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I. Introduction

The Critical Legal Studies ("CLS") movement has, in less than ten years,[1] established itself as one of the more formidable movements in legal and constitutional analysis. That it is less than ten years old makes it by definition new wave. The claim that it constitutes a rebirth of utopian socialism is made on the basis of similarities that can be found between CLS and the utopian socialism of Fourier and Owen. One could certainly point to a number of radical thinkers other than Fourier and Owen, including Babeuf and Saint-Simon, for purposes of comparison. As this author reads CLS literature,[2] however, with its emphasis on community, its attacks on liberalism and individualism, its critique of the law and the legal order, and its challenge to the social hierarchy and demand for a fundamental change in human relations, the visions of Fourier and Owen spring to mind. In both one can see an emphasis on community, an interest in social, or collective, happiness as opposed to individual

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1. The movement dates generally from 1977.

2. Some of the leading articles in CLS literature are as follows: UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY (1976); Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983); Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601 (1977); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979); Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623 (1984); Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411 (1981); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1981); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983). For a very useful introduction to CLS and a selection of representative articles, see THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982).

happiness, a critique of social hierarchies except, perhaps, those based on age, and a challenge to laissez-faire capitalism and liberal democracy. In addition, both movements maintain, in general, that people are by nature good, that they have been corrupted by society, and that changes in the social environment are necessary to restore the natural goodness inherent in human beings. The purpose of this Article, however, is not to defend a thesis which argues that CLS constitutes little more than a re-awakening of a political pipedream.

This author believes that an article finding parallels between the late eighteenth and early nineteenth century utopian socialist thought of Fourier and Owen and the late twentieth century phenomenon of CLS would prove enlightening. Nevertheless, the goal of this Article is less ambitious. Its purpose is twofold: (1) to define and to delineate a set of characteristics that, taken together, explain the overriding philosophy of CLS; and (2) to offer, from a general perspective, some criticisms that strike at the fundamental philosophical themes of CLS. It is the contention of this Article that, unless CLS modifies its goals and desires, its fate will parallel the fate of Fourier's Brook Farm and Owen's New Harmony.[3] If CLS continues its assault on society, including society's legal order, at the same level of intensity it has demonstrated over the past five years, then it is possible that the movement will fade into a minor chapter in a historical treatise on anachronistic approaches to social organization based on visions of utopian socialism. This unfortunate result would prevent a serious consideration of those CLS claims that are worthwhile. Thus, to avoid anonymity, CLS must modify its charges, form alliances, and remain content with piecemeal gains. To provide support for this claim, it is first necessary to examine CLS philosophy.

II. The Theory

While CLS literature is quite varied and diffuse, it is possible to describe generally common strands of CLS theory. Inasmuch as CLS claims that traditional legal scholarship at its best constitutes a futile effort to shore up a disintegrating and moribund philosophy (liberalism) or at worst an illegitimate and counterproductive quest for the legitimacy of judicial review,[4] some effort must be made to organize the leading issues inherent in this relatively nascent move-

3. *See* E. WILSON, TO THE FINLAND STATION 102-15 (1972).

4. Brest, for example, writes: "I shall argue that the controversy over the legitimacy of judicial review in a democratic polity . . . is essentially incoherent and unresolvable." Brest, *supra* note 2, at 1063; *see also The Politics of Law*, *supra* note 2, at 4, and articles by Tushnet, *supra* note 2.

ment. Rather than attempt to catalog CLS themes,[5] this Article will set forth narratively the theory emerging in CLS literature. At the end of that narrative, a summary of the leading ideas will be presented.

CLS focuses its major analytical efforts on liberalism in an effort to delegitimize, demystify, unmask, or trash it.[6] "The Critical Legal Studies movement is not committed at any level to liberalism."[7] Analytically and historically, liberalism refers to the tradition of political philosophy rooted in the social contract theories of Hobbes, Locke, and Hume. Phillip Johnson describes the tradition as follows:

> Liberal political theory in this sense assumes that society is composed of autonomous individuals whose values are based upon subjective desires. It aims not to transform those values but to accommodate them through institutions like the free market, majority rule, collective bargaining, the social contract, and the United States Constitution. It assumes that a society made up of such individuals has common values, or at least can agree on procedures to resolve value conflicts when they do exist.[8]

Mark Tushnet provides the following description:

> In its unadorned Hobbesian version, liberal theory begins with the premise that each of us desires as much as he or she can obtain. We are inclined to grasp everything within reach, without regard to the desires or interests of others. Nevertheless, we recognize that our desire for more will generally be thwarted in the war of all against all. Liberal theory proposes that we solve this dilemma by surrendering some of our autonomy to the state in exchange for security of our possessions. That surrender creates the new danger, however, that the state will exercise the power that we give it in ways that reduce both our possessions and our security. The rule of law is our protection against the state. The state must be constrained by rules that are independent of the desires of those charged with applying them in order to protect individual autonomy and prevent the state from becoming another weapon for partisans to use in the general war.

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5. Louis B. Schwartz has already compiled such a catalog. *See* Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413 (1984).

6. These terms are used interchangeably to capture the idea that liberalism, and especially liberal legalism, has been used to cover up — and contribute to — inequalities, inequities, and injustices and to perpetuate the status quo. For a detailed discussion of liberal legalism, see *infra* notes 37-69 and accompanying text.

7. Tushnet, *Critical Legal Studies*, *supra* note 2, at 627.

8. Johnson, *Do You Sincerely Want To Be Radical?*, 36 STAN. L. REV. 247, 256 (1984).

> The acquiescence of individuals to the liberal rule of law depends upon their continued unshakeable faith in its objectivity. Thus the conflict between objectivity and subjectivity cannot readily be confronted within the legal sphere without undermining liberal society itself.[9]

Thus, there are contradictions in liberalism that it is incapable of overcoming or satisfactorily resolving and these contradictions will eventually be its undoing. One of the tasks of CLS is to describe these irresolvable contradictions. For example, the liberal tradition exhibits contradictions between individual and community, subjectivity and objectivity, active rights (rights to liberty) and passive rights (rights to security), and, for purposes of constitutional interpretation, a commitment to democracy and an endorsement of the antidemocractic practice of judicial review. For clarification purposes, a brief description of two of these contradictions of liberal theory will indicate why they are irresolvable.

Since Hobbes, the liberal tradition has focused attention on the individual. Indeed, social contract theory begins with the assumption that the state of nature is such that each person is his own lawmaker, and that life is "solitary, poor, nasty, brutish and short."[10] In this state of nature, to have all and do all is lawful for all.[11] In such a state, life is governed by a right of nature that allows individuals to use whatever is within their power to preserve themselves. Ultimate protection, however, can eventually be seen residing in a community of individuals sharing equally in the distribution of benefits and burdens of social life. One might ask how a collection of individuals can ever come to share equally in communal life. For that to occur, individuals must be transformed into communitarians with a focus on communal rights and responsibilities rather than on individual rights and responsibilities. Liberal theory, unfortunately, remains committed ideologically and philosophically to the concept of individual rights. Thus, liberalism will never be able to reconcile the individual-community dichotomy. After all, is it not a contradiction to speak of a community of individuals?

The same general difficulty holds for the tension between active rights and passive rights. There are, interestingly enough, two problems here. First, these rights pose a conflict for the individual itself. For example, the individual wants the liberty (active right) to

9. Tushnet, *Legal Scholarship, supra* note 2 at 1206-07.
10. T. HOBBES, LEVIATHAN 82 (M. Oakeshoot ed. 1960).
11. *See generally id.* at 83-84.

do whatever he wants without outside interference. By the same token, the individual wants to be sufficiently secure (passive right) so that he can do whatever he wants to do. But, if one individual is secure enough to do whatever he wants to do, then a second individual may not be able to do whatever she wants to do. Security, however bounded, precludes unbounded liberty. Similarly, if one's liberty is unbounded, then he or she will not have sufficient security to exercise that unbounded liberty. This conflict within the individual is a conflict of liberalism. Once again, it is the liberal emphasis on the individual that generates this irresolvable conflict. Second, these rights pose a conflict between individuals within society. For example, the more passive rights *A* has, that is security, the fewer active rights, that is, liberty, *B* has. For every liberty *A* has, *B* has a corresponding insecurity, and vice versa. Each individual wants both freedom and security. For every freedom one person has, however, someone else lacks security. Can this dilemma be resolved? It cannot be resolved within the constraints of liberalism for that tension is part of the theoretical landscape of liberalism. Once again, people must overcome liberalism if they expect to lead rich, meaningful lives. Indeed, there is a sense in which a society must go beyond freedom and security if its inhabitants expect to live a life that is distinctly human.[12]

The liberal tradition since Hobbes, however, has made numerous efforts to balance, if not resolve, these ineluctable dualities. The results have always been the same, namely, the suppression and manipulation of humanity and the deification of the status quo behind a veil of rationality and objectivity. CLS contends that

> the liberal approach [to social justice] tends to rationalize oppression rather than to cure it. This is because liberals underestimate the degree of social conflict and the extent to which the privileged classes can manipulate "neutral" governmental processes to their own advantage. Liberals also make an arbitrary distinction between public and private compulsion, which fosters an illusion that people are free when government is restricted. Once the smoke-screen of liberalism has been lifted, we will recognize the underlying oppression and alienation inherent in modern society, and then we will become able to conceive of new forms of human association that do not involve domination and hierarchy.[13]

12. In this context it would be worthwhile to compare B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1972).

13. Johnson, *supra* note 8, at 256-57.

The way in which CLS lifts the liberal smoke-screen is by taking an area of law, or specific legal doctrine or concept, and exposing the contradictions and questionable assumptions implicit in the liberal analysis of that area of law or with respect to that particular legal doctrine, theory, or concept. The only way to unveil the liberal mask is to "step outside the liberal paradigm"[14] and focus on "concrete areas of law, unpacking them, and exposing their particular presuppositions."[15] Some of the most interesting CLS work has been done in pursuit of that goal.[16] The following three examples serve to elucidate the kind of analysis and conceptual work in which CLS is engaged.[17]

David Kairys, in his essay *Legal Reasoning*,[18] seeks to elucidate the idea of legal reasoning and one of its most traditional concepts, *stare decisis*. Legal reasoning, for Kairys, constitutes little more than a clever technique by means of which the true nature of legal decision-making, that is, law as politics, is buried. Commenting on the Supreme Court decision in *Hudgens v. NLRB*,[19] Kairys writes: "There is no legal explanation in any of this; the law has provided a falsely legitimizing justification for a decision that is ultimately social and political."[20] In essence, "[t]he problem is not that courts deviate from legal reasoning. There is no legal reasoning in the sense of a legal methodology or process for reaching particular, correct results."[21] Appeals to *stare decisis* provide the legal system with an appearance of neutrality, objectivity, and quasi-scientific standing.[22] That appearance continues to provide deception for the reality, namely, that the exercise of law is primarily a political act. As stated by Kairys:

> In sum, *stare decisis*, while integral to the language of legal discourse and the mystique of legal reasoning, serves a primarily ideological rather than functional role. Nor is there any more validity to the notion of legal reasoning when the source of law

14. Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1237 (1981).
15. *Id.*
16. *See supra* note 2.
17. *See* Kairys, *Legal Reasoning*, in THE POLITICS OF LAW 11 (D. Kairys ed. 1982); Klare, *Critical Theory and Labor Relations Law*, in THE POLITICS OF LAW 65 (D. Kairys ed. 1982); Rudovsky, *The Criminal Justice System and the Role of the Police*, in THE POLITICS OF LAW 242 (D. Kairys ed. 1982).
18. Kairys, *supra* note 17, at 11.
19. 424 U.S. 507 (1976).
20. Kairys, *supra* note 17, at 14 (emphasis in original).
21. Kairys, *Introduction*, in THE POLITICS OF LAW, 1, 3 (D. Kairys ed. 1982).
22. *See* Kairys, *supra* note 17, at 16.

> is a statutory or constitutional provision or the language of an agreement. Courts determine the meaning and applicability of the pertinent language; similar arguments and distinctions are available; and the ultimate basis is a social and political judgment. Indeed, even the facts relevant to a particular controversy (largely reduced to uncontroversial givens in law schools) are not capable of determination by any distinctly legal or nonpolitical methodology. Law is simply politics by other means.[23]

Karl Klare demonstrates the analytical and conceptual program of CLS in his essay "*Critical Theory and Labor Relations Law.*"[24] Klare maintains that, while the law has protected workers' rights in some areas, that protection has come at the expense of worker autonomy in other areas.[25] It appears that workers were once asked the following kind of question: Would you rather have certain rights protected, such as those relating to health, safety, job security, and decent pay (terms and conditions of employment) or would you prefer the opportunity to exercise freedom in the industrial marketplace? Such an offer would clearly constitute a bifurcation and as such it is illogical. After all, why is it that workers cannot have freedom and security? Klare demonstrates the role of CLS in uncovering the hidden agenda of law's participation in human affairs or in unveiling the unconscious reality that has developed with the unwitting support of law.

> The endeavor [of CLS] is to uncover the moral and political vision embedded in the doctrine [of labor law], the values and images of justice and workplace rights that the [legal] cases evince . . . . An effort of this kind reveals that labor law is animated by a powerfully integrated set of beliefs, values, and political assumptions, liberal political assumptions. The labor movement, or at least much of its leadership, has to a large extent internalized this vision. Labor law values form an aspect of the collective unconscious of the American labor movement. Many labor leaders accept a set of definitions of what is possible and desirable in the workplace that stands as a barrier to industrial freedom.[26]

Thus, labor law, and specifically collective bargaining, is analyzed

23. *Id.* at 16-17. In another essay in the same book, Kairys takes the same basic approach, namely, that law serves to cover up the social and political reality of what is going on. One of the concepts under scrutiny in this essay is that of the "clear and present danger" standard. Kairys, *Freedom of Speech*, in THE POLITICS OF LAW 140 (D. Kairys ed. 1982).

24. Klare, *supra* note 17.

25. *See id.* at 70-72.

26. *Id.* at 73.

and criticized "to progress toward freedom in the workplace."[27] After all, "the collective bargaining agreement is the legal form by which organized employees consent to their own domination in the workplace."[28]

David Rudovsky's "*The Criminal Justice System and the Role of the Police*"[29] provides, in part, a CLS analysis of police practices in contrast to contemporary public opinion. For example, regarding police conduct, "the popular perception is not of an uncontrolled police force but rather of police who are handcuffed by the courts, thus allowing the crime rate to spiral."[30] In an all-too-short essay, Rudovsky outlines the bankruptcy of that perception. He argues that the court-imposed limitations on police power, such as that exercised in *Miranda v. Arizona*[31] and *Mapp v. Ohio*,[32] are conveniently and cleverly sidestepped by police, with the assistance of law. Yet the public perception that police are hamstrung in their efforts to do their job remains. For example, the exclusionary rule is perceived as a threat to achieving proper police protection. Rudovsky writes:

> The attack on the exclusionary rule is an example of the way the public's perception of the criminal process has been consciously manipulated. The distortion of the actual impact of this rule on conviction rates and (if, in fact, any relationship exists) on public safety diverts the focus from the illegal police conduct and leads the public to believe that constitutional principles are too dangerous to enforce.[33]

It is equally difficult to bring and to win law suits against police or to initiate criminal prosecution of police. All in all, the legal system, even while maintaining the guise of a liberal proponent of the underdog, serves to secure and to perpetuate the status quo:

> No one can dispute the fact that there are some particularly abusive police, but the failure of the criminal justice system to provide meaningful controls on the exercise of state-sanctioned force should be understood as a deliberate political judgment to free the police to control the streets and enforce the status quo. This policy in turn results in the subordination of equality and fairness to the preservation of order.[34]

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27. *Id.*
28. *Id.*
29. Rudovsky, *supra* note 17.
30. *Id.* at 246.
31. 384 U.S. 436 (1966).
32. 367 U.S. 643 (1961).
33. Rudovsky, *supra* note 17, at 247.
34. *Id.* at 250.

Once unmasked, liberalism, or as Tushnet has irreverently called it, "the party of humanity,"[35] will be seen as a movement which has managed to formalize and to institutionalize the very social structures that makes the attainment of its aims impossible. Liberalism has not, however, done this consciously and deliberately; the liberal tradition embodies high ideals and manifests good intentions. It fails to achieve meaningful change in human relations primarily because it cannot escape the aforementioned contradictions it has created for itself. After all, it is now virtually four hundred years since Hobbes, Locke, the Protestant Reformation, and the Enlightenment gave shape to the liberal dreams of secularism, toleration, liberation, democracy, reason, and laissez-faire economics. Today, life can still be characterized as one of domination and exploitation, as exhibited throughout our social order and in our social relations. Society may have more things — life may be materially better — but it has failed to transform social relations. While one may argue that capitalism fosters relations of dominance and dependence, liberalism is the primary theoretical construct that must be unmasked because liberalism reinforces economic realities by encouraging belief in society's ability to "tinker" with the system to improve it. No amount of "tinkering," however, will change the fundamental structure of today's society. That is why liberalism must be unmasked, delegitimized, demystified, and trashed. According to CLS, the tenets of liberalism must be critically examined so as to recognize that it is liberalism that distorts and masks reality; it is liberalism that provides false hopes and holds out empty promises to people in search of a more humane society. Liberalism does not merely fail to solve society's problems; it actively contributes to them. Liberalism must be trashed and delegitimized so that society can begin to achieve a more meaningful sense of self, community and justice. Freeman, for example, explains the goal of trashing as follows:

> The goal of trashing, however, is not liberation into nihilist resignation . . . . The point of delegitimation [trashing] is to expose the possibilities more truly expressing reality, possibilities of fashioning a future that might at least partially realize a substantive notion of justice instead of the abstract, rightsy, traditional, bourgeois notions of justice that generate so much of the contradictory scholarship. One must start by knowing what is going on, by freeing oneself from mystified delusions embedded in our consciousness by the liberal legal world-view. I am not

35. Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1370 (1984).

> defending a form of scholarship that simply offers another affirmative presentation; rather, I am advocating negative, critical activity as the only path that might lead to a liberated future.[36]

The first and primary part of CLS theory, then, is to confront liberalism and its claims to social and political legitimacy. Intimately related to this idea is the relation between liberalism and the legal order. Liberalism manages to cloak itself in the veil of the rule of law, thereby exacerbating social problems. Liberalism and the rule of law combine to form what is known as liberal legalism. Liberal legalism must also be delegitimized.

Liberal legalism has been defined by Trubek as a view of law in society whose adherents "believe that the legal orders of capitalist societies can achieve autonomy and generality, and that, in so doing, they will necessarily secure equality, protect individuality, and achieve community,"[37] which of course, they will not and cannot. More specifically, legalism refers to an "ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules."[38] Liberal legalism is a particular, historical version of legalism that "serves as the philosophical foundation of the legitimacy of the legal order in capitalist societies."[39] Klare explains liberal legalism further as follows:

> Its [liberal legalism's] essential features are the commitment to general democratically promulgated rules, the equal treatment of all citizens before the law, and the radical separation of morals, politics and personality from judicial action. Liberal legalism also consists of a complex of social practices and institutions that compliment and elaborate on its underlying . . . jurisprudence. With respect to its modern Anglo-American form, these include adherence to precedent, separation of the legislative (prospective) and judicial (retrospective) functions, the obligation to formulate legal rules on a general basis (the notion of *ratio decidendi*), adherence to complex procedural formalities, and the search for specialized methods of analysis ("legal reasoning") . . . . The rise and elaboration of the ideology, practices, and institutions of liberal legalism have been accompanied by the growth of a specialized, professional caste of experts

36. Freeman, *supra* note 14, at 1230-31.

37. Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW AND SOC'Y REV. 529, 551 (1977).

38. J. SHKLAR, LEGALISM 1 (1964).

39. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 1937-1941 62 MINN. L. REV. 265, 276 (1978).

trained in manipulating legal reasoning and the legal process.[40]

Liberal legalism, then, fosters a commitment to the concept of the rule of law. That concept suggests that law is independent from the social-political world in which it is found. Insofar as people accept a presumed independence, and rationality,[41] of law and the corresponding legal order, liberal legalism legitimizes a political order that operates to the detriment of some (the have-nots) and to the advantage of others (the haves). People come to accept the rule of law implication that a legal system or structure objectively and formally adjudicates social disputes. To liberal legalists, an independent, formal, rational, and objective law exists to resolve social dilemmas. It is through this legal system — a system that appears "uncontroversial, neutral, acceptable"[42] — that social order and hierarchy unfolds and is reinforced. Gordon explains how this phenomenon occurs by reference to Antonio Gramsci's concept of hegemony. This concept maintains that "the most effective kind of domination takes place when both the dominant and dominated class believes that the existing order, with perhaps some marginal changes, is satisfactory, or at least represents the most that anyone could expect, because things pretty much have to be the way they are."[43] The problem, of course, is that it is impossible to find a formal, objective, and rational legal order. That, however, is a somewhat controversial claim. To provide support for the claim that no formal, objective, and rational order exists, CLS engages in deconstruction.

Deconstruction essays constitute efforts to expose the myths of liberal legalism; it is liberal legalism, after all, that erroneously assumes a legal model of rationality, objectivity, formalism, and independence. Deconstruction has been defined as holding

> that a text lacks a single, objectively determinable meaning. A text's only meaning is the one given by the interpreter, who in turn always reads the text against a particular social and political backdrop. From the Deconstructionist's point of view, to speak of a value-neutral interpretation is to speak nonsense. Thus the Deconstructionist will take a text apart, seeking to ex-

40. *Id.*

41. In defining law as fundamentally patriarchal, Diane Polan argues that it is, in part, the legal system's "undeviating bias in favor of rationality over all other values" that defines it as patriarchal. *See* Polan, *Toward a Theory of Law and Patriarchy*, in THE POLITICS OF LAW 294, 301 (D. Kairys ed. 1982).

42. Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW 281, 286 (D. Kairys ed. 1982).

43. *Id.*

> pose the fallacies and contradictions in the "approved" interpretations and to show how these past efforts at interpretation are deeply imbued, whether consciously or not, with the values of the interpreters.[44]

Deconstruction enables one to discover a malignant reality behind a benign appearance. Deconstruction reveals the liberal legalist presumption of a knowable, objective, value-neutral, and rational law or legal order as representing a distortion of what in fact exists. Deconstruction essays delegitimize liberal legalism.[45] One finds, for example, that "[t]here is no legally required rule or result, and despite endless attempts by judges and legal scholars to find transcendent legal principles, there simply are none."[46]

Essays in deconstruction generally demonstrate this method through constitutional case analysis. The deconstructionist proceeds by demonstrating the indeterminacy of the text under review, by showing that there is no single way to achieve legal consensus as to the text's meaning, and, despite textual indeterminacy, by revealing that Supreme Court decisions do not vary radically from the prevailing opinions in the social-political order. The odds that an objective Court could take an indeterminate text and still render decisions that generally reflect social norms are astronomical. That the Court's decisions so closely parallel the prevailing sentiments of society indicates that the judicial decision-making process is less than objective, rational, and formal. Those few cases in which a deviation appears reflect at best the Court's need to appear neutral.[47] Thus, deconstruction explodes objectivism and formalism. At this point, one should ask what these terms really mean and why must they be trashed. The clearest definitions of objectivism and formalism come from Unger and merit restatement. Unger writes as follows:

> What I mean by formalism . . . is a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary . . . . The formalism I have in mind characteristically invokes impersonal purposes, policies, and principles as an indispensable component of legal reasoning.

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44. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 823 (1985).

45. *Id.* at 822-23.

46. Kairys, *Freedom of Speech*, *supra* note 23, at 161.

47. For similar ideas, see also, Gordon, *supra* note 42, at 282-86.

. . . .

> This thesis can be restated as the belief that lawmaking and law application differ fundamentally . . . . Lawmaking and law application diverge in both how they work and how their results may properly be justified. To be sure, law application may have an important creative element. But in the politics of law making the appeal to principle and policy — when it exists at all — is supposed to be both more controversial in its foundations and more indeterminate in its implications than the corresponding features of legal analysis.

. . . .

> By objectivism I mean the belief that the authoritative legal materials — the system of statutes, cases, and accepted legal ideas — embody and sustain a defensible scheme of human association. They display, though always imperfectly, an intelligible moral order. Alternatively they show the results of practical constraints upon social life — constraints such as those of economic inefficiency — that, taken together with constant human desires, have a normative force. The laws are not merely the outcome of contingent power struggles or of practical pressures lacking in rightful authority.[48]

What, then, are the problems with these concepts?

The problem with formalism is that it suggests a closed, tightly constructed, deductive system of judicial decision-making when in fact all decision-making, including legal, is open-ended, flexible, and contingent on the system of beliefs accepted by the decision-maker.[49] Objectivism suggests an authoritative, well-defined and morally justifiable ordering of human relations that makes life comfortable, predictable, orderly, and coherent while simultaneously masking the debasement and moral impoverishment of humanity behind a cloak of seemingly justified hierarchy.[50] Through deconstruction, it is possible to "reject the common characterization of the law and the state as neutral, value-free arbiters, independent of and unaffected by social and economic relations, political forces, and cultural phenomena."[51] It will no longer be necessary to mask "the existence of social con-

48. Unger, *The Critical Legal Studies Movement*, *supra* note 2, at 564-65.
49. For further explanation regarding belief systems, see Gordon, *supra* note 42, at 287-89.
50. *See generally* Unger, *The Critical Legal Studies Movement*, *supra* note 2.
51. Kairys, *supra* note 21, at 4.

flict and oppression with ideological myths about objectivity and neutrality."[52] Finally, law will be revealed as "a major vehicle for the maintenance of existing social and power relations by the consent or acquiescence of the lower and middle classes."[53] Thus, formalism and objectivism must be trashed to enable individuals to recognize the social injustices and inequalities inherent in and perpetuated by legal liberalism. As a means of understanding the CLS critique of liberal legalism, a brief examination of their critique of one of the more common shibboleths of liberalism and liberal legalism, namely, the concept of rights, will be helpful.

Liberal legalists, according to CLS, are undeniably fond of "rights-talk."[54] In general, the more rights individuals have, the better off they think they will be. When individuals are granted a specific right, such as the right to bargain collectively, they think that they can transform substantively human relations, thereby making society a more humane enterprise. When individuals lack a specific right, such as a right to health care, they think that, if they could only obtain this right, if only they could get society to recognize it as a fundamental human right, then the quality of life would be transformed and, once again, society would be a more humane enterprise. In short, the more individual rights a society has, the more humane the social (communitarian) order. There are, however, some real problems with rights-talk.

Rights-talk alienates individuals from their most important experiences. Rights-talk has the effect of diverting attention from meaningful life experiences to meaningless, abstract talk about rights. Tushnet writes:

> When I march to oppose the United States intervention in Central America, I am "exercising a right" to be sure, but I am also, and more importantly, being together with friends, affiliating myself with strangers, with some of who I disagree profoundly, getting cold, feeling alone in the crowd . . . . It is a form of alienation or reification to characterize this as an instance of "exercising my rights." The experiences become desiccated when described in that way. We must insist on preserving real experiences . . . . The language of rights should be abandoned to the very great extent that it takes as a goal the realization of the reified abstraction "rights" rather than the experi-

52. *Id.*
53. *Id.* at 5.
54. *See generally A Critique of Rights*, 62 TEX. L. REV. 1363 (1984).

ence of solidarity and individuality.[55]

In addition, as with so many other liberal platitudes such as equality, freedom, and justice, rights-talk is counterproductive. "It is not just that rights-talk does not do much good. In the contemporary United States, it is positively harmful."[56] It is literally quite possible to starve to death or "die with our rights on" while pursuing the rhetoric of rights. "[A]bandoning the rhetoric of rights would be the better course to pursue for now. People need food and shelter right now, and demanding that those needs be satisfied . . . strikes me as more likely to succeed than claiming that existing rights to food and shelter must be enforced."[57]

In addition to these criticisms, Staughton Lynd provides a useful summary of three additional problems with rights-talk.[58] First, the historical documents on which this country's government is based — the Declaration of Independence and the Constitution — contain "questionable metaphysical assertions about the origin and nature of rights."[59] Even if there ever was a general consensus as to what these rights entailed, which is doubtful, that consensus certainly no longer exists. Furthermore, a consensus about the nature of rights will never exist in the future because the idea or notion of rights is "arguably inconsistent with the modern understanding that the particular society into which a person is born shapes that person's ideas about the world."[60] Second, rights-talk is highly abstract and therefore necessarily incoherent.

> Because the language of rights is formalistic and indeterminate, rather than concrete and specific, the application of a "right" in a particular setting will depend on factors external to the legal concepts involved. This causes rights rhetoric to become incoherent, because decisionmakers arbitrarily select varied and often contradictory rationales to justify outcomes that are not logically compelled by the premises chosen.[61]

Thus, rights-talk, as well as talk about legal rules, is no more capable of predicting a particular outcome when applied to a specific situation or set of facts than the toss of a coin. Third, "the language of rights is permeated by the possessive individualism of capitalist soci-

55. Tushnet, *supra* note 35, at 1382-83.
56. *Id.* at 1386.
57. *Id.* at 1394.
58. Lynd, *Communal Rights*, 62 TEX. L. REV. 1417 (1984).
59. *Id.* at 1418.
60. *Id.*
61. *Id.*

ety."[62] According to this view, rights are possessed by individuals and therefore come to be seen as kinds of property.

As with the tension between active and passive rights noted earlier,[63] the possession of a right by one person necessarily entails the limitation on a right of another person. For example, if one has a right to health care, then someone has a corresponding (Hohfeldian) duty to see that the right is satisfied. That necessarily entails, however, that certain individuals no longer have a right to exercise their professional training as they choose. Lynd writes: "Consistent with this analysis of rights as property, the conventional view implicitly assumes that the supply of rights is finite, and thus that 'right' is a scarce commodity. In this view the assertion of one person's right is likely to impinge on and diminish the rights of others."[64] A society genuinely interested in improving the quality of human life is well-advised to transcend this ephemeral pursuit of rights. As Lynd has stated: "If we desire a society in which we share life as a common creation and genuinely care for each other's needs, then this rhetoric, which pictures us as separated owners of our respective bundles of rights, stands as an obstacle."[65]

Finally, liberal legalism will be delegitimized once the false ideologies behind legal reasoning are recognized. The present concept of legal reasoning must be debunked.[66] There is legal reasoning, to be sure. Once again, however, there is a difference between appearance and reality. The process of legal reasoning — the utilization of *stare decisis*, application of the correct statute or constitutional clause, and the use of like methods — gives the appearance of an independent process capable of arriving at objectively correct results. The reality, however, is that "social and political judgments about the substance, parties, and context of a case guide [a judge's] choices, even when they are not the explicit or conscious basis of decision."[67] Kairys continues:

> The idealized model of the legal process . . . is based on the notion that there is a distinctly legal mode of reasoning and analysis that leads to and determines "correct" rules, facts, and results in particular cases. The concept of legal reasoning is essential to the fundamental legitimizing claim of government by

62. *Id.*
63. *See supra* notes 10-13 and accompanying text.
64. Lynd, *supra* note 58, at 1419.
65. *Id.*
66. *See supra* notes 18-28 and accompanying text.
67. Kairys, *supra* note 21, at 3.

> law, not people; it purports to distinguish legal analysis and expertise from the variety of social, political, and economic considerations and modes of analysis that, in a democratic society, would be more appropriately debated and determined by the people, not judges.[68]

The same basic idea is expressed by Kennedy as follows:

> Teachers teach nonsense when they persuade students that legal reasoning is distinct, *as a method for reaching correct results*, from ethical and political discourse in general (i.e., from policy analysis). It is true that there is a distinctive lawyers' body of knowledge of the rules in force. It is true that there are distinctive lawyers' argumentative techniques for spotting gaps, conflicts, and ambiguities in the rules, for arguing broad and narrow holdings of cases, and for generating pro and con policy arguments. But these are only argumentative techniques. There is never a "correct legal solution" that is other than the correct ethical and political solution to that legal problem.[69]

To summarize, CLS focuses its critical artillery on delegitimizing liberalism and with it, legal liberalism. CLS critiques the notion of law as a formal, rational, objective, value-neutral system existing independent from the social-political order in which it is located. The goal of trashing is to generate a meaningful change in fundamental human relations in the direction of liberation and the breakdown of hierarchy. Deconstruction is the means or process by which CLS exposes the contradictions and questionable assumptions of liberal legalism. Deconstruction unmasks the myths of formalism and objectivism in the legal order. Delegitimization reveals that legal reasoning is intimately related to policy. To paraphrase Marx, the primary CLS goal is to demonstrate that legal scholars have only interpreted the world and the legal order in various ways. The point, however, is to change it. CLS desires to change the world account for the subtitle of Kairys' book, "A Progressive Critique." CLS is not interested in legal reform; it seeks, rather, to transform social, political, and legal institutions.

III. The Theory Destructs

It is probably clear by now that CLS poses a challenge to traditional discussions concerning the nature and role of law in society. If

68. Kairys, *supra* note 17, at 11.

69. Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW, 40, 47 (D. Kairys ed. 1982) (emphasis in original).

the claims of CLS can be sustained, then one would have to conclude that most traditional constitutional scholarship and constitutional interpretation threatens the very foundation of a democratic society while at the same time it unconsciously plays into the hands of those people who have appointed themselves as guardians of all social-political values. This in turn serves only to enhance their incredibly secure position in the economic hierarchy. That, of course, assumes that CLS theory is sound, which it is not. The elaborate, intricately involved critiques of CLS mask an inordinately weak and superficial substructure. It is necessary, and will continue to be necessary, to analyze the considerable work that has been accomplished regarding legal analysis from the CLS perspective, but the long-range impact of the proponents of CLS remains dubious. While their insights will help redefine legal scholarship in some areas, their overall impact will parallel that of Fourier's and Owen's, namely, their superficial philosophy will not sustain their vision of the community, and reality will continue to be shaped by people who, while not living in dreamland, from time to time can act on the basis of their dreams. Raising several problems with CLS theory will demonstrate its structural weaknesses. The problems raised are systematic rather than specific.[70]

The first problematic issue that springs to mind concerns the CLS choice and identification of the "enemy." Why did CLS set its sights on liberalism rather than capitalism? Is it because the philosophy of liberalism appears to provide a pleasant ideological home for the socially corrupt and divisive nature of capitalism? If that is the case, then it is the responsibility of CLS to demonstrate that liberalism provides more convenient soil in which capitalism can grow than any other political tradition or ideology, a demonstration they have not made. A closer analysis of social causation might reveal that capitalism, as well as any other "ism," can destroy a well-cultivated society if the citizens of that society do not maintain it properly. Liberalism's proponents may not have exercised sufficient diligence in adhering to the principles of liberalism, or sufficient tenacity in pursuing liberalism's goals, but that is another issue. For whatever reasons liberalism may have failed, if in fact it has failed, CLS does not make it clear why the problem is more liberalism than

70. It is not necessary to rehearse the excellent critiques of CLS already in print. Some of the better critiques include Schwartz, *supra* note 5; Carter, *supra* note 44; Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199 (1984).

capitalism, or why the problems attributed to liberalism do not have more to do with religion, tradition, history, philosophy, or even climate. Having found something that looks guilty, the CLS movement proceeds to punish it without ever fully and adequately inquiring into whether or not the accused is guilty. This line of inquiry arises, however, only if the assumption that liberalism provides a home for capitalism, an extremely questionable assumption, is relied upon. This faulty assumption is susceptible and will be unmasked.

Locke, for example, one of the leading figures in the history of liberalism, implies that the accumulation of property could result in the unequal distribution of social goods and benefits.[71] That, however, is only implicit in Locke. There is no clear, necessary relationship between the principles of liberalism and capitalism, unless, of course, the CLS argument rests on the laissez-faire economic theory of Adam Smith.[72] Smith, however, never used the laissez-faire concept with respect to his views on social and political policy. Indeed, while noninterference of government, free trade, free enterprise, and freedom of occupational choice are substantively affirmed, Smith never asserts, implicitly or explicitly, that economic policy is inviolate.[73] It must be remembered that Smith wrote the *Wealth of Nations* as a treatise on "political economy." This requires that economic policy and political policy can never be radically separated. Smith would argue for governmental intervention in both the economy and in individual lives to insure justice, which includes formulating rules, and punishing their infraction, not only with respect to individual behavior, but also to corporate behavior as well. The government can rightfully engage in quality control and worker protection. Taxes can be raised to secure order, stability, and community harmony. In addition, if there is an industry in which a monopoly is unavoidable, Smith would argue that it should be public rather than private.[74] Furthermore, it must not be forgotten that Smith was a major moral philosopher.[75] It seems most unlikely that Smith would have justified an economic theory that undermined his emphasis on the moral sentiments of a community of individuals.

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71. J. LOCKE, SECOND TREATISE OF GOVERNMENT 17-31 (R. Cox ed. 1982) (of property).

72. *See* A. SMITH, THE WEALTH OF NATIONS (E. Cannan ed. 1976).

73. *See generally* 1 SMITH, THE WEALTH OF NATIONS, *supra* note 72, at 447-524 (Of Systems of Political Economy); 2 SMITH, THE WEALTH OF NATIONS, *supra* note 72, at 213-486 (Of the Revenue of the Sovereign or Commonwealth).

74. *See* 2 A. SMITH, WEALTH OF NATIONS, *supra* note 72, at 277-78.

75. *See, e.g.*, A. SMITH, THE THEORY OF MORAL SENTIMENTS (D.D. Raphael & A.L. Macfie eds. 1976).

It is clear, then, at least in classical liberal theory, that an endorsement of blind, uncontrolled capitalism, a kind of economic anarchy, is anathema. There is, in short, no necessary connection between liberalism and capitalism. Why, then, is CLS confused about this? The confusion may be a failure to distinguish adequately between liberalism and modernity, which is manifested in Unger's work, *Law and Modern Society*.[76] The pith of Unger's thesis is found in Chapter 3, entitled "Law and Modernity."[77] For Unger, it is the complexity of modern society that makes it difficult for people to "live at peace with each other and themselves."[78] Why is this condition a failure of liberal society? Is it because society takes Hobbes' concept of individual greed and self-love more seriously than Marx's concept of classes and organizations?[79] If that is the case, then CLS must explain why Hobbes is taken more seriously than Marx, if that is the case. Once that hypothesis is supported, CLS must then proceed to show the precise connection between Hobbes and the myriad problems confronting contemporary society. The causal connections on which so much of CLS theory rests remain unexplained and unsupported. Why the injustice and inequality in today's society issues ineluctably from liberalism remains a mystery.

Second, even if we could assume that liberalism is a legitimate target, some effort must be made to define specifically what liberalism is. If it is modern liberalism, what distinguishes it from Rousseau liberalism or Lockean liberalism? What distinguishes twentieth century liberalism from eighteenth century liberalism, which is lost and needs to be recaptured? What, in short, is the theory that is being considered and why is it fundamentally flawed? Finally, is it flawed because it leads to injustice and inequality or is it flawed because it is politically, morally, and ideologically bankrupt?[80]

Even if CLS can answer these questions, their problems have just begun. Assume that liberalism is the problem and that it has been properly defined and classified. CLS is then open to the critique of inconsistency. CLS has criticized contemporary legal scholarship, in part, on the grounds that it fails to acknowledge the indeterminacy of rules and decision-making.[81] Tushnet, for example, has ar-

76. R. UNGER, LAW IN MODERN SOCIETY, *supra* note 2.
77. *See id.* at 134-242.
78. *Id.* at 167.
79. *See id.* at 174.
80. *See, e.g.*, T. LOWR, THE END OF LIBERALISM (1969).
81. *See, e.g.*, Tushnet, *Following the Rules Laid Down*, *supra* note 2.

gued that interpretivists[82] have difficulty with history, original intention, and hermeneutics.[83] In short, past beliefs and intentions are not determinate and identifiable for those who try to understand the foundational documents[84] for our constitutional democracy. One should ask why they are any more determinate and identifiable for those who try to critique something as broad as liberalism. At least there are documents,[85] records,[86] and theories[87] available for interpretation, as opposed to theories and ideas that, taken together over a period ranging from Socrates to Mill, constitute a liberal tradition. If Berger cannot arrive at original understanding[88] and if Ely cannot interpret historical intentions,[89] then, to be consistent, CLS cannot reach a consensus about liberalism. Thus, if liberalism cannot be adequately defined, then it cannot be subjected to a proper critique either, for then CLS would have done what it claims cannot be done. The most that CLS has done with respect to liberalism is to erect a straw man argument and then find that it indeed can be knocked down.

Third, CLS efforts demonstrating the indeterminacy and unidentifiability of history and intentions are simultaneously ingenious and disingenuous. CLS critique of some legal cases and legal doctrines has contributed, albeit dubiously, to legal scholarship. These ingenious analyses demonstrate rather clearly that law is not independent from the social order in which it finds itself and that efforts to discover some definite and unchanging historical meaning is irrevocably subjective and relative. The demonstration itself, however, while ingenious, is disingenuous for the simple reason that few, if any, believe in some clearly definable and identifiable past, regarding either meaning or intentions. CLS would profit from reading George Herbert Mead.[90] In his *Philosophy of the Present*,[91] Mead describes the impossibility of discovering some specific past in a theoretical and sound manner. One of his examples concerns the histori-

82. As defined by Ely, interpretivism implies "that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution . . . ." J.H. ELY, DEMOCRACY AND DISTRUST, 1 (1980).

83. *See* Tushnet, *Following the Rules Laid Down*, *supra* note 2, at 793-804.

84. *See* The Declaration of Independence; The Articles of Confederation; U.S. CONST.

85. *See supra* note 84.

86. *See, e.g.*, CONG. REC.

87. *See, e.g.*, A. HAMILTON, J. JAY & J. MADISON, THE FEDERALIST (H.C. Lodge ed. 1888).

88. *See* R. BERGER, GOVERNMENT BY JUDICIARY (1977).

89. *See* Ely, *supra* note 82.

90. G.H. MEAD, THE PHILOSOPHY OF THE PRESENT (1959).

91. *Id.*

cal fact of Caesar crossing the Rubicon.[92] There is no doubt, Mead argues, that Caesar crossed the Rubicon. That is not the issue. The issue concerns what the act means, and the meaning is consistently changing. Each age reinterprets that act, as well as all historical acts, in light of its present. The past, for Mead, is not static. Rather, it is shaped by the present. For purposes of constitutional scholarship, Mead would argue that a Constitution exists but that its meaning necessarily changes as society changes. As Heraclitus said, it is impossible to step in the same river twice. Indeed, Cratylus may be more correct: one cannot step in the same river once.

Thus, CLS has not discovered anything new here. The liberal mind, whatever it is, has been aware of the socially contingent and historically relative nature of reality for quite some time. Why and how that makes any difference must be explained by CLS. Indeed, by acknowledging this contingent and subject reality, CLS has undermined its own position. As Hutchinson and Monahan write, "[t]o sustain any definite vision of future society, the Critical scholars must renege on their basic commitment to social contingency and historical relativity. CLS is ultimately hoisted on its own Critical petard."[93]

Last, it has been argued by CLS that it is necessary for liberal theory to discover a definite and easily identifiable interpretation of an indeterminant text, that is, the Constitution, in order to salvage judicial review and to refute the claims of CLS.[94] Why that is necessary is not clear. Regardless of the clarity of the text or rule, there will be conflicting interpretations. What is the problem here? According to CLS, indeterminacy and subjectivity constitute the fundamental challenge to the sacred ideal of the rule of law. If there is no clear constitutional meaning, then the rule of law constitutes little more than rule by those in power. That deduction, however, is invalid for a variety of reasons.

First, the doctrine of the rule of law contains no specific content. It represents an ideal. Thus, if decisions are viewed as arbitrary and illegitimate, the threat posed is to the legal and political order of society, not necessarily to the rule of law. Plato, for example, wrote *The Laws* after realizing that the ideals of *The Republic* could not be realized in his world. This does not mean that the philosophy of

92. *See id.* at 31.

93. Hutchinson & Monahan, *supra* note 70, at 233. A similar point is made by Schwartz, *supra* note 5, at 430-33.

94. See generally *supra* note 2, particularly those articles by Tushnet.

The Laws overrides that of *The Republic*. By parody of reasoning, the legal order does not override the rule of law. CLS has engaged in *non sequitur* reasoning here in two ways. From the fact that people cannot agree on constitutional meaning, it does not follow that the rule of law is problematic. Furthermore, from the fact that those in power can manipulate the laws of society, it does not follow that the rule of law is a fanciful notion to be used by the powerful to manipulate the powerless. Indeed, as will be seen, it is the rule of law that provides the powerless with safeguards against the powerful.

Second, CLS is no clearer about what constitutes the rule of law than it is about what constitutes liberalism. The concept of the rule of law can be understood in two senses, the real and the ideal. In establishing government, it is necessary to safeguard against the abuse of power. There are several ways in which this can be done. Adopting procedures of selection that delegate authority carefully and constructing limits on official action is one method. That, however, may not be enough, for no selection procedure can weed out all undesirable candidates and no set of limits can foresee ever burgeoning realms of official action. In addition, even with the best of intentions, public officials make mistakes. Is it possible to provide additional, albeit still incomplete, safeguards against abuse of official authority? To construct better security against official abuse, J.R. Lucas argues that society

> need[s] to supplement the set of sharply defined procedures which constitute Process of Law by further procedures, divisions of authority, limitations of discretion, critiques of the exercise of discretion, in order to guide and safeguard those in authority, and enable their decisions to be criticized. These we shall call the Rule of Law.[95]

The Rule of Law, as such, lays down procedural rules governing official authority rules, for example, that requiring authorities to "hear both sides of the case, . . . consider all relevant factors, . . . not be biased by fear, or favor, or private interest."[96] In addition,

> the Rule of Law is expressed in certain vague principles — Freedom, Justice, Humanity — . . . which should guide the authorities in cases where they are applicable. These principles do not lay down exactly what is, or is not, to be decided in particular cases. They are kinds of argument, rather than rigid rules.[97]

95. J.R. LUCAS, THE PRINCIPLES OF POLITICS 107 (1966).
96. *Id.* at 110.
97. *Id.* at 110-11.

Interestingly enough, as will be seen shortly, Freedom, Justice, and Humanity are CLS goals as well. Thus, while there are problems in formulating precisely the Rule of Law, it is valuable in limiting constitutional abuses. CLS has failed to distinguish between the Rule of Law and the Ideal Rule of Law. The Ideal Rule of Law "presupposes the traditional doctrine of the Separation of Powers, which is itself only an approximation."[98] Furthermore, "the Ideal Rule of Law provides the important safeguard that the supreme legal authority may not authorize coercion against any particular person."[99] Obviously, "the Ideal Rule of Law is an ideal only."[100]

The Ideal Rule of Law cannot be imposed on the judiciary wholesale. A functioning system requires greater latitude and flexibility than the Ideal Rule of Law permits. Nevertheless, it represents one aspect of constitutional limitations and "serves as a valuable bulwark against tyranny."[101]

The point of this digression is not to defend a particular conception of the rule of law. The point is to demonstrate that the conception of the rule of law is more complex than CLS admits and represents different ideas with respect to the relationship between law and society. For the CLS critique of the rule of law to be sustained, CLS theorists must begin to make clear exactly what it is they find problematic about this concept.

Third, CLS fails to distinguish between Constitutional Limitations and Constitutional Criticism. Constitutionalism is a broad concept used primarily to denote adherence to a governmental structure designed to limit the power of the sovereign. More specifically, constitutionalism is defined as "the doctrine or system of government in which the governing power is limited by enforceable rules of law and concentration of power is provided by various checks and balances so that the basic rights of individuals and the groups are protected."[102] The concept of constitutionalism as here defined dates back at least to Plato's Statesman, in which we find the need to limit government by rules of law.[103] For Lucas, constitutionalism, as a check on unlimited sovereignty, can be understood in two ways, namely, as Constitutional Limitation or as Constitutional Criticism.[104] Constitutional

98. *Id.* at 113.
99. *Id.*
100. *Id.*
101. *Id.* at 116.
102. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 486 (1981).
103. *See* PLATO, STATESMAN (J.B. Skemp trans. 1957).
104. *See* LUCAS, *supra* note 95, at 34.

Limitations restrict the scope of lawful supreme authority. As Lucas writes:

> We may go from saying that not all things are lawful to the supreme authority, and lay down some of the things that are not lawful. We cannot, as we have seen, specify exactly the limits of lawful authority, but we might hope to lay down, not exact, but outside, limits to the supreme authority.[105]

Constitutional Criticism, on the other hand, does not restrict the scope of lawful supreme authority. In Lucas' words:

> we may not commit ourselves to limits (of lawful authority), which since they must be outside the limits must allow too much, but rather reserve the right to criticize at any time the decisions of the supreme authority as being "unconstitutional" or "not in accordance with the spirit of the constitution."[106]

The British practice is one of Constitutional Criticism, the American, one of Constitutional Limitation.

In this context, it seems that CLS would support Constitutional Criticism while rejecting Constitutional Limitation, although both could exist together. CLS would support Constitutional Criticism because Constitutional Criticism, like CLS, bases its position on shared values of community. The government that violates those values can be roundly criticized. Unfortunately, in such a system, there is no clear recourse to any particular legal or political remedy. Constitutional Criticism provides a basis for argument, but not for action.

Constitutional Limitation, however, overcomes the defect of inaction in Constitutional Criticism. Under Constitutional Limitation, sovereign action can be declared unconstitutional. Granted, the scope of Constitutional Limitation will be large, thus permitting unlawful acts within that broad range. Constitutional Limitation, in general, cannot prevent governmental abuse without creating a horrendous amount of legislative rules, a task that is, for all practical purposes, impossible. In addition, those limits themselves may be so vague that no one can be sure whether a particular act falls within the legitimate constitutional range. These difficulties, however, have been mitigated successfully through the process of judicial review.

> This admirable creation [the Constitution] is detailed enough to leave nobody in much doubt about the proper procedures of government, without, save in a few minor respects, being so detailed

105. *Id.* at 36-37.
106. *Id.* at 39.

> as to prevent the natural change of the content of government from one generation to another: and it includes enough statements for general principle to communicate to any reader the spirit of the Constitution, while ensuring by means of judicial review, that the other organs of government cannot disregard the general principles it has set out. In this way, the Constitution lays down limits, which are clear enough in normal circumstances, but which, if a new situation does arise where the application is not clear, can be given an authoritative interpretation.[107]

Resting such power in one branch of government raises the question of who the guardians are. This question, however, is not an issue here. The issue at this point is addressed to the nature of the two methods of constitutionalism, where CLS stands, and why. If CLS rejects both forms of constitutionalism, what will provide adequate checks and balances in their form of government? If Constitutional Criticism is adequate, then what are citizens to do about an egregious abuse of sovereign power? Are revolution or emigration their only alternatives? In addition, how will CLS determine the community of interest necessary to sustain critique of inappropriate governmental decision-making? If Constitutional Limitation is the chosen method to achieve control over the sovereign, how will the CLS constitution differ from the one in present use? Finally, will society be able to avoid some form of judicial review that will require interpretation of the new constitution? If so, how?

To summarize this fourth point, this Article is intended to illustrate that the concept of the rule of law is far more complex than CLS admits and that its indeterminate and subjective qualities are more of a strength than a weakness. In addition, the failure of CLS to define terms continues to detract from its criticism. For example, does CLS oppose the rule of law as it is found in Constitutional Limitation, Constitutional Criticism, or both? If both, then what will CLS substitute for the rule of law concept, or why will substitution be unnecessary? On these issues of foundation, CLS is as indeterminate and subjective as the system it seeks to delegitimize.

CLS theorists have gotten away with a great deal of criticism, for they have not had to concern themselves with the ongoing management of society. The role of critic suits them well. What happens, however, when the role of critic must be replaced by the role of manager? This brings us to a fifth point, namely, what is the proper di-

107. *Id.*

rection following deconstruction?

As strong as the CLS critique is with respect to constitutional scholarship,[108] it is comparatively weak with respect to positive vision and reconstruction. CLS wants to bring down a social structure, but they have nothing with which to replace it, except, of course, some hackneyed "liberal" calls for freedom and equality, democracy, and some form of socialism. Brest, for example, admits that he has neither an agenda nor a political theory, and that, at best, CLS represents "amicus Briefs" designed to convince others "to adopt [its] various notions of the public good."[109] In addition, society should be reconstructed as "one in which the concept of freedom includes citizen participation in the community's public discourse and responsibility to shape its values and structure."[110] Peter Gabel argues that society must transform the production process and hence the social process to achieve justice rather than just tinker with the system. He adds that

> [individuals] can create the possible conditions for a concrete justice — that is, the possible conditions for a living milieu in which human labor is a creative social activity, in which the production of material goods is purposefully designed to satisfy real human needs, and in which each person recognizes the other as "one-of-us" instead of "other-than-me" irrespective of sex or skin color.[111]

Gerald Frug argues that it is necessary to decentralize power in our society by returning power to the city or, perhaps, Plato's or Rousseau's city-state.[112] In arguing "that real power must be given to the cities," Frug holds that this could be done in several ways. Cities, for example, could regain power by creating city banks and city insurance companies, and reorganizing the city "as a vehicle for new forms of organization and popular participation."[113] Unger identifies needs that must be met, including the needs (1) to reshape society to enhance personal and interpersonal relationships; (2) to rethink and restructure democracy to avoid private interest groups and de facto disfranchisement of minorities; (3) to reorganize government to make it more effective while preventing it from curtailing freedom; (4) to reorganize the economy to enhance individual initia-

108. While that critique may not be very strong, that is its strongest position.
109. Brest, *supra* note 2, at 1109.
110. *Id.*
111. Gabel, Book Review, 91 HARV. L. REV. 302, 315 (1977).
112. Frug, *supra* note 2, at 1150.
113. *Id.* at 1150-51.

tive and creativity without enslaving the social and political order; and (5) to redefine and securely establish a system of rights designed to enhance autonomy.[114]

It is seriously doubtful that anyone would oppose these ideals. Such opposition would be tantamount to an opposition to peace. One must ask, however, what any of this means. How can these wonderful goals be achieved? Why are they any less vague than the rule of law? Why are they more liberating than liberalism? Unger goes so far as to refer to his vision as superliberalism. Yet, and to use his own words, it is impossible to see how his vision, or any other CLS vision, avoids being "just another variant of the mythic, antiliberal republic,"[115] or little more than "some preposterous synthesis of the established democracies."[116] In short, the efforts of CLS at reconstruction strike one as little more than fanciful flights into an imaginary world of political theory and practice. CLS must improve its reconstructive skills if it ever expects to have its efforts taken seriously. Furthermore, if its reform efforts are not taken seriously, it will not be long before the critical efforts of CLS will be ignored. It is incumbent on CLS to get its constructive house in order.

Sixth, CLS is unable to distinguish political reasoning from legal reasoning. Kairys' claim, of course, that law is nothing more than an extension of politics,[117] renders such a distinction unnecessary. Kairys' claim is, however, at best simplistic and at worst, a misrepresentation. Contrary to the claims of CLS, there are differences between law and politics, and between legal systems and political systems. This statement is not intended to mean that there are no similarities or that these concepts do not overlap or that they are not periodically and, under certain circumstances, influenced by one another. There is no more strict separation between law and politics than there is between law and morality. That does not mean, however, that there is no separation whatsoever or that there should not be some separation. Indeed, a society governed by a system in which all politics is law and all law is politics would be criticized on the grounds that it failed to separate the two fields.

In looking for a distinction between law and politics, one does not have to go any further than Virginia Held's essay on legal and political justification.[118] Held argues, quite correctly, that legal and

114. *See* Unger, *The Critical Legal Studies Movement*, *supra* note 2, at 586-602.
115. *Id.* at 602.
116. *Id.*
117. *See supra* notes 13-26 and accompanying text.
118. Held, *Justification: Legal and Political*, 86 ETHICS 1 (1975).

political modes of reasoning are distinct and distinguishable. She writes, for example, that "*deontological justification is especially characteristic of and appropriate to legal systems, teleological justification especially characteristic of and appropriate to political systems.*"[119] Since law, for CLS, is nothing more than an extension of politics, there is no need for CLS to distinguish between political and legal systems and their respective modes of reasoning and decisional justification. In blurring the relevant distinguishing characteristics between law and politics, CLS misrepresents the different methods of decisional justification. Regarding the difference in methods of justification, Held writes:

> [I]f it is thought that in difficult cases the judge is free to reach beyond the existing legal system to moral principles not yet incorporated into it, these principles ought not to be deontological ones. Thus, if existing rules of a legal system do not provide grounds for a decision, and if appeal to those principles which have already been the basis for prior judicial decision is still inadequate, a judge may appeal to such deontological moral principles as that no person should profit from his wrong doing, or that courts ought not to allow their decisions to be inequitable or unjust. But, appeal to a utilitarian prescription for the maximization of happiness would not be appropriate . . . .
>
> The range of political decisions, on the other hand, covers those which are predominantly concerned with results. Characteristically, political decisions are wagers on the expected good consequences their defenders hope to bring about, and deontological factors are often appropriately put aside. The concepts of welfare and public interest, essential for evaluations of political decisions, are properly best understood in teleological terms. The issues they raise cannot adequately be dealt with by reference to legal rights and obligations.[120]

There is a sense in which law is an extension of politics — politics, after all, gives effect to law — but it is not a sense that would concern or trouble most people. CLS thinks it is onto something here, but again, its inability to draw clear definitions and adequately explain the nature of the concepts under which critical review takes place precludes them from recognizing the fundamentally different natures inherent in those concepts. Indeed, it is because there is a difference that society knows when either system is going wrong. Indeed, if there were no difference, then society would know it had no

119. *Id.* at 11 (emphasis added).
120. *Id.* at 13-14.

problem. If the claim of CLS is that in our system of government there is no difference, then that claim must be supported. Even if that claim is supported, however, it does not necessarily support the theory of CLS. All that CLS theorists will have done is indicate that there is no difference when, in fact, there should be one, and, if there should be one, that is the difference liberal theory has long acknowledged. The CLS claim that there is no difference between law and politics is not only specious, it is also pointless.

IV. Conclusion

Until such time that CLS can provide a more substantial social and political theory, and one that properly locates the relationship between law and politics in that context, rather than opt for either nihilism or Marxism, this author prefers to tinker with the constitutional democracy presently in place. In doing so, however, the critiques of constitutional scholarship made by CLS will not be ignored. Their long-range contribution to legal scholarship, if any, will be in their unorthodox approach to legal analysis. Their higher aspirations will not, indeed cannot, be fulfilled. The problems of constitutional democracy will remain, and with them, the problem of judicial review. Fleeing to the fantasyland of CLS will not move society any closer to the resolution of these problems or even toward the realization of any CLS values, as diffuse as they are. Utopian socialism in the nineteenth century held out hope for many that there could be a better world in which to live. It would be pleasant to think that this new wave could do the same for the twentieth century. Today's society is richer because of the work of those nineteenth century utopian socialists. This author hopes CLS can make the same caliber of contribution in the twentieth. Given what the advocates of CLS have produced thus far, however, there is little to indicate that they will be as successful as their intellectual ancestors.