hence toward the practicing bar which they perceive to be in thralldom to these values and interests. They tend to regard themselves as being above serious concern with the mundane practicalities of the worlds of trade, industry, and finance. In their teaching, and even more emphatically in their scholarship, there is a marked proclivity towards highly abstract theorizing and stridently censorious moralizing. They often display marked frustration with the earthy, resiliently pragmatic texture of the common law tradition, which has shown a hardy resistance to the assaults of theoreticians and moralizers over the many centuries since command of the common law was decisively wrested from the clergy and the universities by those eminently practical men of affairs, the benchers and barristers of the Inns of Court.

I will conclude with a few thoughts about how we as conservatives might best respond to the challenge posed by this new brand of leftism within the legal academy. First, it is vitally important that we give not even the appearance of espousing the

13. *Id.*

naive and untenable position that the law is one thing and politics, broadly conceived, wholly another. We, of course, reject the Marxist contention, which has been adopted by the CLS movement, that law is indistinguishable from politics and that courts are nothing but legal arms of the ruling class. But to pretend that law and politics, in the grand tradition of political thought, are or should be totally unconnected would only lend substance to our opponents' caricature of what we stand for. The very idea that law should be something other than a political force is, after all, itself a political idea. It is characteristic of the leftists to set up a strawman and then claim to have exposed a hoax when they succeed in knocking it down. One of their favorite strawmen, constructed out of their misperception of our position, is the view they attribute to us that law exists and functions in a kind of aseptic isolation from political values. Surely no group calling itself the Federalist Society could seriously ascribe to such a view. Rather, we know, as did the American Federalists, that the legal order is shaped by, and draws sustenance from, political values, not in the narrow and ephemeral partisan sense, but in the larger sense of a nation's vision of the good society and its constituent elements. This is its glory, not its shame.

Much of socialism's appeal, such as it is, functions on the level of assertions about politics and morality. If we are not to be "struck dumb by the least cliches of socialism" (to borrow William Buckley's phrase), we must be prepared to grasp that nettle, and not seek refuge in narrow professionalism. In this respect we are well-girded for the struggle by the inspiring example of the American Federalists, many of whom were not only fine lawyers in the professional sense, but also great practitioners of politics in the most elevated meaning of the term. Surely they furnish proof, if proof be needed, that lawyers who are broadly cultivated and well-versed in history and philosophy can think capaciously as well as rigorously, thereby enhancing their contribution to the times in which they live.

Second, however highly one might esteem the contributions of the law and economics scholars, conservatives must no longer leave to them the exclusive task of articulating our case. We must demonstrate that conservatism stands for a good deal more than allocational efficiency. As was once said, man does

not live by bread alone. [14] This seems particularly true in societies such as ours where an abundance of bread and other materials things is so often taken for granted. Even successfully demonstrating that socialist prescriptions would shortly reduce ours to an Albanian standard of living might not make our case with those with whom we must make it: the vast majority of law students and young lawyers who consider themselves neither radicals nor conservatives. However synthetic their strident moralizing, we must not abandon the high ground of moral philosophy to our opponents.

Third, I commend to you a warning given by that great schoolmaster of all American conservatives, Russell Kirk, that we beware of what he called the chronic vice of conservatives, self-serving complacency, which often takes the form of obdurately defending the indefensible.[15] We must guard against the natural tendency to react to the extravagant assaults from the left with extravagant defenses of the status quo, by which we would become a mirror image of what we oppose. We should not reflexively deny that there exist in the United States, as in all nations, occasions of serious injustice, that there are inequalities of condition impinging on equality of opportunity, and that much suffering and distress have gone unrelieved. After all, much of our quarrel with the left concerns how these shortcomings can best be remedied without sacrificing liberty, and not the question of whether they should be remedied.

In waging our struggle, we will labor under one important disadvantage, that of seeming to be in a defensive posture. Given the times in which we live, the polemic and forensic advantage always appears to lie with those who are on the attack and who promise brave new worlds. Against this, however, we enjoy at least one great advantage: the propositions about law and the nature of the good society for which we stand do evoke fortifying resonances from the diverse traditions of this country. Not the least of these is the legacy of the American Federalists of which this Society has constituted itself a combative conservator.

14. *Luke* 4:4.
15. R. KIRK, THE CONSERVATIVE READER xxiii (1982).