Part I: Historizing Law and Critique – *Historisierung von Recht und Kritik*

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Critical Legal Studies[1]

Critical Legal Studies (CLS) — a cross between Post Structuralism and the Frankfurt School that was all the rage in the 70's and 80's — was animated by a worry, no, a conviction, that the currently in place processes of adjudication and interpretation are inflected and infected by base motives, primarily the motive of a ruling political/economic class to shore up its power and privilege. Where Legal Realists urged the jettisoning of traditional legal rules (Llewellyn's "paper rules") because they were empty, CLS proponents (known as Crits) added to the indictment the accusation that those same rules are tools in the effort to maintain an illegitimate political and cultural hegemony. What makes them tools useful to that bad task is their indeterminacy, that is, their failure to generate a specific set of interpretive outcomes; they are thus normatively weak (to say the least) and can be made to point in any direction a skillful manipulator desires. Because the solemn sounding incantations of jurisprudential discourse don't have any direction of their own, they are, the Crits argue, the perfect (because empty) vehicle of a content — an agenda — that rather than announcing itself (as in "the goal is to further corporate interests") presents itself as the inevitable product of doctrinal inevitability. It just so happens, we're supposed to believe, that when the law is rigorously followed and its hallowed

1 This excerpt from the essay "Impossible Things" was previously published in the Christ the King 2023 issue of *The Lamp* magazine. It is reprinted with permission here in a slightly amended form that includes added references.

vocabulary is set in motion, the result will be favorable to big business and masculine hegemony.

Law schools that teach doctrine as if it were coherent, logic-driven, and apolitical are, says Duncan Kennedy, in the business of "ideological training."[2] Students are being prepared "for willing service in the hierarchies of the corporate welfare state."[3] And according to Mark Kelman, professors of Law, or at least some of them, know that that the legal arguments they are teaching won't hold up under interrogation. "All the fundamental, rhetorically necessary distinctions collapse at a feather's touch... Law professors are, in fact, a kiss away from panic at every serious, self-conscious moment in which they don't have a bunch of overawed students to kick around."[4] (Kelman's mistake here — and it deserves an essay of its own — is to assume that distinctions rhetorically formulated and rhetorically upheld are unreal; they are what reality is made of.)

The chief distinction that must be seen through and collapse according to the Crits is the distinction between law and politics, a distinction that is necessary if law is to be considered an "impartial third" that does not side with either party in a controversy, but provides a disinterested judgment of the opposing claims. Law, in this traditional view, cannot be interested in outcomes; it can only be interested in the rigorous unfolding of its own procedures; any outcome those procedures generate is legitimate. It is this picture of law — basically the picture of liberal rationalism — that the Crits declare to be a cheat and a scam that can only be maintained if the law's political bias in favor of the status quo is hidden or camouflaged. That hiding is the work of law schools. Teachers, Kennedy complains, "convince students that

2 Kennedy (1982), 591.
3 Kennedy (1982), 591.
4 Kelman (1984), 322.

legal reasoning exists and is different from policy analysis."[5] In short, teachers convince students that law is autonomous, that there *is* something called law that is more than various interest groups jockeying for political/economic advantage and using the shaky, ramshackle edifice of legal reasoning to support their unannounced causes.

Here is where CLS and Legal Realism at once meet and diverge. They meet in the conviction that the edifice is supported by nothing and supports nothing; it's transcendental nonsense. But where legal realists then turn to social science and say let's look at the facts of legal practice directly and without the distorting lens of an abstract vocabulary, Crits extend the critique to legal practice entire, which is in their view complicit at every level in the conspiracy against the public performed by the powers that be. The job the law currently performs is the maintenance of "status hierarchies [...] founded, at least in significant part, on sham distinctions,"[6] the very distinctions that are the content of legal reasoning as it is presently formulated. And the job Crits assign themselves — in essence a job of deconstruction — is to "unfreeze the world as it appears to common sense as a bunch of more or less objectively determined social relations and to make it appear as it really is,"[7] a landscape structured by self-interested forces that hide behind the mask of legal neutrality. The promise is that if we rip the mask away, we shall see that the hierarchies common sense now presents to us as natural are in fact constructed by malevolent political/economic agendas, and we will then be able "to take control over the whole of our lives and to shape them toward the satisfaction of our real human needs."[8]

5 Kennedy (1982), 596.
6 Kelman (1984) 325; see also Gordon (1982), 287–288.
7 Gordon (1982), 289.
8 Gabel/Feinman (1998 [1982]), 498.

So that's the CLS program: demystify and remove the structures of perception, classification, understanding and evaluation that impose themselves on us (this is Llewellyn's anti-categorizing taken very seriously), and then… And then, what? This should by now be a familiar question for the readers of this essay. What remains when the categories of thought and action within which we routinely move and have our inauthentic being are delegitimated and discarded? And the answer should be familiar too. What remains is nothing, because in the absence of such categories — of any in place demarcations of the world that identify possible paths of negotiating it — thought has no direction either to maintain or move beyond, is nowhere and so can go nowhere.

But like all theorists, Crits are committed to going somewhere and where they are committed to going is hinted at in Gabel and Feinman's invocation of "our real human needs."[9] What exactly are real human needs and what are the unreal human needs they are opposed to? Real human needs in this polemic are needs that exist beyond or to the side of the manufactured needs that oppressive and illegitimate agendas create, as capitalism can be said to create the need for high-dynamic-range televisions and off-road SUVs. Real human needs are the needs we have by virtue of just being human, needs we experience *before* we experience the false needs foisted on us by alien and alienating cultural/institutional pressures. The key value in this picture is authenticity. "Existing legal thought," says Gabel, "helps to maintain the alienated character of our current social situation."[10] Because we fall into the roles demanded of us by categories of self-presentation we did not choose, we act in an inauthentic manner. Gabel offers an as example the bank teller whose every gesture and word is pre-scripted and insincere. As Gabel approaches, she

9 Gabel/Feinman (1998 [1982], 498.
10 Gabel (1984), 1563.

"affects a cheerful mood"[11] and suggests that "she is glad to see me,"[12] whereas, in fact, she is just "playing the role of being a bank teller while acting as if her performance is real."[13] Gabel in turn performs the role of a cheerful customer with an equal "artificiality."[14] In concert each "withdraws" from a true self "and adopts a false self."[15] No genuine contact is made.

In the legal realm, this same kind of alienation is produced by a regime of rights that encourages individuals to think of themselves as discrete silos without any genuine connection or obligation to others. The rights-cosseted self is concerned only to protect his or her territory from external incursions — "I'm alright, Jack" — and has no impetus to engage in communal cooperation. "Rights talk"[16] leads us to "represent each individual […] as […] a passive locus of possible action rather than as in action with others."[17] The result is a "collective passivity"[18] which contributes to the maintenance of the status quo and its built-in inequalities. "We coerce each other into remaining passive observers of our own suspended experience, hiding together inside the anonymity of artificial self-presentation that perpetually keep us locked in a state of mutual distance."[19]

Is there a remedy? Crits Alan Freeman and Elizabeth Mensch think they have one. Fashion a new kind of community "where relationships might be just 'us, you and me and the rest of us,' deciding for ourselves what we want, without the alienating

11 Gabel (1984), 1567.
12 Gabel (1984), 1567.
13 Gabel (1984), 1568.
14 Gabel (1984), 1568.
15 Gabel (1984), 1572.
16 Glendon (1991), 3–7.
17 Gabel (1984), 1576.
18 Adapted from Gabel/Kennedy (1984), 28–29, 46.
19 Gabel (1984), 1581.

third of the state."[20] Deciding for ourselves? And what "selves," exactly, would be doing the deciding? Presumably, selves without institutional or professional or commercial or educational or political attachments. But there are no such selves for the same reason that there is no intrinsic merit or innocently observed lawyerly performance. To be a self is to be located in a pre-given network of possible roles in relation to which choices and actions and intelligible and performable. (Performances *are* real.) I might be a father, a Republican, a worker in the mechanical trades, a churchgoer, a patriot, a passionate partisan of an athletic team, a believer or non-believer in climate change, a city dweller or a rural recluse, a high-school dropout or the recipient of a Ph.D. Each of these associations and the thousands I did not list point me in some potential direction or other. A being inclined in no direction or affiliated with no project would have nothing inside it, no reason to move here or there, no route to the making of a decision because no measure for weighing evidence and opposing propositions would be available. Neither the unencumbered self (a phrase of Michael Sandel's) nor the decidings that self supposedly performs are conceptual possibilities. Authentic selves with authentic (not socially imposed) needs, just you and me, join the chimeras of intrinsic merit, raw data, pure social fact, just what lawyers do, and words in and of themselves, as participants in the hopeless project of purifying human actions by getting rid of everything that is human (i.e. political, angled, situated) about them.

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Two other authenticity-based versions of this project are anti-professionalism and interdisciplinarity. Anti-professionalism is the general stance of which blind submission is one byproduct. If the standard submission process is an obstacle to the

20 Freeman/Mensch (1987), 256.

identification of intrinsic merit, isn't this true, necessarily, of the entire machinery of professionalism — the vast apparatus of colleges, departments, dean's offices, provost's offices, search committees, budget committees, tenure committees, ranking systems, local and national conventions, officially recognized journals, discipline-awarded prizes, certificates of accreditation, advanced and more advances degrees — an apparatus whose primary business, it would seem is (as Magali Larson and other commentators have observed) to replicate itself. Professions are routinely the object of the accusation that rather than serving some ideal — the delivery of medical service or the dispensing of justice or the celebration of poems — they serve themselves and work to protect and extend the gatekeeping power they jealously and zealously guard. One critic of professions speaks darkly of the "arrogance, shallowness, and …abuses…by venal individuals who justify their special treatment and betray society's trust by invoking professional privilege, confidence and secrecy."[21] The flourishing of the profession replaces the flourishing of health, justice and aesthetic excellence and this betrayal is furthered by educational institutions designed to consolidate and restock entrenched hierarchies, institutions where neophyte practitioners (the words are those of lawyers and law professors lamenting their experience) "become accultured to an unnecessarily limited way of seeing and experiencing law and lawyering, a way which can separate lawyers … from their [own] sense of humanity and their own values."[22]

Once again, we see a distinction between authentic human values and the values manufactured and imposed by special-interest agendas that substitute themselves for the core human interest they claim to further. But what are those authentic values? Where do they come from? How do you get access to them? Well, they are what you find when what Theodor Adorno calls the

21 Bledstein (1976), 334.

22 Dvorkin/Himmelstein/Lesnick (1981), 2.

"prevailing realm of purposes"[23] and Max Horkheimer calls the "categories which rule social life"[24] are dismantled, piece by piece, to reveal.... What? If, as Adorno, Horkheimer, Herbert Marcuse and Jurgen Habermas repeatedly tell us, the prevailing realm of purposes flows into everything including our efforts to dislodge it through the exercise of so-called critical thinking, how do we even begin this dismantling? If the realm is really that prevailing, how could we even get a sight of it preliminary to undoing it? We can't because what Roberto Unger terms the "background plan,"[25] rather than being something we can think *about,* is what we think *within*. We can't step to the side of it or view it askance and so the dream of getting away from it is a non- starter.

Now, the background plans of professions, the realms of prevailing purposes within which practitioners act, are not generally totalizing; they do not fill every nook and cranny of everyday life; but they do fill every nook and cranny of the professional lives of those who self-identify as lawyers or judges or literary critics or historians. If you are one of these, you live and move and have your being in what Kuhn calls a paradigm and Wittgenstein calls a "form of life"[26] and I call an interpretive community; and the paradigm or life world or community furnishes you both with the possible courses of action you might contemplate and the resources for prosecuting them. When you enter the practice's space (and this is precisely the complaint of anti-professionalists) you know without reflection what tasks there are to be completed, the tools you bring to that task, the protocols presiding over that task, the objections you have to the work of others in the field, the responses you might make to criticisms of your performance

23 Adapted from Adorno (1979), 33, 37. The original text is based on Adorno's lecture "Funktionalismus heute" delivered in 1965 at a meeting of the German Werkbund in Berlin; see also Adorno (1977) 379, 388.

24 Horkheimer (1982), 208.

25 Unger (1983), 587.

26 Adapted from Wittgenstein (1958), 8.

— all this and more is *given* to you by the profession's prevailing norms; and also given to you are the paths of critique that you might go down should you wish to challenge those norms. That challenge can be mounted, but it will take the shape allowed it by the very entity — vision, framework, background plan, prevailing realm — it is challenging. And if the challenge is successful — if something in the existing order is changed or even expelled — the prevailing realm will still prevail although in altered form.

So, I have come to my usual conclusion. Sweeping away the structures and protocols that preside over and configure a professional practice would result not in a purer form of that practice but in its disappearance. You can't just *do* law or literary criticism; those activities only exist in a form defined and constituted by the formal categories and procedures that mark professional membership. (There are independent scholars, but their work follows the norms of the professional community of which they are not officially members.) To be sure, neither the shape nor the content of those categories and procedures is fixed; my account is not a recipe for the status quo. It is always possible, though not inevitable (an effort is required), to step back from the practice of which you are a member and reflect on the divergence of its present state from the ideal it is supposed to realize. You can then act in ways designed to bring the practice closer to the ideal as you understand it. What is important to note, however, is that this kind of reflection, engaged in at times by all of us, does not issue from a special muscle of the mind that stands apart from all contexts but can be brought to bear, like a powerful searchlight, on any context. There is no *general* capacity of reflection; there are only particular acts of reflection that have been provoked by the perception of a specific disparity between what the practice promises and what it is currently delivering. Reflection always has the shape allowed and demanded by its object.

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