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Review Essay

Critical Legal Studies as Radical Politics and World View

Mark Kelman, *A Guide to Critical Legal Studies*, Cambridge, MA: Harvard University Press, 1987. Pp. ix, 360. \$14.95.

Eugene D. Genovese

I am a democrat because I believe in the Fall of Man. I think most people are democrats for the opposite reason. A great deal of democratic enthusiasm descends from the ideas of people like Rousseau, who believed in democracy because they thought mankind so wise and good that everyone deserved a share in the government. . . . The real reason for democracy is just the reverse. Mankind is so fallen that no man can be trusted with unchecked power over his fellows. Aristotle said that some people were only fit to be slaves. I do not contradict him. But I reject slavery because I see no men fit to be masters.

C. S. Lewis,
Present Concerns

As an act of simple justice to Professor Mark Kelman and his *A Guide to Critical Legal Studies*, I must begin with a caveat. Every author has the right to expect a reviewer to criticize the book he has written, not the

one he might have written. I have tried to meet that obligation but probably failed. Accordingly, Professor Kelman has a right to get sore. Still, the Critical Legal Studies movement entails a good deal more than quarrels over strictly legal questions, however discretely important. It proudly proclaims itself the cutting-edge of a new radical politics and a new social theory. He who would guide us through CLS but obscures that larger program is asking for trouble.

Guide consists of nine chapters that might have been grouped in three parts. As a bonus, Kelman offers fifty-eight pages of annotated notes that provide an invaluable bibliography of CLS writings. The first three chapters discuss rules and standards, the subjectivity of value, and intentionality and determinism. Together, they constitute a synthesis of CLS's familiar, controversial, slashing attacks on the premises and practices of the legal system. The synthesis contains some fresh contributions by Kelman, but its primary value lies in its systematic recapitulation of the arguments the Critics have been scattering throughout a variety of law journals.

The middle three chapters contain a powerful attack on the law-and-economics school, which Kelman views as the principal embodiment of the liberal ideology and program that CLS has set out to combat, and a noticeably less powerful attack on the legal-process school. Kelman adds fresh contributions, some of them excellent, to debates that will be familiar to those who follow the law journals.

The three remaining chapters discuss the contributions of CLS to legal history, its critique of the rule of law, and its effort to construct a theory of legitimation. Here we might expect the constructive side of CLS to emerge with full clarity. It does not, and Kelman only strengthens the gnawing feeling that there is not much there to emerge. But then, were there much, Kelman might have opened his book with a "Here We Stand." Instead, he assures us throughout that the Critics' destructive work should be understood as Prolegomena to its work of construction. If so, we are left with *Hamlet* without the Dane. This failure reflects no lack of talent on the part of an admirably talented author; it reflects the lack of the promised constructive work in CLS itself. That lack proves illuminating, for it exposes the inadequacies of the utopianism that has plagued the Left, including the Marxist Left, from its beginnings and that once again threatens to ruin its efforts.

Kelman does shed some light on the implicit theoretical and political program, but, primarily, he seems determined to repel mean-spirited and ignorant attacks by demonstrating that CLS should be regarded as a respectable tendency within the legal profession and the law schools. He has performed well. As John Stick observes, "One of the interesting results of Kelman's intellectual style is that much of the current notori-

ety surrounding CLS is made to look quite silly.”¹ Those words might be translated to mean that Kelman has performed too well and accomplished the astonishing feat of making CLS appear dull.

Guide is poorly written. Normally, civility would call for silence or at most a passing rebuke, but in this case the style of the book captures its content. Sentences, paragraphs, pages need to be reread, sometimes more than once, to be understood even by Kelman’s fellow lawyers.² Clauses within clauses abound for no apparent reason. *Guide* could easily provide fodder for the *New Yorker*’s illustrations of the undecipherability of academic prose. Kelman invites ridicule for a performance that reeks of mandarinism. After all, an exponent of radical egalitarianism might be expected to display a strong preference for “the plain style” and to reach out for the widest possible readership. The problem is not that Kelman cannot write well, for we have good reason to know that he can. His article on “Trashing,” for example, is clear and, at its peak moments, elegant and witty.³ The contrast suggests that *Guide*, for all its preaching against mandarinism, has a mandarin purpose, and that, for all its assault on the muddleheadedness of the despised liberals, it is trapped by the muddleheadedness of its own point of view.

Kelman’s Introduction invites a nonlawyer to proceed no further. With disarming frankness he tells us what *Guide* is not about, notably the political and institutional history of the CLS movement. In other words, Kelman mercifully spares us a recitation of the nasty quarrels that have been disgracing our law schools and flooding Academia with gossip. For that we should be grateful. Less mercifully, he spares us an explication and critique of all except the minimum of the CLS world view. For that we should not be grateful.

There is a limit beyond which any viewpoint becomes dull when it remains on the attack, content to assail other intellectual positions. *Guide* launches an attack on the theoretical basis of the liberal legal system and its dichotomies of rules and standards, the objectivity and subjectivity of values, and the recourse to assumptions of intentionality and determinism. But it suffers from the easy assumption that the contradictions themselves, rather than their specific forms, should be attributed to liberalism instead of being seen as inherent in human nature and therefore inherent in any society we might construct. Time after time, a reader wants to cry out: “Doubtless, it is all a mess. But what, exactly, do you propose to put in place of the legal system you are attacking?”

Kelman scorns to suggest something to put in its place. By exposing

1. John Stick, *Charting the Development of Critical Legal Studies*, 88 COLUMBIA LAW REVIEW 409 (1988).

2. Kelman’s style has drawn especially heavy fire in a generally harsh review by Richard L. Barnes, *Searching for Answers without Questions*, 24 SOUTH DAKOTA LAW REVIEW 220-225 (1989).

3. M. G. Kelman, *Trashing*, 36 STANFORD LAW REVIEW 293-348 (1984).

the contradictions and inconsistencies in the liberal legal system, he seems to think he has done his job. But if, as Calvin Massey, among other opponents, points out, contradictions and inconsistencies arise from the predicament of man in society, then any legal system—any social system—may be expected to suffer accordingly. Thus Massey scores a point when he notes that Kelman's often cogent critique of the privileging of rules over standards does not begin to demonstrate that rules should be dispensed with. It is not clear to me that Kelman in fact does think they should be dispensed with, but, as Massey says, it is no accident that Kelman winds up with the embarrassing rhetorical flourish, "Rules are the opiate of the masses."⁴

Similarly, Mark Hager, in a friendly review, finds "puzzling" Kelman's discussion of the contradictions of liberalism. "I cannot see," he writes, "what could be thought specifically '*liberal*' about the contradictions identified—rules/standards, value objectivity/subjectivity, free choice/determinism. They can more plausibly be viewed as *existential* or *structural* than as specifically *liberal*." And he adds, "A given legal order is characterized not by the existence of contradictions, but rather by the nuances of how the contradictions are, if you will, 'mediated.'"⁵ In fact, Kelman and the Critics do not deny that unreconcilable contradictions exist in human nature. Rather, they charge liberal society and the legal order with obscuring them. So far, so good. But they then assume that by opening up the society and legal system to participatory democracy and by exposing the contradictions to full view, we could somehow reduce the consequences to a bare minimum and usher in a much healthier social order. That far, not so good. And nowhere convincingly demonstrated.

The present social order and legal system may well be much worse than a practical alternative, as Kelman, the Critics, and many others believe, but that notion is precisely what needs to be elaborated and defended. Kelman does not do so. How could he, since he admits that CLS embraces an array of political tendencies and lacks a positive program? Instead, he offers an exhortation to risk a plunge into the unknown. That exhortation may fire the faithful but is likely to chill those who have counted the corpses piled up in such projects, especially during this century.

Thus, the alarmed protest of Harold Berman against the cavalier treatment of rules and standards cannot readily be turned aside by ever more cutting exposures of the philosophic pretensions, ambiguities, and incon-

4. Calvin R. Massey, *Law's Inferno*, 39 HASTINGS LAW JOURNAL 1274 (1988); Kelman, GUIDE at 63.

5. Mark Hager, *Against Liberal Ideology*, 37 AMERICAN UNIVERSITY LAW REVIEW at 1057-1058 (1988). Emphasis here and throughout in the original. See also Philip E. Johnson, *Do You Sincerely Want to Be Radical?*, 36 STANFORD LAW REVIEW 257 (1984).

sistencies in the rule of law. Berman properly scoffs at the notion that the replacement of the emphasis on rules by one on substance would end well, especially if carried as far as many of the Critics seem willing to go. "What is to prevent discretionary justice," he asks, "from being an instrument of repression and even a pretext for barbarism and brutality, as it became in Nazi Germany?" Nor does an appeal to the benign effects of a strong sense of community serve well, for as Berman observes, "Most communities of more than face-to-face size can hardly survive for long, much less interact with one another, without elaborate systems of rules, whether customary or enacted."⁶

The Critics do have a strategy for social change, but they never outline the content of the desired change itself. They invoke "participatory democracy" and "equality," as if those code words speak for themselves. On principle they refuse to identify the specific content since, in their view, the content must emerge from practice and thereby define itself. The strategy calls for a demand that counter-principles be given equal weight with principles (e.g., substance with rules) so as to force society and the legal system to realize their own professed ideals. Kelman stands with the redoubtable Roberto Mangabeira Unger in rejecting siren calls to revolutionary violence and the transformation of society in a single stroke. Unger insists that radicals undertake the patient work necessary for the steady transformation of existing institutions. His program therefore respects existing democratic and constitutional procedures.⁷

But how far does this respect extend? During the 1960s the New Left experimented with a strategy of raising demands that roughly conformed to prevalent ideals and of escalating those demands immediately upon having them granted. Thus, in effect, no institution could continue to meet the demands without destroying itself. The cynicism of the strategy doomed it from the start, for it quickly became obvious that a large and largely hidden agenda lay behind seemingly innocent proposals. Unger displays no such cynicism and palpable bad faith. He lays his cards on the table in seven books that work out the theory of a transformation to an egalitarian society. Rejecting both socialism and capitalism, as those

6. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* at 40-41; *see also id.* at 590-591, n. 88 (1983).

7. Unger's books deserve careful study by those interested in social theory and historical interpretation and are essential for an evaluation of CLS: ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* (1975); *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* (1976); *THE CRITICAL STUDIES MOVEMENT* (1986); *PASSION: AN ESSAY ON PERSONALITY* (1984); *SOCIAL THEORY: ITS SITUATION AND ITS TASK. A CRITICAL INTRODUCTION TO POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987); *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY. PART I OF POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987); *PLASTICITY INTO POWER: COMPARATIVE-HISTORICAL STUDIES ON THE INSTITUTIONAL CONDITIONS OF ECONOMIC AND MILITARY SUCCESS. VARIATIONS ON THEMES OF POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987). Throughout he rejects all-or-nothing politics and calls for a strategy of piecemeal institutional transformation.

terms are commonly understood, he outlines a new economic and social order that would transcend the familiar concepts of state and private property.

Were the Critics to make his vision and program their own, they could no longer be fairly charged with negativism, much less nihilism. But, if Kelman guides us aright, as I believe he does, they make a virtue of the ideological disarray in their ranks, treat Unger's work as one interesting possibility, and settle for a transformative strategy without committing themselves to a definite outcome. They thereby fall into the same trap as the New Leftists of the 1960s did, and they lay themselves open to the charge of deliberately hiding their true objectives. Those who file that charge make the doubtful assumption that the Critics could agree on true objectives.

The Critics' strategy threatens unforeseen and ominous consequences. If their quest for participatory democracy and equality constitutes a will-o'-the-wisp, then their work of destruction, instead of clearing away rubbish in the fight for a better society, would probably lead to new and worse forms of domination. Without a commitment to Unger's program for restructuring property relations, or some coherent alternative to it, the CLS's attack on the legal system can only work destructively in the idle hope that increased popular empowerment must end with desirable results. We have been there before.

Cultural radicalism underlies Kelman's kind of political radicalism and is reflected in his writing style, which invites objections, large and small. Here let us settle for a small one with large implications. I make no apology to the ladies for usually writing "men" instead of "persons" and always writing "his" instead of "his/her" or God knows what, for I cannot fathom how a commitment to justice and equity for women requires a trashing of the great English language. Kelman, who enjoys deconstruction, does not agree. Throughout his book he concedes this ground to the radical feminist ideologues he drolly assumes to speak for progressive women. We are treated to an orgy of "persons" and, for good measure, to "she" and "her," as well as "he" and "his," when the antecedent is not gender-specific. And in almost every case, Kelman treats us to "she" and "her" when the gender-unspecific antecedent is a good guy (a Critic, a victim of oppression, a defenseless child, a noble soul), and to "he" and "his" when the antecedent is a bad guy (a law-and-economics professor, an egotist, a murderer, a sadist).

I regret to learn that they still play cops and robbers at Stanford Law School, where Kelman teaches, but since I have greater respect for institutional autonomy than he seems to, I shall mind my own business. In any case, Kelman is by no means alone among the Critics in playing this childish game. What have we come to when men who aspire to speak seriously of serious things degrade themselves by cowering before

threatened accusations of sexism? For myself, I can only offer a paraphrase of the retort given by Mike Quill to some slob who red-baited him: I would rather be called a sexist by a damned fool than a damned fool by a sexist.⁸

The Critics may well be cowering, as I fear, but they are also doing something a good deal worse. Apparently, they have embraced androgyny and, with it, much else, including the reduction of social standards to a matter of “sexual preference” on the basis of some high principle I cannot wait to hear explicated and defended.⁹ They are entitled to their point of view, but their tactics speak volumes. Rather than compel a national debate over issues of capital importance, they invite us into an imperceptible reordering of social, political, and moral standards by a series of irreversible steps taken in response to “small” demands allegedly designed to remove residual bigotry. The tactics conform to a strategy, the strategy to a world view—the very world view Kelman labors mightily to obfuscate.

The problem arises from the Critics’ method, which identifies a counter-principle for every principle. Up to a point the exercise proves fruitful. But the Critics insist that the legal system embraces a liberal bias that privileges the principle in such a way as to make it seem natural and to make the counter-principle seem either deviant or merely a stratagem to accommodate exceptions. It may do just that, but the case made against it raises hackles. Surely, as the Critics charge, the procedure creates a powerful tendency toward the legitimation of the principle and throws the burden of proof on those who would like to reverse matters and privilege the counter-principle. But that is what any legal system ought to do, if only because it is difficult to imagine social order on any other basis.

The Critics reply that we need to unmask the arbitrariness beneath the pretense of objectivity in deciding upon the principle to be privileged. Very well. But, that we could hope to avoid such arbitrariness in the absence of transcendent and revealed truth remains to be demonstrated. The Critics want us to accept the recognition of inherent contradictions and to present principle and counter-principle on equal terms. In that way we may discipline ourselves through constant practice to revolutionize the legal system and indeed our lives in a continuous way. We may discipline ourselves, that is, to live in a state of permanent revolution as a

8. Quill, who led the Transport Workers Union in New York City before and after World War II, was famous for his marvellous Irish brogue and militant left-wing politics, at least until he broke with the Communists shortly after the war. The oft-quoted words attributed to him were: “I’d rather be called a Red by a rat than a rat by a Red any day.”

9. Kelman might be surprised to learn that many staunch feminists associated with the Left do not share the position of the radicals on these and other questions and, in fact, find them imprisoned by individualist ideology. See, e.g., ELIZABETH FOX-GENOVESE, *FEMINISM WITHOUT ILLUSIONS: A CRITIQUE OF INDIVIDUALISM* (1991) and its references to the works of others.

method for constantly widening the possibilities for self-expression and the realization of the creative potentialities in our personalities. We have their word for it: Such a world would exhibit a social order superior to the one we now have. I see no reason to believe it and know of no historical evidence to encourage me to. To the contrary, I can only see the prospect of what Louisa Susanna McCord of antebellum South Carolina, a social critic of parts who opposed the utopianism of her day, referred to as "a wrangling dog kennel."¹⁰

The Critics demonstrate that liberal society and its legal system do not sustain their own professed democratic and egalitarian premises in practice. They everywhere find not democratic and egalitarian practice but oppression and hierarchy, and wherever they find hierarchy, by which they seem to mean any structure of authority, they conclude, to their own satisfaction, that they have found oppression. On these and related matters we confront the book not written, for much of the difficulty arises from the lack of a theoretical and political consensus in the CLS movement itself. Kelman punts: He tells us that the movement is a house of many mansions and should be understood as a coalition of radicals of different kinds. Thus he reduces his discussion of the CLS world view to its negative common denominator. To Kelman's credit, he does not spare other Critics, including Unger, criticism, and he thereby makes worthwhile contributions to the clarification of secondary issues. But he succeeds primarily in revealing, if inadvertently, that the Critics are not rallying to the standard of Unger, their most intellectually powerful social critic, however much they accord him a guru status he probably does not aspire to.

Unger does have a positive vision, does struggle to transform negative criticism into constructive theory, does advance the outlines of a political program. To review Kelman's book in the customary professional manner would mean to bypass Unger. To focus upon the corpus of Unger's work would be to do Kelman dirty. To include a truncated review of Unger's work would mean to treat a powerful social theorist superficially. Not to risk the inclusion would mean to discuss CLS without attention to everything in it worthy of general consideration. Now it is my turn to get sore.

I shall do my best but must insist that Unger's rich, complex, and carefully nuanced work deserves to be studied and evaluated on its own terms and with due respect for its subtleties. But a special problem arises from those subtleties, and from the subtleties of Kelman and the best of the Critics. They display an extraordinary talent for anticipating criticism: Unger is a perfect genius at it. Much may be learned from the

10. Louisa Susanna McCord, *Woman and Her Needs*, 13 DEBOW'S REVIEW 275 (1852). Alas, Mrs. McCord was defending slavery and the subordination of women. I regret the uses to which she put her learning and good sense, but learning and good sense she had.

qualifications and refinements they constantly introduce, and any brief critique of their views risks some unfairness and distortion. But in the end, their rhetoric overwhelms their dialectics. For no matter how many qualifications they introduce into their discussions of democracy, equality, and much else, their intentions and ideological stance come shining through.

Let us begin with the never-defined term "hierarchy," which the Critics assail in a manner that passes into a broadside attack on authority *per se*. In Kelman's book, as in all CLS writing, authority appears as illegitimate, oppressive, exploitative. Even Unger, who wisely warns against the delegitimization of all authority, hardly begins to make a convincing case for a legitimate authority.¹¹

Consider the CLS insistence that men should be free to move from one situation to another as the best guarantee against majoritarian tyranny and oppression.¹² That admirable goal ought to mean, for example, that if faculty members or students experience negatively the policies and arrangements of a university, they ought to be able to move to one more congenial. But if the experienced oppression stems from the imposition of a democratic consensus, then the reigning attitudes may be expected to reappear in the substituted university and produce a similar result. The only assurance against such institutional flattening would lie in the university's ability to project and defend autonomous goals and procedures and to assert dissident values. If all were compelled to adhere to standards established in society as a whole, whether established democratically or not, the freedom to move would become a sham. And the Critics' appeal to a plethora of communities and institutions within society only brings us back to the same problem.

Specifically, since the Catholic Church, appealing to the revealed word of God, regards homosexuality as a sin, it could not tolerate homosexuality on its campuses without prostituting itself. More generally, if a Catholic university could not discriminate in the hiring of its faculty and could not infuse its curriculum, not merely its theology courses, with its own version of Christian ethics, it would cease to be Catholic in any respect other than in its claims on government subsidies. (Please do not tell me that Catholic universities do just that. I repeat: They could not do so without prostituting themselves and ceasing to be Catholic. I am painfully aware that a good deal of prostitution is taking place.) A Catholic university must be allowed to discriminate and to stand on its prejudices. But to allow it to do so, society must acknowledge the legiti-

11. Unger's warnings may be found throughout his books. In a similar vein he warns that the decline of the rule of law could endanger freedom and unleash a new tribalism. See *LAW IN MODERN SOCIETY* at 237-239.

12. See, e.g., UNGER, *KNOWLEDGE AND POLITICS* at 279-280; *LAW IN MODERN SOCIETY* at 239.

macy of some claims of discrimination and prejudice. It does not follow that any institution should be allowed to discriminate at will. Collective historical experience has prior claims. The United States has paid a terrible price for racism, and nothing should prevent its placing racial discrimination beyond the pale. But it does follow that such strictures should be held to the barest minimum.

And it also follows that a democracy imposed upon, say, a Catholic university would threaten institutional autonomy and distinctiveness, especially if the university were prevented from prejudicing the hiring of faculty to guarantee a critical mass of Catholics. At that, anyone who had received confirmation in the Church could claim to be a Catholic and yet be ready, as so many are these days, to treat the standards of the Church with contempt. How long would it take for such a faculty, acting democratically, to destroy the very Catholicity of the university? To put it another way, only a strong dose of institutional authority and hierarchy could preserve such distinctiveness, which even the Critics claim to regard as essential to the preservation of democracy and freedom in the larger society.

A question: Are the Critics prepared to impose their egalitarian and anti-hierarchical notions on the episcopal churches? If so, what becomes of religious freedom? And never mind that they could reasonably crow that, even in the Catholic Church, the laity is doing it for them. Sanity may yet return to the laity, or the laity may be put down by a Pope who, whatever his faults, gives no sign of being a fool or a marshmallow.

Unger, sensitive to the inevitable complaint that his egalitarianism could undermine social order, argues that only an expanding experience of equality could reveal what equality really is.¹³ The same might be said for a lot of things sensible people would rather not try. To demonstrate that inequality causes pain and comes at high personal cost is hardly enough to tempt those who are not desperate.

The CLS strategy of self-revolutionizing legal reform proceeds on undefended assumptions. The liberals and free-market right-wingers have no right to complain since they generally proceed on similar assumptions. I regret the clumsy reference to "free-market right-wingers," but whatever these Chicago school chaps may be, conservatives they are not. The traditionalists, who are conservatives, have every right to complain, but since, with the partial exception of Unger, neither the Critics nor their leading opponents bother much with them, their viewpoint is rarely heard in today's polemics. The assumptions at issue concern democracy and equality, which presumably embrace proper values and constitute worthy goals. One of the finest achievements of CLS criticism has been its ruthless exposure of the contradictions and failures

13. UNGER, *LAW IN MODERN SOCIETY* at 240.

of what, in the old days, the Left called “bourgeois democracy” and “the parliamentary swindle.” Most notably, Unger offers a marvellous critique of the social deadlock that arises from the cycles of parliamentary shifting between defenders of the status quo and reformers.¹⁴ As Kelman shows, virtually all of the Critics, in one way or another, share Unger’s view on this matter. Invariably, the proposed solution emerges as more and more “participatory” democracy. We get hardly a word in defense of the concepts of democracy and equality themselves. Thus the largely implicit attacks on republicanism demonstrate its contradictions, weaknesses, and failures in a way that merely assumes the existence of a constructive alternative.

Republicanism implies a measure of democratic control, for it acknowledges an ultimate appeal to the people, whom it recognizes as the ultimate source of political authority. In this sense, even most modern traditionalists subscribe to Churchill’s celebrated *bon mot* that democracy is the worst form of government except for all the others. But the kind of democracy implied here necessarily succumbs to charges of building in hierarchy—the Critics’ *bête noire*. The transformation of the CLS critique from a destructive assault on what might arguably appear as the best we could get into a constructive program for social change would require a defense of direct or “participatory” democracy—require, among other things, a demonstration that it could work in a technologically complex modern society or indeed in any civilized society at all. Instead, we are asked to assume that which must be demonstrated, presumably on the grounds that if the liberals and free-market rightwingers also speak as egalitarians and democrats, we have no problem.

This romance with “participatory democracy” leaves little room for the protection of minorities or for dissident individuals for that matter, except perhaps for those who chatter in the name of ever more democracy. The American Left, or most of it, today joins the Center and Right in cheering wildly over the “democratization” of Eastern Europe. To read the left-wing press is to learn that, shucks, that is what the Left had in mind all along but was just too busy to mention. Like the Center and even much of the Right, it may soon have to swallow hard, as the Rumanians, Hungarians, Albanians, Serbs, Croats, Azerbaijanis, Armenians, and other shiny new democrats democratically resume their age-old pastime of slaughtering each other—a pastime the nasty Reds undemocratically kept them from indulging in for nearly half a century. Still, in one respect we may see a democratic consensus across tribal lines: They may yet democratically agree to settle accounts with their Jews. And what we may expect from the democratic wonders of a demo-

14. UNGER, *CRITICAL LEGAL STUDIES MOVEMENT* at 28-32; *FALSE NECESSITY*, ch. 2.

cratically reunited Germany I, for one, would rather not think about, although I know I have to.

The assumption that democracy is intrinsically wonderful—that the more of it we have the better off we are—exposes the deeper and more difficult problem of equality. All the leading contributors to the current debates stand on the principle that “all men are created equal”—a principle announced as self-evident though nowhere seriously defended; a principle the flagrant cant of which could hardly be more apparent. The traditionalist critique of equality thereby goes unanswered. The tactic serves the Critics well and allows them to embarrass their principal opponents, for, on one issue after another at law and in society generally, the Critics effectively show that the legal system perpetuates inequality in some form.

Unger makes a telling point, which echoes in Duncan Kennedy’s essay on Blackstone, lurks just beneath the surface of Kelman’s book, and says much too much: “Even reliance on merit becomes suspect when its dependence on the distribution of genetic endowments is taken into account, for people may begin to doubt whether a man’s social place should be determined by a fact of which he is not the author.”¹⁵ Indeed, “men may begin to doubt.” But could any statement of the politics of envy be clearer? And if we place in doubt not merely all authority based on social convention but all authority based on natural endowment, on what grounds could we respect any authority at all? Unger, throughout his work, defends religious thought and sensibility as necessary for the construction of the new metaphysics we require. Kelman, Kennedy, and the Critics in general show little taste for religious thought and sensibility, and they thereby undermine their theoretical project since they have nothing to substitute. Whatever their personal views, they may well sense a trap. For on religious premises, intelligence and talent must surely rank as a special gift of God and, therefore, as a firm basis for legitimate authority. And no such gift would be relevant unless developed and disciplined by the individual effort that the Critics tell us constitutes no authorship.

Unger, Kelman and other sensible Critics—we may leave aside the dummies and cranks—know that without some measure of authority civilized life would be impossible. Unger specifically warns that liberal thought and practice are undermining all authority, with appalling con-

15. UNGER, *LAW IN MODERN SOCIETY* at 172. Duncan Kennedy similarly frets over “hierarchical structures of power, welfare, and access to enlightenment that are illegitimate, whether based on birth into a particular social class or on the accident of genetic endowment.” See Kennedy, *The Structure of Blackstone’s Commentaries*, 28 *BUFFALO LAW REVIEW* 212 (1979). Unger is troubled by the implications and returns to the subject in *FALSE NECESSITY*, where he makes excellent points on the nature and danger of envy and admits that some inequality may be unavoidable. He allays his doubts by again invoking love, faith, and sympathy. *FALSE NECESSITY* at 169-173, 212-217, 220-221, 270-271.

sequences for society. We need, he argues, “to make [individual] autonomy compatible with authority.”¹⁶ But an occasional admonition is as far as even he goes. If there is a concept of legitimate authority anywhere in Unger’s books or in Kelman’s *Guide* or anywhere else in CLS writing, I have somehow missed it. The Critics have left themselves wide open to the charge that they seek to enforce not equality of opportunity, which they recognize as an impossibility and a fraud, but an equality of condition that makes no sense in a world of economic scarcity and that would require what they themselves confess to be a violation of nature. Skeptics may be excused for wondering about the kind of society that would arise on a principle so transparently cynical. The problem does not lie primarily in CLS negativism per se, as many of their opponents charge and as Kelman himself focuses on.¹⁷ For, in response, Kelman makes out a reasonable case for the constructive uses of negative criticism. Rather, it lies in the particular kind of negativism, which the Critics themselves insist upon as a political program. They wish to tear down liberal society and its legal system in the hope that whatever replaces them, if guided by an egalitarian ethos and sensitive to the demands of participatory democracy, would probably be better. As opponents of determinism, they offer no guarantees, but they do try to make a case for an overwhelming probability the basis for which remains elusive.

A long and depressing history tells a different story, which is full of murderous attempts to realize the beauties of egalitarianism and a world without hierarchy. In the wake of such attempts, particular forms of inequality and hierarchy have repeatedly given way to new forms. The exchange has often proven salutary, but the human cost has surely run high enough to make us wary. A case for social revolution and the acceptance of fearful blood-letting could, nonetheless, be made. Whatever the miseries of the French and Russian revolutions, our world would arguably be worse off had they not occurred, and slavery in the United States might not have been abolished without a ghastly war. But such a case would not readily offer aid and comfort to CLS utopianism. Indeed, as Unger has bravely insisted throughout his work, such revolutions, however defensible, have proven the worst possible way to solve the problems of particular historical injustices.

Kelman and the Critics justifiably fear that any grammar of assent must lead to a politics of resignation, to a hardening of the heart to human suffering, to apologetics for the status quo. Such fear from adherents of radical indeterminacy inspires some mirth, but we should not be too quick to laugh. Those outcomes may not be foreordained, but they remain strong possibilities. The Critics’ discomfiture is also ours. In a

16. UNGER, *LAW IN MODERN SOCIETY* at 237.

17. Kelman, *Trashing* at 296-297.

world that rejects the revealed truth of religion and that has not yet discovered the new metaphysics Unger calls for, where do we turn for the wisdom that can steer society between Scylla and Charybdis?

The closest Kelman comes to a reply occurs in his essay on "Trash-ing," and it is unworthy of him. He attacks Robert Ellickson for a "purely theoretical refutation" of the critique of hierarchy and adds that Ellickson "falls back on the most laughable 'history' imaginable: Hierarchy must be fine because 'hierarchy is ubiquitous within all organizations of any size.' Unless one is ready to dismiss, *a priori*, the very possibility of power and illegitimate domination, universality is hardly proof of necessity."¹⁸ It is striking that Kelman reads a defense of authority as necessarily a defense of illegitimate authority, but that too we may let pass. True, ubiquity is not proof of necessity, but it creates a powerful case for proceeding as if it were. Surely, it places the burden of proof on those who would sustain the contrary. And to what do the Critics appeal beyond "purely theoretical refutation"? They do not themselves invoke a laughable history, for they invoke no history at all in support of their contention that civilized life would be possible without some form of hierarchy. All they say is that there is a first time for everything. Like hell there is.

Kelman does seem troubled by this point. After referring proudly to the CLS's work as "utopian," Kelman writes: "I see too little reason to believe either that history has a significantly predetermined teleological path, particularly a progressively bettering one, or that we could discern such a path if it did exist, to believe that the precise nature of our better tomorrows can be understood by looking more carefully at the hands we've already been dealt."¹⁹ It is too bad that those fine words have been enlisted in an unworthy defense of playing politics *va banque* and, in effect, for absolving oneself in advance for the consequences of doing so. For no anti-utopian could say it better. Is it possible that Kelman does not recognize how far those words go toward undermining his own political position?

On this matter Philip Johnson rams the Critics' words back in their craw. Unger, he observes, admits that a solution to the conflict between community and personal autonomy would require a new metaphysics. Johnson comments: "Whatever may have been the author's intentions, the political implications of these messages seem conservative to me. If we not only do not know how to get there from here but also don't know where 'there' is, doesn't it follow that we should stay here until more information comes along?"²⁰ Other, more mean-spirited opponents have accused the Critics of totalitarianism, and some have even called for

18. *Id.* at 306, n. 37.

19. *Id.* at 336, 343.

20. Johnson, *supra* note 5 at 283.

purging them from the law schools. They conflate the sin with the sinner and the possible outcome with the intent. In doing so, these liberals are remarkable. They never stop flaunting their anti-Stalinism, but what are they doing if not invoking Comrade Stalin's glorious dictum that the "objective" outcome reveals the intent? The possible, indeed probable, outcome nonetheless cannot be swept aside. In criticizing the CLS for its personal liberationism, I may seem to have advanced an argument that cannot coexist with the charge that the program of the CLS contains totalitarian dangers. In fact, it coexists easily. The history of utopianism demonstrates, in case after case, that movements dedicated to the creation of a social equality designed to liberate the individual to realize a presumably benevolent inner will have ended, usually quickly, in the opposite.²¹ A dubious psychology condemns it in the first instance. If people are good and "altruistic"—more accurately, if the goodness and "altruism" in them are capable of extraordinary expansion through political struggle—and if the regime, whatever its specific characteristics, presents a communitarian agenda that liberates them to become truly human, then they should respond on cue. Unhappily, they rarely if ever do. From which it follows that these particular people, no matter how numerous, must not be quite human to begin with and should expect to be dealt with accordingly.

Kelman and the Critics cannot easily turn aside the charge that they seek to impose upon others their own notion of what everyone else's inner will needs in order to achieve fulfillment. Their open acceptance of the need for what they call "paternalism" in human affairs does not in itself make the case against them, but the specific kind of argument they are compelled to make does.²² And that kind of argument betrays the radical individualism that lies at the core of their supposed communitarianism. For, in rejecting the traditionalist (organicist) premise that society remains prior to the individual and has superior claims, they must scramble to postulate for all humanity a complex of mutual love, faith, and sympathy that needs to be released from the repressions of hierarchical controls. Their whole doctrine of solidarity rests upon this presumed goodness, in contradistinction to the doctrine of the organicists, which postulates the prior claims of community and has no need for a descent into high comedy. In passing, let us note that Kelman and the Critics talk much about rights but rarely if ever about the duties that must accompany rights, at least if we are to proceed on sensible communitarian principles.²³ Kelman does mention duties, but, somehow, they

21. Kelman might well deny that CLS invokes the doctrine of inner will—see, e.g., GUIDE at 137—but I see no other way to read him and the Critics generally.

22. KELMAN, GUIDE at 137-141 and *passim*. Kelman shows the CLS to be uneasy about paternalism, and he makes some useful distinctions. But he also shows that, by any other name, a strong dose of paternalism lies implicit in CLS thought.

23. It is noteworthy that the index to GUIDE refers to three places and six pages under "rights

always turn out to be the duties imposed on those who should be made to surrender privileges.

Unger goes to the extraordinary lengths of proposing that a good (democratic, egalitarian) society ought to allow people to opt out. That is, every man ought to be guaranteed the "right" to a decent standard of living even if he refuses to work and to share the ordinary social burdens.²⁴ Unger apparently assumes that few would choose to do so or at least too few to disrupt society. I doubt that I am alone in assuming the reverse and in refusing to take the gamble. And Unger must assume that those who do the work, having had their altruistic sentiments expanded by the joys of participatory democracy, would cheerfully tolerate those who lived off them. He must also assume that socially useful work itself need not be viewed as essential to character formation and need not be viewed by society as a duty and a matter of honor. Nothing in *Passion* or Unger's other books supports such assumptions, unless we count as something a long list of hopeful assertions.

Kelman, for his part, falls silent on such questions, much as he falls silent on the implications of his radical egalitarianism for such urgent questions as the fate of the steadily widening class of sociopaths our society is producing. The Critics' rejection of a doctrine of the prior rights and exigencies of the community, reinforced by their rejection of hierarchy, lies at the root of the totalitarian tendencies they certainly do not want to see realized, as well at the root of Kelman's intellectual evasions. For if the interdependency of men and the need for "paternalism" are to be accepted without a capitulation to totalitarianism, then hierarchy, legitimate authority, and a healthy dose of repression cannot be avoided.

Kelman and the Critics abhor dependency relations and people who give orders. Their defense of "paternalism" would seem to imply the one and countenance the other, but they make no effort to square the circle. Their argument, as Kelman presents it, comes close to an assertion that dependency is not really dependency when it realizes the dependent's inner will. In contrast, the southern slaveholders, who had daily experience with paternalism, never claimed that they were realizing their slaves' inner wills, only that they were protecting their slaves' rights, as defined by capacity. They were deceiving themselves, *ma non troppo*, in comparison with the Critics. Having no wish to engage in satire, I only suggest that the Critics make a greater effort to clarify their ideas. Unger in fact is more careful, but not careful enough. He hints that, after all, the problem is to reduce arbitrariness and oppression to a bare minimum

discourse," but has no entries for "duties," "obligations," or "responsibilities." Whoever made the Index performed in a manner faithful to the spirit of the text.

24. UNGER, *FALSE NECESSITY* at 526. Unger does write "if the wealth of society permits," and a variety of sermons could be preached on that text. Again, the rhetoric and its implicit view of human nature overpower all dialectical qualifications.

by making all leaders accountable to the greatest possible degree.²⁵ Nazis aside, who would argue? Even law-and-economics professors might be able to live with that formulation since it smuggles in an acceptance of some kind of legitimate authority and leaves all the knotty theoretical issues and organizational specifics up for grabs.

The problem of institutional autonomy recurs since the Critics want to politicize everything and virtually eliminate the private sphere. Once again, they are good on the attack, demonstrating the ways in which ostensible respect for privacy permits not only oppression but atrocities no civilized society should tolerate. But their solution treats the right to privacy lightly. To democratize everything means to politicize everything, and since everything that happens in social life has some political implications, the case for the total politicization of the family and everything else is supposed to be invincible. In fact a dose of common sense would take care of the general problem. Much of family life may be put beyond the purview of the state without giving a blank check to wife-beaters and child abusers. The privacy of the family has long been respected while limited. But that arrangement requires the recognition of a legitimate authority in both state and family and an acceptance of such dreaded hierarchy as that of parents over children.

We neither have nor should expect to have a formula that could satisfactorily divide the public from the private sphere. Here too, historical experience offers the safest guide, but the interpretation of historical experience will always be ideologically charged. Indeed, as the Critics would be the first to insist, the very distinction between the spheres makes an ideological statement. But it remains difficult to imagine any degree of individual freedom worthy of the name without a wide swath for privacy and the institutional autonomy upon which freedom and privacy often depend. The problem concerns the bias brought to bear on the large and unavoidable gray area between the claims of privacy and the necessity for intervention to curb atrocities. On that question, the burden of the Critics' argument points toward the privileging of the claims of the state. I should suggest that even those of us who place community cohesion above individual right would do well to resist that siren call, lest we undermine the measure of individual freedom that ought to be compatible with social safety.

Today we are all democrats, if only for want of an alternative, but the Critics espouse a democracy that is radically egalitarian and "participatory." Hence the demand to politicize everything. The realization of the vision of the good society that Unger projects and that peeps through Kelman's blasts at hierarchy would require every man's con-

25. This too is a running theme in Unger's work. *See, e.g., FALSE NECESSITY* at 432-436. Kelman remains unclear but could easily be read to make similar concessions.

stant participation in politics, for it must depend upon the direct politicization of all intermediary institutions and arrangements between the individual and the state: businesses, unions, churches, schools, the family. If Oscar Wilde could recoil from socialism because it would take too many evenings, what would he think of this project? Unger makes his customary brave effort to avoid his colleagues' facile utopianism and to meet the issue. Sensitive, as most Critics are not, to the nightmares in which all dreams of the revolutionary creation of "New Men" and "New Women" have ended, he outlines a process of the expansion of participation in the step-by-step ordering of institutions and rejects all calls to play *va banque* with society as a whole. When, therefore, he says that we must experience equality in order to know what it is, he is not speaking frivolously.

In Unger's view each new measure of participation in decision-making deepens individual consciousness and releases untapped energies. Doubtless it does—up to a point—and who would object to a reasonable testing of limits? But his project is open-ended, and, notwithstanding warnings against adventurism and excessive demands on people in time and place, it rests on a faith in a quasi-egalitarian outcome that only a willingness to live in a state of permanent revolution could sustain. At first glance the vision has a genuine nobility, but a nobility that demands immeasurably more of people than we have reason to believe they could sustain threatens to collapse into its opposite.

Since a defense against the tyranny of the majority can no longer practicably rest on the consensual morality of Christian revelation, it must rest on a man-made alternative. Thus Unger calls for a new metaphysics—a project he surely knows is easier to call for than to effect. Meanwhile, our only guide would appear to be historical experience as read, however arbitrarily, by those prepared to invoke the Christian dogma of the moral equality of man. Moral equality, however, does not imply physical, intellectual, or civil equality and cannot logically be invoked to support CLS assumptions. And I fear that history compels us to stand—gagging, if we must—with Burke in regarding government as a compact of the living, the dead, and the unborn. The permanent revolution implicit in the CLS project could not flourish on such ground, and the project itself offers no other ground to stand on.

The Critics' project of human liberation—for that is what it amounts to—stands or falls on its assessment of human nature. One looks in vain in Kelman's *Guide* for such an assessment, although there are hints. Unger, as is his wont, does confront the issue and does contribute valuable insights on the ways in which what is assumed to be bedrock reveals itself a historical product. But he does not refute the fundamental insight of Christian theology, albeit an insight abandoned by the mainline Protestant churches more than a century ago, and of such secular doctrines

as Freudian psychoanalysis before they too succumbed to liberal bastardization. I refer to the doctrine, however secularized, of original sin and the depravity of man.

Let us leave the theology to the theologians on the pretext that it need not concern such enlightened secularists as ourselves. Translating it into other terms, we may appeal to the historical record of human experience, which science has not yet effectively contradicted, to postulate warring tendencies in everyone: the drive for self-expression and the unavoidable dependency on others. This contradiction cannot be reduced to a question of freedom versus social order, autonomy versus authority, the individual versus the collective. It will not do to note that man's freedom is itself a product of social life and then to cry out with Duncan Kennedy, "But at the same time it forms and protects us, the universe of others. . .threatens us with annihilation. . . . Numberless conformities, large and small abandonments of self to others are the price of what freedom we experience in society."²⁶ These remarks appear dialectically sound, if somewhat ambiguous, but rhetorically they reduce their own dialectical truth to nonsense. For "the price we pay" necessarily defines the freedom itself. Only by identifying freedom with personal desire could Kennedy threaten us with "annihilation." Kennedy here apes the moral stance of the liberals he sometimes caricatures—the kind of people who, when confronted by the dilemmas of life, offer up the only prayer they know: "May God have mercy on us."

From start to finish, in Kelman's *Guide* and without, the Critics proclaim their war against individualism, and from start to finish they wallow in the individualism they purportedly war against. Kelman, like Unger, Kennedy, and others, begins with the conflicted concerns of the individual and ends with his liberation or, more accurately, with a commitment to push for a presumably maximum liberation against all odds. They extol the community (society, group) and insist that the individual expand his personality with due respect for the personalities of others, but they reject, virtually out of hand, the alternate concept of the prior rights and imperatives of the community. In this respect they follow proudly in the tradition of the great bourgeois theorists from Hobbes to Locke and Blackstone and Burke, and beyond.

Those great theorists argued that man has a God-given natural liberty and, with it, rights. Yet they also argued that man willingly sacrifices much of his natural liberty in order to secure some of it. Why? Because natural liberty entails murderous—"mischievous" was Blackstone's preferred word—impulses, which, if released, would unleash anarchy and destroy liberty itself. Now, how could the God-given gift of natural liberty entail murder, mayhem, and mischief? Was God drunk? What

26. Kennedy, *supra* note 15 at 212.

could liberty conceivably mean other than a liberty that would be secured, healthy, and constructive? The answer does not emerge from the Critics' secularization of the problem, any more than it emerged from the secularization offered by Hobbes. Thus Albert Taylor Bledsoe, taunting Blackstone and the liberals of the nineteenth century in which he lived, denied the existence of any liberty other than that which arises from society's repression of our negative impulses. Society, he argued, made liberty possible, and therefore liberty has no meaning apart from society's constraints.²⁷ Accept this view and the Critics' theoretical edifice crumbles.

The Critics implicitly answer that the organicist vision rests on a myth—that the prior claims of society cannot be grounded empirically or in an undisputed metaphysics. That answer proves no answer at all. Kelman seems to think that, because his politically strongest opponents, the free-market rightwingers and the liberals, also dismiss the organicist argument, he need pay it no mind. The organicist notion does in fact rest on a myth, but so do the alternatives. Kelman might reflect on his own work of deconstruction, which proves inherently incapable of demonstrating that we could do without one or another such myth. In the absence of a superior social science and an adequate metaphysics, we are compelled to choose among contending myths, for the work of deconstruction and the revelations of negative dialectics do no more than remind us that life is hard. Choose we must, and good sense dictates that we choose the myth that conforms most closely to historical experience.

Freedom, however defined, has arisen historically within and as a product of society, which remains prior to the individual not merely chronologically but—*pace* all CLS warriors against false necessities—as a matter of undiminished historical necessity. Its claims, therefore, are also prior. A “free” society may, accordingly, be viewed as one that expands individual freedom to the utmost consistent with an imposed sense of social order, and that places the burden of proof on those who would limit the individual's claims against society and the state. It proceeds on the assumption that, were men left wholly free to express themselves, they would eat each other alive.

The Critics seem to think that the massive historical evidence easily arrayed in support of such an assumption is beside the point—that historical contingencies could be overcome by revolutionary praxis. Maybe. But it requires a dangerous mind-set to toss out the whole record of human experience in favor of a riverboat gamble on the patently utopian imagination of men who admit the antisocial nature of our deepest desires but who hope that it could be neutralized by love, faith, and sympathy.

27. ALBERT TAYLOR BLEDSOE, AN ESSAY ON LIBERTY AND SLAVERY, ch. 1 (1856).

In a perceptive critique of the communist regimes, Unger defines their central contradiction as the juxtaposition of hierarchical political and economic structures and their professed goal of an egalitarian society that liberates the individual to maximize autonomy and self-expression.²⁸ He is right, but he never does question the professed goal, much less note that Marx himself arbitrarily imposed it on a powerful interpretation of history with which it had no logical connection. We need not close our eyes to the grievous faults of the particular form and content of the communists' hierarchy to see that their failure should be attributed primarily to the impossibility of sustaining adherence to an unrealizable ideal.

Kelman could not easily have obscured or trivialized these issues had he taken the measure of the attack on individualism mounted by the traditionalist or organicist Right. The free-market rightwingers and most liberals may be able to reject organicist theory out of hand since they unabashedly take individualist ground, but those who, like the Critics, advocate a communitarianism dare not. Communitarian theory, whether in conservative organicist or Marxist and socialist versions, has always accepted or accommodated to principles of leadership that the Critics call hierarchical. The one thing the Critics cannot get away with is the pretense that communitarianism per se implies nonhierarchical relations. To the contrary, their problem is to demonstrate that a practicable communitarianism could be reconciled with a repudiation of hierarchy at all.

The organicists pose a double challenge, the one political, the other theoretical. While Kelman directs his fire against the free-market rightwingers, and Duncan Kennedy directs his against the left-liberals, Unger has his eye on new political alliances.²⁹ His proposals for constructive social change might well attract people from across the ideological spectrum, and it is a measure of his political seriousness that he wants few doors closed. Unfortunately, despite some feints, he seems unwilling to open the door to the organicists, with whom he may well share more than he would like to—certainly, much more than other Critics would want to hear about.

Kelman does not match Unger's effort to meet the arguments of the organicists. In *Law and Society* Unger dismissed organicist theory by observing that it could not account for social conflict.³⁰ But it does account for it, after a fashion. It should be enough to recall Roland

28. UNGER, *LAW IN MODERN SOCIETY* at 233.

29. See esp. Unger's opening remarks to *SOCIAL THEORY*.

30. Unger discusses organicist theory and a number of points in *LAW IN MODERN SOCIETY* and *KNOWLEDGE AND POLITICS* and, as usual, has many valuable things to say about the history as well as the theory. In *KNOWLEDGE AND POLITICS* at 82-83, he concedes that it has been a staple of modern Western thought. But he nonetheless ends dismissively, arguing, e.g., *id.* at 250, that it has largely sought to reestablish older orders of estates and roles. Clearly, it is the organicists' commitment to hierarchical authority that he cannot swallow.

Mousnier's remarks in his illuminating history of early-modern peasant uprisings. The "cause" of social conflict, he wrote, lies in original sin and man's inability to live in accordance with the laws of God.³¹

Unger returns to the organicists in his recent books, but he does so uneasily, as if he suspects that he is still not doing them justice.³² Part of the problem may arise from his being riveted on certain European and Latin American schools of thought, particularly those associated with Catholicism. He nowhere discusses the primary American variant, that of the southern conservative tradition from Thomas Roderick Dew, John C. Calhoun, and Bledsoe down to Allen Tate and the Agrarians, Richard Weaver, and such contemporary figures as M. E. Bradford and Thomas Fleming.³³ Hence he avoids a confrontation with a distinctly republican body of thought that, especially since Tate, has claimed for itself the "modernist" ground Unger wants the Left to occupy. Instead, Unger offers a discussion of "moderate organicists" whose views are presented with a noticeable lack of clarity. Who these moderates might be and what they stand for remain obscure.

To add to our frustration, Unger bravely alludes to the intellectually serious streak of corporatism in early fascist thought and hints that it might have something to offer.³⁴ It does, but who would be crazy enough to pursue the matter in the virtuous climate of "diversity" that now prevails in our universities? A hint, in any case, is all we get. But by ignoring the southern conservatives, who have grounded their own version of individualism in a community with prior claims, and by sidestepping the fascists, Unger, in effect, strikes his colors. No wonder, then, that Kelman and his colleagues proceed as if the challenges need not be noticed.

American traditionalists, as they prefer to be called, appeal to Christian theology to ground their view of human nature, however secular the form it may take in the writing of a particular individual. Unger ought to welcome the challenge since he makes his own strong and arresting appeals to religious thought. We may doubt that many if any of his colleagues among the Critics take him seriously in this respect, but if they do not, they cannot easily build on his thought. This is a big subject in itself, which will have to be left for another day. Let it suffice for the moment that Unger's repeated invocations of religion refer to God "if He exists" and, more to the point, refer to the all-loving and forgiving God of liberal and especially Universalist theology. The organicists, including

31. ROLAND MOUSNIER, *PEASANT UPRISINGS IN SEVENTEENTH-CENTURY FRANCE, RUSSIA, AND CHINA* at 306 (1970).

32. See, e.g., UNGER, *FALSE NECESSITY* at 384-389.

33. The work of Richard M. Weaver offers the best introduction to traditional southern thought. See esp. *THE SOUTHERN TRADITION AT BAY: A HISTORY OF POSTBELLUM THOUGHT* (1968); *IDEAS HAVE CONSEQUENCES* (1948); and *VISIONS OF ORDER* (1964).

34. UNGER, *FALSE NECESSITY* at 386.

the occasional atheists among them, have a different God in mind: the God of wrath, who proclaimed Himself "a jealous God." Do not get mad at me. Unger, not I, introduced these questions, even if Kelman has seen fit to ignore them. All I say is that if we are to take up the theological aspects of the relevant issues, then let us meet the responsibility to evaluate the long and illuminating record of theological debate.

It is true that, on balance, the organicists tend to flatten social conflicts in their defense of historically evolved community life, but that tendency may flow less from the exigencies of their world view than from the exigencies of their embattled political opposition to capitalism, liberalism, and socialism. The problem with their version of communitarianism arises from their acceptance of a consensus elucidated by elites whose social and institutional power rested on social foundations that were shattered in the 1860s. Southern conservatives therefore speak of their tradition as "at bay." Indeed it is, for the valued consensus prevailed as hegemonic doctrine only in the Old South under the social relations of slavery. These conservatives want no part of the legacy of slavery, but they have yet to figure out how to defend and develop a world view the roots of which have been severed.

At the moment they find themselves in the absurd position of defending "traditional values" in a Reaganite coalition that trumpets capitalism and the free market, which have always been anathema to them and which have proven to be history's most powerful solvent of traditional values. A refusal to confront the rich thought of these traditionalists has nonetheless cost the Left dearly, especially since their thought has important things in common with the petty-bourgeois thought Unger deeply admires. The cost of that refusal may be expected to mount as the Left struggles to come to terms with a corporatist future. Unger has to prefer his radical-democratic, petty-bourgeois heroes to these conservatives, not because they had a better critique of bourgeois property and better proposals for replacing it—they did not—but because they stood for equality and against hierarchy. Regrettably, on that issue the southern conservatives have had much the better case.³⁵

Meanwhile, Kelman has largely succeeded in doing the limited job he set out to do. He has written a book that ought to put every socially conscious lawyer, judge, and law professor and student on his mettle. Kelman, on his chosen terrain, shows himself to be an intellectually acute and worthy representative of the best in CLS by exposing the contradictions between the professed principles of the law and actual practice and its attendant injustices. Kelman and the Critics may fairly be accused of a negativism that conflates the corrigible at law with the con-

35. The celebration of petty-bourgeois radicalism constitutes a principal theme of FALSE NECESSITY. UNGER, *supra* note 7 at 29-31, chides the radicals for clinging to the ideal of a world of small propertyholders—an ideal shared by the southern traditionalists.

sequences of human frailty, but better that error than the easy assumption that all blatant contradictions and injustice may be accepted as the way things are and must be. It has often been observed that men have an infinite capacity to bear with equanimity the misfortunes of others. The Critics, like the legal realists, are determined not to convict themselves on that score.

Whatever the frustrations aroused by Kelman's book, it provides powerful ammunition for those lawyers who seek to compel liberal society to live up to the finest of its own professed goals and who seek to combat gross injustice and the genuinely illegitimate structures of authority. Implicitly at least, it also provides ammunition for those who recognize the corporatist tendency of the modern world and who understand that a critical view of its dynamics is essential for any effort to defeat its sinister features. Kelman's performance nevertheless invites the words of simultaneous praise and rebuke uttered by John Stick in his generally respectful review: "Critics of the CLS like Paul Carrington should wake up and realize that the Crits are just lawyers. Kelman is an excellent lawyer who has written a fine book—but one that addresses the concerns of lawyers, not political theorists or activists."³⁶ I am afraid so, for Kelman takes much of the "bite" (a favorite word of his) out of CLS and drowns the larger and more interesting questions it flirts with. Kelman seems intent upon turning Unger's demand for a "total criticism" of social theory into the safer channel of a critique of legal practice. To the admittedly unpracticed eye of one without legal training, he has done himself proud. But in so doing, he has played Bernstein to Unger's Marx, González Prada to Duncan Kennedy's Bakunin. And at that I may be doing an injustice to Bernstein and González Prada.

The political question remains. However unsatisfactory CLS theory may be, some parts of its strategy retain merit. The collapse of socialism in Europe has compelled the Left in the West as well as the East to reconsider social relations and the forms of property that undergird them—a reconsideration begun by Unger more than a decade ago. Much of the interesting work of the CLS on contract law contributes to a transformation of absolute or bourgeois property into social property of a kind radically different from that heretofore experimented with in the Soviet Union and the other socialist countries. Thus there arises a vision that recognizes the claims of capital to property in factories while also recognizing the claims of labor to that same property. In this sense all economic property becomes social and necessarily requires legal structures to mediate and arbitrate the conflicting claims that must arise from diverse titles to ownership and control.³⁷

36. Stick, *supra* note 1 at 432.

37. See, e.g., UNGER, FALSE NECESSITY, at 491-502.

The possibilities for a restructuring of the economy call attention to the responsibilities of the national state. The Critics support a strong state capable of riding herd on a largely decentralized political and economic system. The state must intervene to guarantee economic growth and adherence to democratic practices throughout society.³⁸ At the same time the state itself must emerge from below as a product of the democratic practices in the institutions that mediate between it and the individual. A thousand objections suggest themselves, but it may suffice to ask how the state could impose its authority on those to whom it is wholly accountable, not in the sense of classical republican accountability, but directly, not to say absolutely? Unger assures us that this wonder could be performed without recourse to hierarchy. His extensive discussions, while ingenious, provide little to convince those who do not share his faith in radical democracy and his willingness to put aside historical experience for speculation. And Unger knows that he is speculating. More than once he warns that the society to which he aspires may well prove unattainable.³⁹

A long shadow falls between Unger's stimulating explorations of the property question and state power and the politically incoherent stand of CLS as a movement. Potentially, the legal practice of the Critics could contribute to those who speak of "market socialism" but whose thought points toward a left-wing version of the corporate state. And some form of corporate state is precisely what we are likely to get, indeed are getting in both East and West. No such state is likely to be able to accommodate itself to the utopianism of the crusade against authority, leadership, and social stratification.⁴⁰

The Critics could justify their negativity only by laying out a minimal social vision that gives people a sense of where they are being led. The internal disorder in the CLS movement may be excused politically: All political movements that aspire to be broad coalitions must project alternate visions, albeit within principled limits. But to make a virtue of political incoherence while trying to destroy an existing social order means to risk a capitulation to demagogy and deceit. Unger has a vision. The Critics may wish to dissociate themselves from it, but then they have a responsibility to present an alternative that could represent them as a movement. To proceed as Kelman does means to play a dangerous game that simultaneously threatens to betray those who rally to the CLS standard and to display a breathtakingly elitist contempt for the uninitiated.

38. This view of the state, explicit throughout Unger's work, undergirds Kelman's *GUIDE*, which, however, contains no explicit statement.

39. See UNGER, *KNOWLEDGE AND POLITICS* at 231. Statements to this effect appear throughout his books. Kelman issues similar caveats. See ch. 9 of *GUIDE* and especially note the tone of the last few pages.

40. See esp. the regular contributions of Louis Ferleger and Jay R. Mandle to *SOCIALIST REVIEW*.

The most discouraging feature of the story of CLS so far emerges from its inadvertent revelation of the condition of the American Left as a whole. For it shows the extent to which the flower of the left-wing intelligentsia perceives the need for a political agenda attuned to the realities of a corporate state for which it has little stomach, and the extent to which it is unwilling to shed its utopian egalitarianism and destructive view of authority. The ability of a largely deranged Left to contribute to, much less lead, a political movement appropriate to the corporatism it woos and fears remains, to say the least, doubtful.