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# Critical Legal Studies as a Spiritual Practice

Peter Gabel\*

## I.

I assume that I was asked to speak on a panel entitled “The Higher Law and Its Critics” because the organizers of this conference believed that as a Critical Legal Studies (CLS) founder and writer, I’d debunk the idea that there is any higher law. They likely felt that CLS stands for the idea that law and the interpretations of law are just an expression of social power, and that any claim that there exists a higher law which the existing legal world somehow exists in relation to would just be regarded by CLS as a form of ideology—mystifying, masking, and rationalizing existing power relations in society.

So let me start by saying that while appeals to a Higher Law certainly can be used to rationalize unjust power relations, I do not at all believe that they must do so; and even more, that I believe CLS was always fundamentally a spiritual enterprise that sought to liberate law and legal interpretation from its self-referential, circular, and ideological shackles. The CLS movement, after all, emerged in response to the moral intensity of the broader social movements of the 1960s, and was an attempt to join forces with the civil rights movement, the anti-war movement, the women’s and workers’ movements to challenge the status quo on behalf of a higher moral vision of what human relations could be like—a vision of a world in which people treated each other with true equality and respect and affection and kindness, and in which people saw each other as fully human and beautiful, rather than as cogs in a machine or as self-interested monads out for their own gain or as any of the other ways of characterizing human beings that seemed to be commonplace within the system as it was. In CLS, we were against the inhumanity of the system as it really was and as it really

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functioned, and we were against the existing legal system to the extent that it sought, consciously or unconsciously, to rationalize the inhumanity of the existing social world and call it something good, the embodiment of liberty and equality.

Thus there was always a spiritual impulse behind the work and the politics of CLS. But it is absolutely the case that CLS—or at least what came to be known as the dominant strain within CLS—refused to embrace this transcendent spiritual impulse, to stand behind it, or to speak about it. We really were motivated by love, but it was a love that dared not speak its name. And in my opinion, that is because our movement was infected with the same fear of the other that underlay the injustices that we criticized in the wider society. We were motivated by a powerful moral transcendent impulse that was an expression of what this conference is calling a Higher Law, but we would not say so, or to be honest, some of us would not say so. On this point, there was a division inside CLS, and in my opinion the wrong side carried the day—but today is another day.

The view that won out inside CLS is what became known as the indeterminacy critique—the idea that legal principles are so abstract and indefinite that they can be used to rationalize virtually any outcome. The literature of CLS has produced hundreds of articles demonstrating this point,<sup>1</sup> but an excellent example not cited so far as I know in existing CLS writing is the legal opinions produced during the rise of the Nazi movement in Germany, in which conventional liberal legal doctrines were reinterpreted by the judiciary to be made consistent with the ideology of the ascendant Nazi party. Thus the German equivalent of the doctrine of “good faith” in landlord–tenant contracts was interpreted not to prevent the otherwise illegal eviction of Jews because Jews were threats to the German people.<sup>2</sup> Using the indeterminacy critique, CLS writers showed in article after article that just as the eviction of Jews could be made consistent with contractual good faith, virtually any legal argument could be made consistent, via the open-ended nature of legal interpretation, with virtually any legal outcome. That being so, the actual explanation of legal outcomes must come from outside of legal reasoning itself—from the realm of politics or conviction or commitment to particular values on the part of the person or group doing the interpreting. And wonderful CLS writers like Duncan Kennedy, Mark

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1. See, e.g., DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIECLE)* 84 n.16, 348 n.5 (Harvard Univ. Press 1997). For a sophisticated recent statement of the indeterminacy position emphasizing that legal materials are always mediated by the strategic work of interpretation and therefore have no determinate existence “in themselves,” see DUNCAN KENNEDY, *A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation*, in *LEGAL REASONING: COLLECTED ESSAYS* 153 (Davies Group 2008).

2. See *Die Justiz im Dritten Reich*, May 30, 2006, <http://www.123recht.net/printarticle.asp?a=16764> (citing a 1936 Berlin civil court case justifying eviction on grounds that being Jewish “undermined the strength of the tenant-house community”).

Tushnet, Gary Peller, or Betty Mensch<sup>3</sup>—who contributed to this discussion at the Higher Law Symposium—showed that it was no answer to this critique to find some other supposed “anchor” for legal reasoning in the political or moral principles of the wider society that would shape the legal thought-process—for these political and moral principles could always be shown to be just as abstract and indefinite in their concrete meaning in any particular case and therefore just as indeterminate in their application.

There was much to be said for the indeterminacy critique as an analytical technique that could help a new generation of legal intellectuals and law students to challenge the authority of received justifications for the status quo, especially the authority of those who claimed that things had to be the way they were in late twentieth century capitalist society because the rule of law required it to be so. Many a law student who had come to law school with a longing to contribute to the creation of a more humane and just world had been subtly talked out of their idealism by sophisticated law professors who were better at manipulating concepts than they were and could use the power relations of the law school classroom to make their instinctive idealism appear naïve or childish or dumb. Armed with the indeterminacy critique and backed by the solidarity of other writers, teachers and students who shared their transformative aspirations, these same students could better stand up for themselves and demonstrate that their professors’ pretensions to superiority of reasoning amounted to no more than a preference for the existing system. Certainly a fifty-page opinion by Justice Scalia in his black robes is far less humbling to the radical spirit if one can show that all of its weighty argumentation and compilation of precedential authority amount to no more than a statement by the writer that “I like capitalism.”

But there was a major problem with the indeterminacy critique—namely, that it was a headless horseman, an analytical method without moral content that could not itself point the practitioner in any moral direction. Like all analytical critiques that rely upon logic to challenge claims to conceptual rationality, the indeterminacy critique is indifferent to the meaning of its object—it employs its scalpel at a distance from whatever may be morally compelling about a claim and satisfies itself with the assertion that a claim purporting to be logically valid is actually not so.

This creates three problems that, in my view, are decisive. First, the logical indeterminacy of abstract concepts, legal or otherwise, does not take account of the power of the moral environment in which such concepts

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3. Elizabeth Mensch, *Cain's Law*, 36 PEPP. L. REV. 541 (2009).

exercise social force. To the extent that human beings are inherently moral beings animated by the longing for meaning and the desire to live in a better, more morally resonant world, the power of law and legal concepts will depend upon the social forces that give weight to a particular moral vision and related moral ideas at particular historical moments. If a particular worldview gains sway by virtue of its socially-anchored moral resonance, then the legal arguments that follow from that worldview will be heard and understood as logical to those who embrace the moral dimension of the worldview whether or not the arguments are logically compelled in the abstract. The Supreme Court's decision in *Bush v. Gore* deciding the 2000 presidential election seemed to many scholars to validate the indeterminacy critique<sup>4</sup> because the Court's reasoning to the result it wanted seemed to almost randomly change between its first decision (based on Article II's reservation of power to the State legislatures to choose electors to the Electoral College),<sup>5</sup> and the second final decision terminating the Florida vote-count on the grounds of the Equal Protection Clause.<sup>6</sup> In addition, the final decision seemed to contradict the Court's new-federalist deference in other opinions to a state's right to manage its own elections within broad parameters that should have included the then-unfolding Florida recount.<sup>7</sup> But as I showed in *What It Really Means to Say Law is Politics: Political History and Legal Argument in Bush v. Gore*,<sup>8</sup> the significant fact is that the decision was found acceptable by Gore and his constituencies in spite of all the grumbling because of historical factors—including, the rise of Ronald Reagan, thirty years of conservative ascendancy in political and legal thought, and the collapse of the Soviet Union and parallel collapse of any worldwide public sphere in which morally compelling democratic social movements could challenge conventionally legitimated democratic institutions—that made the Supreme Court's decision plausible enough to the moral self-understanding of the then-existing national constituency.<sup>9</sup>

Reduced to a sentence, this is to say that the indeterminacy critique, because of its very abstraction and disconnection from immanent meaning, cannot reach what is morally compelling about a legal argument and, therefore, cannot negate the argument to a really existing historical listener anchored in a web of real social relations.

The second problem with the amoral nature of the indeterminacy critique is that to the extent that human beings are moral beings decisively

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4. See Sanford Levinson, *Bush v. Gore and The French Revolution: A Tentative List of Some Early Lessons*, 65 *LAW & CONTEMP. PROBS.* 7 (2002).

5. *Bush v. Palm Beach County Canvassing Bd. (Bush v. Gore I)*, 531 U.S. 70, 71 (2000).

6. *Bush v. Gore (Bush v. Gore II)*, 531 U.S. 98, 98 (2000).

7. See, e.g., *id.* at 135–44 (Ginsberg, J., dissenting).

8. 67 *BROOK. L. REV.* 1141 (2002).

9. *Id.*

animated by the longing for meaning, purpose, and a better world, the indeterminacy critique cannot convey a moral vision of how we are to create such a world and therefore cannot gain any true adherents. In other words, the indeterminacy critique is basically a bummer, leaving the listener in a kind of secular liberal hell of scattered and disconnected individuals with no common passion or direction binding us together. Not only did this erasure of moral purpose disarm the CLS movement of its most compelling spiritual feature—namely its link to a powerful, transformative vision of a socially just world—it also seemed to dismiss as unimportant, and even trivial and misguided, the experience of moral dislocation, social isolation, and meaninglessness that is precisely the most spiritually painful aspect of modern liberal culture. While a few writers tried to justify CLS's "nihilism" as a bracing affirmation of freedom, emphasizing that the critique was only a critique of the authority of reason and not of strongly held, freely affirmed values,<sup>10</sup> this defense simply cast the listener back into the spiritual void of his/her liberal solitude rather than purposefully pointing the listener forward toward the moral world that would finally connect us.

The third and final problem with the valorization of the indeterminacy critique and its preeminence within the CLS movement is that it could be and was used against the movement's own spiritual commitments. Although conservatives were fond of caricaturing CLS writers as a group of radical cynics who didn't believe in anything,<sup>11</sup> most were just the opposite—wonderful, loving, caring people committed to helping others and changing the world in accordance with a moral devotion to mutual affirmation and social equality. But the indeterminacy critique prohibited them from saying so in a universal, visionary language because any such discourse was itself indeterminate, and could be stolen away by the Other and used to rationalize domination. Backed up by Derrida's in-fashion critique of "phallogocentrism"<sup>12</sup>—the historical tendency of abstract male-dominated ideologies to marginalize and dismiss the insights of minority cultures—some CLS writers would just make fun of those of us whose critique of law and legal culture was rooted in a substantive, moral vision of community and equality, as if we failed to grasp that the same critique we ourselves had

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10. See generally Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

11. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 83 (2007); Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984); Louis B. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 433-34 (1984).

12. See JACQUES DERRIDA, *DISSEMINATION* 75-84 (Barbara Johnson trans., University of Chicago Press 1983).

embraced—the use of abstract universals to legitimize the injustices of liberal society—could be used against ourselves. Did we not see that the Devil can cite scripture for his/her purpose and that any universal ideal with which we purported to ground our critique of law could be used to justify the opposite of the meaning we sought to give it? How did we think that an ideal of spiritual community could be the “basis” of anything at all, since it could as easily entail a society of crystal-gazers or religious fundamentalists as it could the loving and egalitarian world to which we aspired?

It is worth pausing for a moment on this last point because it contains an epistemological confusion—or at least a difference of opinion and orienting attitude toward knowledge—that establishes the groundwork for my turn to a discussion of the existence of a Higher Law and a turn to what could give meaning to a rebirth of Critical Legal Studies as the spiritual practice that I am claiming it always was.

When the practitioner of the indeterminacy critique rejects the idea that an abstraction, like “spiritual community,” can be the “basis” of a critique of the status quo, citing the indeterminacy of the meaning of the abstraction, he or she is thinking within the analytical epistemology embedded in the indeterminacy critique itself—as if the relationship of the abstraction to the concrete manifestation, or the universal to the particular, is a relationship of logical entailment of a concept. Thus from this point of view, the critique of the liberal ideals of freedom and equality that are embedded in all of American law is that their very abstract and universal nature can be manipulated in a way that allows the concrete meaning of these ideals to legitimize the unfreedom and inequality of free market capitalism. The critique is that in liberal society, freedom equals free competition and equality means equality to compete in a universal marketplace that actually reproduces, in real life, the inequalities of class society and the unfreedom of servitude to hierarchy. From this truth (and other analogous ones that can be drawn from the concrete histories of pre-liberal societies, from socialism as actualized in socialist societies, and so on across and throughout history), the indeterminacy practitioner concludes that all abstract universals are similarly manipulable and subject to the same logical abuses in the service of legitimation. Because the indeterminacy critique begins and ends in an attitude of moral detachment from its object and analyzes the unfolding of the object through its merely possible logical expressions, the critique rejects a priori (in other words, as a matter of “belief” and not on the basis of its own critique!) that there could be moral “essence” to the object that gives moral direction to the critique of, say, the liberal conceptions of freedom and equality.

The paradox here is evident and refers back to my initial comments: for CLS is and was animated by a vision of overcoming the inhumanity and injustice of the world, and not by mere analytical cleverness or skill at

deconstructing concepts. Caught in the epistemological straight-jacket of their own making, the proponents of the indeterminacy critique managed to make themselves unable to offer any “basis” for their own passionately held moral starting point, declaring that these motivating convictions were “irrational” and outside the realm of rational knowledge, like the relationship of chaos theory to normal science.<sup>13</sup> Far from being a bad thing, these CLSers believed that this irrationalism would protect the critical aspect of critical legal studies from absorption into falsifying rationalistic ideologies and maintain a liberated free-space for political action in support of their irrationalist convictions. The politics of this position was then that there should and could be a public, democratic debate among competing convictions—left, right, and center—about what kind of social world and what kind of legal culture we humans should be aspiring to create, a debate unburdened by any transcendent moral claims which appeal to a non-existent, or at least unknowable, transcendent moral authority whose very investiture with social power would reproduce our subordination to some Other that would not be ourselves.

Unfortunately, the validity of this view rested on a “belief” about the very nature of social reality that is, with all due respect to my long-time comrades who hold it, wrong. For the world, as it really is, is suffused with moral longing that pulls upon the conscience of humanity to elevate ourselves from the limitations of what is, toward the realization of what ought to be, and the evocation of precisely that longing has been the decisive force behind every social movement that has advanced the development of humanity toward a loving and humane common existence since the beginning of time. It is equally true that the appeal to this moral longing has been the basis for terrible injustice and suffering. But this struggle over the way forward is a moral struggle anchored in the capacity of every one of us to manifest ourselves to each other in a way that points us in the right direction. A successful critical approach to the present—or in the case of law, to a successful critical legal studies—requires the illumination of the injustice of what is, that is anchored in a transcendent intuition of the just world that ought to be.

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13. See, e.g., Clare Dalton, *The Politics of Law*, 6 HARV. WOMEN'S L.J. 229, 234–48 (1983) (book review).



## II.

During Friday night Shabbat services at my synagogue Beyt Tikkun in San Francisco (Beyt Tikkun means House of Healing and Repairing), we always go outside in a whirl of dancing, holding hands in long lines, and singing *Tov Le'Hodot La'Adonie* ("It's Good to Give Thanks to G-d"). By this time, our rabbi has already stipulated that the God we do not believe in does not exist so that we do not have to spend our time worrying about it, and our goal is to elevate our awareness, to apprehend the miraculous nature of the universe as we turn away, at "sundown," from the mysterious great ball of fire one million times larger than our own planet and face the other billions of fireballs in what we call the sky. To apprehend this magnificence while singing and dancing with other whirling comrades is just Wow! as the prayers say. It takes you out of the humdrum flatness of everyday existence, in which this same earth and sky appear as mere objects before us as we carry out our functional activities, in which our minds are racing from thought to thought distracting us from Being Present, or better yet, in the words of Ram Das, from Being Here. Even more, the whirl of the spiral dance allows us to make eye contact with each other, to actually see each other as radiant spiritual beings, with open hearts and bursting with recognition as we share this amazing experience of where we actually are, where we have actually been all day. How remarkably different this collective encounter is from the reciprocal withdrawnness, from the mutual solitude of the day, as we woke up, got out of bed, dragged a comb across our heads, found our way downstairs and drank a cup, and somebody spoke and we went into a dream.<sup>14</sup>

The very purpose of this spiritual practice is to bring ourselves into contact with the world behind the world, by lifting our spirit to deepen our awareness of the phenomena before us so as to unveil a spiritual and moral meaning that is obscured by the leveled-down empirical perception of everyday life. The poet William Blake brilliantly captured the necessity of this deepening of awareness for gaining access to truth when he said, "We are led to Believe a Lie When we see [with], not Thro', the Eye."<sup>15</sup> And it is just this kind of access to another dimension of reality that is sometimes made possible by social movements, in which people emerge from the passive station of their reciprocal isolation into a new kind of connection, a new "mutual recognition," that allows the seemingly fixed appearance of the world to dissolve, revealing a spiritual depth that had previously been

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14. See THE BEATLES, *A Day in the Life*, on SGT. PEPPER'S LONELY HEARTS CLUB BAND (Parlophone 1967).

15. WILLIAM BLAKE, *Auguries of Innocence*, in THE COMPLETE POETRY & PROSE OF WILLIAM BLAKE 492 (David V. Erdman ed., Anchor Books 1988) (1965).

“unconscious” in the sense of inaccessible to conscious knowledge.<sup>16</sup> Historical moments touched by these movements often produce outpourings of intellectual and cultural creativity, as people in disparate locations begin to express the new insight in a burst of music, literature, intellectual work, and activism, all of it seeking to “realize” what we’ve been given an intimation of. And the work that is thus produced can have the effect of altering the entire social landscape to such a degree that no one is free not to admit some relation to what is going on, not to “admit that the waters around you have grown,”<sup>17</sup> to swim or to refuse to swim and try to get the waters to go down.

The 1960s was certainly such a period, and I suspect that forty years later many of us in this room are still trying to establish our relationship to the breakthrough of consciousness that altered our way of seeing the world itself and the meaning of our existence within it as we ourselves constitute it. By way of analogy to my description of the elevation of consciousness during the Shabbat service at my synagogue, the ‘60s should be understood as a dawning of awareness that unfolded through the overlapping influence of the civil rights movement’s illumination of injustice, the evocative power of Martin Luther King, Jr., the linguistic fissures and image-scrambles produced by the Beat poets, the song, dance, and creative movement of rock n’ roll, the youthful moral eloquence of JFK, and the consequent emergence of a student movement, a women’s movement, a gay liberation and sexual liberation movement, and an environmental movement that expressed an opening up of the heart allowing a new kind of sight into what we came to see as the insanity of the fixed and rigid posture and thinking that was producing the Vietnam war, with its 55,000 American and three million Asian dead.<sup>18</sup>

Within the critical legal studies movement that was itself an expression of this upsurge in awareness, we were confronted by a “legal order” and hierarchical institutions that supported this order that seemed to allow no room whatsoever for the sense of love, hope, and transcendence that we felt ineffably all around us. On the contrary, it seemed to be an enormous, spiritually dead thought-machine that produced and reproduced both

16. This is among the main themes of my book, PETER GABEL, *THE BANK TELLER AND OTHER ESSAYS ON THE POLITICS OF MEANING* (Acada Books 2000) (see especially *What Moves in a Movement?* on page 184).

17. BOB DYLAN, *The Times They Are A-Changin’* on *THE TIMES THEY ARE A-CHANGIN’* (Columbia Records 1964).

18. Bernard Weinraub, *30 Years Later, Cake and Credit Cards in Saigon*, N.Y. TIMES, May 1, 2005, available at <http://www.nytimes.com/2005/05/01/international/asia/01saigon.html>.

hierarchies and rules that made the world of the war, and racial hatred, and sexual repression, and environmental destruction appear entirely normal and inevitable. And this disjunction between our dawning, idealistic awareness and the professional settings in which we found ourselves as young adults led us to throw ourselves into trying to (a) take apart the fixity of, and (b) reveal the meaning of what everywhere surrounded us.

Here we come to the key split that developed within CLS. For the part of the work that was motivated by “taking apart the fixity” of the legal order became the indeterminacy critique, and the part that was motivated by “revealing the meaning” of that order became the critique of alienation, to which I shall now turn. Located within this historical process, it is clear, I hope, that the work of these two strands within CLS was at first complementary, in the sense that both were intended to be in service of a breakthrough to another level of social being and knowledge in which our idealistic vision of a more loving and caring world would become possible. That they became separated was too bad, the result of the effects of fear and loss of confidence in our transcendent hopes as we were complexly enveloped by the rise of Ronald Reagan, by tenure struggles, and related dilemmas of personal identity as we ebbed away from each other with the ebbing of the ‘60s themselves, and by the resulting defensiveness and separation within our own groups. But for reasons that I will return to, we are now approaching a new historical moment in which a reunification of our efforts may become possible.

In the case of both the Shabbat service consciousness and the social movement consciousness, a transformation of our social being takes place that allows a transformation of our knowledge of the world. In each case, prior to the transformation, we exist underneath the weight of our inherited conditioning, cemented within our pre-existing social roles, eyes darting away from each other’s gaze, withdrawn into our separateness and seeing the world from a detached state, a solitude which we assume to be natural, the way things are. Without realizing it, we exist in a state of secret Fear of the Other, preoccupied unconsciously with keeping the Other at a distance, and in a state of denial of the world’s loving and transformative energy.<sup>19</sup> We try to close ourselves up, and to treat the world around us as equally closed or fixed, because we are afraid to reveal what has not been *confirmed*. But through the outbreak of connection permitted by the singing and dancing and expressive discourse of the service and movement, we attain a new level of mutual recognition which in turn confirms a new kind of insight into the “fallen” and despiritualized nature of the world. From a

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19. See GABEL, *supra* note 15, at 87–92 (discussing a full development of these ideas in the chapter, *The Blockage of Social Desire: The Circle of Collective Denial and the Problem of the Rotating Lack of Confidence in the Desire of the Other*).

philosophical/epistemological point of view, a change in both the subject and object occurs, such that the being of the knower finds a new moral platform with which to see the world as suffering under the weight of its own alienation and separation, and the being of the known object or “world” becomes suddenly transparent in its depth-dimension as something not fixed according to its prior surface appearance, but as alienated and in need of a restorative salvation. Or to put this in yet another way: The recovery of each of us as subjects through the spiritual elevation of mutual recognition provides the inter-subjective ground that reveals the moral deficit in the world as object-of-knowledge. Martin Luther King, Jr. made exactly this point when he defined Justice as “love correcting that which revolts against love.”<sup>20</sup>

Thus the type of insight that emerges from the ratcheting up of awareness allowed by the upsurge of confirmatory recognition is an inherently spiritual and moral awareness that both critiques the falsity of what is as an alienated appearance trying to deny its own falsity, and at the same instant points in a moral direction toward bringing into being a world that embodies the connection that has allowed our confirmatory recognition to take place.<sup>21</sup> Why would we want to kill the Viet Cong? They are not “them,” they are us, G-d’s children, and furthermore, we are not the “fellow Americans” that Lyndon Johnson keeps referring to, but vessels of universal humanity scattered apart in an historical shatter that must be repaired.<sup>22</sup> As we elevate our awareness by uplifting each other through a new mutual recognition, fixed nationalities appear as imaginary, as collective defense mechanisms born of an entire world of mutual fear, and in need of a compassionate spiritual redemption so that we as “peoples” might appear to ourselves not as alien threats to each other, but as unique incarnations of a common humanity.

To the strand of CLS that emerged from this kind of insight, the problem with law was not that it was indeterminate and therefore a mask for political choices made by free individuals, but that it was serving as a legitimating vehicle for our alienation from one another, making our

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20. MARTIN LUTHER KING, JR., *Montgomery Bus Boycott*, in RIPPLES OF HOPE: GREAT AMERICAN CIVIL RIGHTS SPEECHES 210, 213 (Josh Gottheimer ed., Basic Civitas Books 2003) (1955).

21. See Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1567–69, 1586–91 (1984).

22. The reference is to the teaching of the Kabbalah that our alienation is expressive of an original shattering of G-d’s Divine Light that must be repaired through the work of *tikkun olam*, the healing and repairing of the world.

alienation appear to be the embodiment of justice and obscuring our true spiritual and moral destiny as communal beings, a destiny that we had glimpsed through the redemptive insights of our participation in the movement. In reality, it was this “alienation critique” that was the entire basis for the CLS critique of law as legitimating ideology, because the critique necessarily refers to a transcendent moral horizon to challenge the ideology’s claims to legitimacy. For as I have already said, insofar as an aspect of legal ideology is “believed in” as a moral discourse supporting the status quo, it cannot be dismissed by a showing of its logical indeterminacy, but only by revealing, through our anchorage in a transcendent moral vantage point, the “determinate” meaning of the legal ideology as an act of legitimation, as a kind of advertisement for a morally impoverished state of affairs.

This then is the true relationship between CLS and what this conference is calling a “Higher Law”—a higher law not as a metaphysical or religious abstraction, but as an embodiment of the presence of social justice manifesting itself in the real world through a spiritually elevating movement that provides a moral horizon for revealing what must be changed about the world, in part through the progressive transformation of legal culture, through law.

Here are eight examples from CLS that appeal to a higher law so defined:

- Karl Klare’s critique of the Supreme Court’s use of a new post-New Deal ideology of “social conceptualism” to steal away the democratic aspirations of working people as they expressed themselves through the upsurge of the labor movement (*Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*).<sup>23</sup>
- Alan Freeman’s critique of the Supreme Court’s use of an individualistic conception of racial discrimination as bad acts by isolated “perpetrators” as a way of naturalizing and legitimizing the ongoing societal racism suffered by its victims (*Legitimizing Racial Discrimination Through Antidiscrimination Law*).<sup>24</sup>
- Duncan Kennedy’s demonstration of how Blackstone’s Commentaries absorbed and transformed the legal statuses of feudal hierarchies (from *The Law of Wrongs* to *Incorporeal*

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23. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1933–1941*, 62 MINN. L. REV. 265, 301–03, 322–25 (1978).

24. Alan David Freeman, *Legitimizing Racism Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–57 (1978).

Hereditaments) to rationalize the emerging bourgeois hierarchies of pre-liberal societies in the eighteenth century (*The Structure of Blackstone's Commentaries*).<sup>25</sup>

- Paul Harris's and my account of how the architecture of courtrooms induce deference to the legitimacy of legal hierarchies in a way that confers political legitimacy on social and economic institutions that claim to be expressions of popular will, but are actually expressions of social alienation (*Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*).<sup>26</sup>
- Mary Joe Frug's critique of the legitimation of male toughness in common law contract doctrine from the vantage point of women who care about the welfare of their contracting partners (*Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*).<sup>27</sup>
- Anthony Cook's articulation of the importance of experientially-based insight, growing out of religious practice and social struggle, to the reconstruction of just communities (*Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*).<sup>28</sup>
- William Forbath's analysis of how the American labor movement's moral vision of an egalitarian society rooted in mutuality and solidarity was constrained and reshaped by workers' encounter with the individualist categories of American law (*Law and the Shaping of the American Labor Movement*).<sup>29</sup>
- Rhonda Magee Andrews's argument that the realization of equality within the meaning of the Fourteenth Amendment requires legal recognition of the existential suffering and denial of humanity produced by racial subordination and the creation

25. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979).

26. Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1983).

27. Mary Joe Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985).

28. Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 989-93 (1990).

29. WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991).

of remedies based on a substantive vision of human dignity (*Racial Suffering as Human Suffering: An Existentially-Grounded Humanity Consciousness as a Guide to a Fourteenth Amendment Reborn*).<sup>30</sup>

None of these works makes use of the indeterminacy critique, and all of them are moral statements in which existing (or then-existing) legal regimes obscured or deflected the struggle for a more humane and just world.

### III.

In my view, CLS “stopped,” or perhaps “paused,” about fifteen years ago because it lost track of this spiritual and moral foundation. One reason for this was the dissipation of the social movements of the ‘60s themselves, which undermined the intuitive social ground of confirmatory recognition which made this spiritual dimension visible to CLS teachers and writers and audible to our listeners and readers. A second reason influencing the dissipation of the movements themselves was the collapse of socialism and the Marxism that had supported it, which for 150 years provided the principal metaphor for the morally transcendent communal horizon against which the shortcomings of the present society had been measured. A third factor intimately bound up with the other two was the rise of the New Right as a conservative moral response to the social challenge and disruption that the movements of the ‘60s had introduced into public space, with the Reagan Revolution championing deregulation, an attack on entitlement programs, and an originalist, new-federalist constitutionalism that sought to delegitimize the public sphere itself as an arena of collective moral action. Faced with this loss of footing at both the experiential and ideological levels (or at the levels of both intuitive understanding and reflective interpretation), we lost confidence in the forward trajectory that had united us. Deprived of an anchor-point in the future that could unite our project in the present, we tumbled back into the social separation of the wider system—our professional “roles” congealed around us and our social identities were reabsorbed by the hierarchical institutions we had hoped to transform.

The ascendancy of the indeterminacy critique and its separation from the spiritual and moral foundation within which it was originally located was an expression of this social and moral hemorrhage, as CLS became increasingly identified with a specialized analytical technique of doctrinal deconstruction that could be assimilated by the academy as merely a school

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30. Rhonda V. Magee Andrews, *Racial Suffering as Human Suffering: An Existentially-Grounded Humanity Consciousness as a Guide to a Fourteenth Amendment Reborn*, 13 TEMP. POL. & CIV. RTS. L. REV. 891 (2004).

of legal thought. And robbed of its morally compelling message, CLS has proved no match for the Law and Economics movement as its principal competitor to be the successor to the normative paradigms of the New Deal (Legal Realism and the Legal Process School); for the Law and Economics movement is rooted in the moral ideal of the market as the social realization of individual liberty and popular democracy. Indeed, at the ontological/epistemological level, it is difficult to distinguish the CLS of the indeterminacy critique from the Law and Economics movement because they both presuppose that free of illegitimate constraints, the world is a free competition (or a “democracy of interpretations”) among the free choices (or ideas/convictions) of individual actors, with the CLS critique of the authority of abstraction and any socially binding universal vision being the analogue to the Law and Economics critique of Big Government. Neither point of view apprehends the world as an intersubjective life-world with an intelligible social essence that can be the basis for moral insight and transformative social action.

But it’s not too late! For the way out for CLS is to return to its original instincts as a righteous social transformation movement and this time recognize that there is a spiritual basis for our understanding of the social individual that is rooted not in the materialism of Marxism or state socialism, but in the enlivening mutual recognition, or Love, that was always at the heart of the movement out of which CLS was born. Human beings are bound together not primarily by their relationship to the means of production or any other shaping practical medium, but by the desire for confirmation within a loving community that will have overcome the legacy of alienation and social separation. The work of CLS is both to illuminate how that legacy has created a legal culture that has legitimized this alienation by making it seem natural and just, and by beginning to construct a new legal culture that would strengthen and help to realize the loving bond between us: the bond that actually unites us as social beings.

This calls not for a rejection of past CLS work, but for a reclaiming of the spiritual dimension of that work. And this in turn requires a reunderstanding of the indeterminacy critique as being merely an analytical moment within the synthesis of a moral critique, as a kind of analytical insight that indicates that the world is open-textured but not going nowhere, and that legal reasoning’s claims that would fix the world in idealized, reified abstractions legitimizing injustice and alienation are actually a passivizing defense against the freedom and creative challenge of social vulnerability and uncharted possibility.



But this also requires a new agenda for our movement that cooperates with the world-wide spiritual-political initiatives that have sprung up since the post-'60s era from which CLS first emerged, and that would be tremendously supportive of our efforts. These spiritual-political initiatives include the religious renewal movements that are linking the spiritual ideal of the beloved community to social action and social change; spiritually informed secular movements like the Network of Spiritual Progressives that are trying to invent new forms of spiritual activism while rethinking foreign and domestic social policy reforms to emphasize spiritual transformation rather than merely liberal redistribution of resources and rights;<sup>31</sup> and the efforts of the environmental and ecology movements to link the redemption of the planet with social healing and sustainable, cooperative economies.

All of these efforts require a new legal culture that links justice with explicitly spiritual outcomes—outcomes that foster empathy, compassion, and social connection rather than the vindication of liberal rights in a legal order founded upon the fear-based separation of self and other. One lesson that CLS scholarship itself has taught is that it is impossible for a social transformation movement to be successful without an ability to express its own ideals as also ideals of justice that can achieve legitimate political expression through legal culture. Without that, as Karl Klare, Alan Freeman, and many others have shown,<sup>32</sup> the movement's radical ideals will be recast and stolen away by the liberal interpretations those movements will suffer through the prism of legal assumptions that actually contradict them. Thus while the movement must create the "parallel universe" that can affirm the ontological/epistemological validity of the possibility of a society based on love and mutual recognition, the movement also requires a legal expression of itself that declares this same realization of love and mutual recognition to be indispensable to just outcomes of social conflicts.

Such a parallel justice system has already begun to sprout up across the legal landscape, alongside the antagonism of self and other, presupposed and reinforced by the mainstream's adversary system. Among its manifestations are the truly remarkable restorative justice movement, which understands crime and social violence as expressive of a breakdown in community and aspires to apology and forgiveness through direct encounters between victims and offenders as a means of restoration of the communal fabric;<sup>33</sup> the transformative and understanding-based mediation movements that make compassion a central objective to the resolution of civil conflicts;<sup>34</sup> the new

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31. See generally The Network of Spiritual Progressives, <http://www.spiritualprogressives.org/> (last visited March 3, 2009).

32. See generally Klare, *supra* note 22; Freeman, *supra* note 23.

33. See David Lerman, *Restoring Justice*, TIKKUN, Sept./Oct. 1999, at 13.

34. See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 14 (rev. ed. 2005) (emphasizing the transformative

forms of spiritually-informed law practice that are redefining the lawyer-client relationship as a non-technical, holistic relationship in which lawyers bring a substantive moral and healing vision to bear on the client's perception of his or her "interests," and the relation of those interests to the well-being of the larger community;<sup>35</sup> and the transformation of legal education away from a focus on the mere manipulation of existing rules and doctrine, toward a more humane and spiritually integrated conception of law and justice.

What these new efforts need from a revitalized critical legal studies movement is a scholarship and pedagogy that provides in every field a critique of existing law and legal culture that reveals the limitations of the liberal world-view out of which the existing order was constructed in the centuries since the Enlightenment, and that points toward the socially connected community that ought to be its successor. It is this intellectual piece of the puzzle that is lacking from all of the recent efforts to transform legal practice in the ways I have just described; all of these efforts without exception, as far as I know, challenge the individualized, antagonistic, and despiritualized character of the adversary system without challenging the substantive content of existing law or the analytical thought process of legal reasoning. Both of these elements of legal culture—the critique of the substance of legal rules and doctrine, and the critique of detached, analytical rule-application through abstract, logical technique resting on a normative foundation—require a cadre of intellectuals to help disassemble what is and point to what ought to be, as a "moment" in the transformation from the individualistic, liberal world we inhabit to a post-liberal socially connected, loving, and compassionate world to which we aspire.

So, for example, a CLS course in Contracts should subordinate its use of the indeterminacy critique to a meaning-centered critique emphasizing how the rules presupposing the legitimacy and desirability of individualistic, self-interested bargains (adjusted by a touch of concern for "the reliance interest") among an infinite number of socially disconnected strangers bound by no common moral purpose or spiritually bonded social community outside their respective blood relatives are rapidly destroying the planet, in part, by making use of liberal abstractions like freedom of choice that make it appear that this lonely destiny is what people really want. Or a course in

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power of "recognition"); GARY FRIEDMAN, *CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING* (2009) (discussing "understanding-based" mediation movements).

35. See, e.g., Douglas Ammar & Tosha Downey, *Transformative Criminal Defense Practice: Truth, Love, and Individual Rights—The Innovative Approach of the Georgia Justice Project*, 31 *FORDHAM URB. L.J.* 49 (2003).

Torts should make it clear to students that there is more to the obligations born of our essential connection to each other as social beings than the duty to not pull chairs out from under each other as we are about to sit down to dinner, or not to smash into each others' cars, or injure each other with exploding Coke bottles—that the bond of recognition itself, and what Emmanuel Levinas calls the ethical demand of the face of the Other,<sup>36</sup> means we have a duty to “rescue” each other, that we must take care of each other, including the poor, the homeless, and those who lack health care.

CLS scholars and teachers should extend—and in many instances already have extended—this kind of critical analysis to every area of law, including developing a critical reflection on the Constitution as a liberal and individualistic document that was a great advance in its time but now must be transformed to embrace a newly evolving vision of spiritual community that was not even conceived of as a universal necessity in the late eighteenth century when it was drafted. Concomitant with the transformation of doctrine must come a transformation of remedy, beyond money damages passed between socially separated litigants conceived as interested only in material outcomes, and beyond a due process model of civil and criminal procedure that links justice to merely the vindication of rights through the dutiful monitoring of a fact-based public hearing that leaves the parties as disconnected or more disconnected than when their legal process began. And finally, supporting such a re-visioning of doctrine, remedy, and process must be a rethinking of legal reasoning itself that goes beyond the normative circularity of the application of indeterminate rules presupposing the legitimacy of the secular liberal order toward a morally grounded reflection anchored in the common effort to realize the values of love, compassion, and mutual concern and well-being that are being carried forward by the movement itself as it tries to link the transformative element of its own social being with a new legal knowledge that would be expressive of it.

If CLS would embrace the moral and spiritual agenda that I'm proposing here, it would instantly revitalize itself. Everywhere today there are law students and young legal scholars trying to figure out how to devote their lives and work to addressing the problems of global warming and the destruction of the environment, to overcoming the social violence and irrationality of religious fundamentalism and pathological, secular nationalism, and to challenging the human indifference of corporate globalization and its blind and reeling world markets. But Marxist materialism can no longer speak to these new generations of potential activists who have become aware that these problems require a spiritually grounded solution, and after a thirty-year assault by the New Right, no one

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36. EMMANUEL LEVINAS, *TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY* (Alphonso Lingis trans., Duquesne Univ. Press 1969).

believes any longer in the model of regulatory government as morally capable of containing and altering a civil society founded upon Fear of the Other and private self-interest. A new spiritual activism actually connecting Self and Other is clearly what is needed, and it is already coming into being in hundreds of hopeful incarnations. If CLS were to rediscover itself as the legal–intellectual expression of that world-wide effort, it could once again challenge legal education and legal scholarship to become vehicles of the creation of a better world, connecting the worthwhile body of work already produced by its older generations with new, more spiritually confident work yet to be written by the young.

What's the problem, guys and gals?

