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## Critical Legal Studies

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CRITICAL LEGAL STUDIES. Edited by *Allan C. Hutchinson*. Totowa, New Jersey: Rowman & Littlefield. 1989. Pp. vii, 348. Cloth, \$45.95; paper, \$22.50.

Critical Legal Studies (CLS) is here to stay and, for better or worse, with a new anthology edited by Allan Hutchinson,<sup>1</sup> the movement takes an important step: CLS has entered the realm of the textbook-worthy. From the ever-expanding body of CLS literature, Hutchinson selected nineteen pieces as "many people's view of the best/most representative/significant/helpful/etc. work in CLS" (p. vii). The scholars he includes are Roberto Unger, Duncan Kennedy, Catharine MacKinnon, Robert Gordon, Morton Horowitz, Alan Freeman, Elizabeth Mensch, Mark Tushnet, Gerald Frug, Clare Dalton, Mark Kelman, Karl Klare, Frances Olsen, Richard Abel, William Simon, Peter Gabel, and Paul Harris. This litany brings together many of the most revered figures in CLS, and edited versions of some of their most interesting work appear in the collection. Even the most well-read CLS disciples are likely to find some great pieces which they had previously overlooked.<sup>2</sup>

Hutchinson edited and organized the excerpts around topics to make them more accessible to the mainstream.<sup>3</sup> In Part I, *Toward Critical Theory*, Hutchinson seeks to introduce the intellectual framework for Critical thinking.<sup>4</sup> Part II, *Tracking History*, then considers the CLS approach to legal history in three pieces which criticize the preexisting mindset of traditional scholars.<sup>5</sup> In Part III, *Confronting Contradiction*, Hutchinson groups together Kennedy's assertion of the "fundamental contradiction" and two other excerpts investigating the

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1. Allan C. Hutchinson is a professor of law at Osgoode Hall Law School, York University, Toronto. Professor Hutchinson is the author of numerous critical pieces and is a self-proclaimed proponent of the CLS movement.

2. This book notice does not intend to add to the endless fray about the value or lack thereof in CLS material: no serious legal thinker can continue to ignore the CLS movement.

3. Because this imposition of structure is conventional and subjective, it would be easy to question, but Hutchinson addresses this problem in the preface, calling it "defensible and illuminating." P. vii.

4. Part I includes three excerpts: Roberto Unger's *Liberal Political Theory* (attacking traditional liberalism and suggesting an alternative based on altruism) (pp. 15-35), Duncan Kennedy's *Form and Substance in Private Law Adjudication* (exposing the contradiction between individualism and altruism in contemporary legal thought) (pp. 36-55), and Catharine MacKinnon's *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence* (indicting both liberalism and Marxism for their failures to address feminist concerns) (pp. 56-76).

5. The three excerpts are Alan Freeman's *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine* (attacking common notions about the civil rights movement) (pp. 120-36), Robert Gordon's *Critical Legal Histories* (surveying critical approaches to legal history in a broad theoretical framework) (pp. 79-103), and Morton Horowitz's *The Triumph of Contract* (challenging prevalent assumptions about the development of contract doctrine) (pp. 104-19).

ramifications of this theory in practice.<sup>6</sup> Hutchinson's fourth grouping, *Beyond Rationality*, offers alternatives to the Rationalist tradition of legal and political philosophy, relying heavily on deconstruction, particularly Kelman's version, called "trashing."<sup>7</sup> Part V, *On Ideology*, argues the proposition that CLS scholars need to identify and reconsider the interests on which traditional ideology is based.<sup>8</sup> Finally, Part VI, *Toward a Critical Practice*, offers several proposals for converting CLS theory into actual practical involvement.<sup>9</sup>

While the collection's structure and accessibility are merits for a textbook, one central concern remains: the very notion of a CLS textbook raises the specter of institutionalization. The reduction of the literature of a radical movement to a mainstream digest poses a real threat to the continuing viability of CLS. As Peter Gabel and Duncan Kennedy point out, assimilation into the academy can result in CLS scholars losing control over their own ideas, especially their radical components.<sup>10</sup> To illustrate this, Gabel and Kennedy use a metaphor borrowed from the film *Invasion of the Body Snatchers*. In the cinematic version of the metaphor, aliens duplicate human bodies, kill the originals, and use the reproductions for alien purposes; in the metaphor's CLS context, the members of the legal academy invade radical ideas, discard the original conceptions, and recast the arguments to

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6. The "fundamental contradiction" is a central assertion of Duncan Kennedy's work. He defines it, in a nutshell, as the assertion that "most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it." P. 139. Hutchinson's Part III includes an excerpt of the article in which Kennedy proposed it, *The Structure of Blackstone's Commentaries* (pp. 139-47), as well as Mensch's *Contract as Ideology* (pointing out the contradictions inherent in the principle of "free" contract) (pp. 148-56), and Tushnet's *Following The Rules Laid Down: A Critique of Interpretivism and Neutral Principles* (investigating the contradictions inherent in traditional doctrines of constitutional interpretation) (pp. 157-78).

7. Part IV begins with Gerald Frug's *The Ideology of Bureaucracy in American Law*, which relies heavily on Derrida's deconstructive methods. Pp. 181-94. The deconstructive critique continues in Clare Dalton's *An Essay in the Deconstruction of Contract Doctrine*. Pp. 195-208. The third piece, Mark Kelman's *Trashing*, is the standard articulation of CLS' linguistic and philosophical approach of the CLS movement. Pp. 209-25.

8. The excerpt from Karl Klare's *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941* (pp. 229-55) laments the judiciary's failure to respond to the radical potential of the labor movement which culminated in the Wagner Act. Frances Olsen, in *The Family and the Market: A Study of Ideology and Legal Reform* (pp. 256-72), investigates the appropriate roles for family-based and market-based approaches in improving women's status in society. Lastly, Richard Abel's *A Critique of American Tort Law* (pp. 273-88) applies neo-Marxist theory to tort damage calculations and recommends a socialist response to conventional methods.

9. William Simon's *Visions of Practice in Legal Thought* looks to the traditional visions of the legal profession and advocates a more radical level of personal and professional commitment. Pp. 292-302. Peter Gabel and Paul Harris offer practical day-to-day methods for empowering litigants in *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*. Pp. 303-22. The collection concludes, as it began, with Unger, and a chapter from his book, *The Critical Legal Studies Movement*. Pp. 323-43.

10. Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984).

support some mainstream use.<sup>11</sup> If this concern is well founded, Hutchinson's anthology might not be a great step forward for the CLS movement as much as a means of hastening its institutionalization.

Perhaps the most disturbing aspect of the book is that Hutchinson does not address this issue. Rather than making radical editorial moves, he caters to conventional tastes, diluting the radicalism of the pieces included and the movement at large. The resulting collection not only fails to offer any new approach, but it also omits much of the most linguistically and structurally innovative CLS work currently available.<sup>12</sup> Yet the final product, an insider's view of the "best" work in CLS reduced to an accessible format, cries out to be used as a textbook in CLS 101.

Does CLS need such a work to come from its own ranks and with the imprimatur of one of its leading proponents? Hutchinson himself appears to answer that question in the negative,<sup>13</sup> yet continues the project anyway. To make matters worse, his editorial style actually ignores primary CLS assertions, contributing further to the anthology's institutionalization of the movement.

For example, one of the major themes running through CLS thinking — and many of the works in this collection — is the importance of collapsing the distinction between law and other elements of society.<sup>14</sup> According to this tenet, law and society are not separate entities but interact constantly and shape each other. Unfortunately, Hutchinson, as a by-product of his editorial decisions, reinforces what he purports to attack. He gives the legal community a collection consisting almost

11. Kennedy's solution to "idea snatching" is to recant his propositions after they have finished their useful radical lives and before they can be corrupted. By rejecting his own ideas, he ensures that their mainstream corruptions cannot claim the weight of his endorsement. See, e.g., *id.* at 15-17 (recanting the "fundamental contradiction"); cf. Kennedy, *supra* note 6.

12. Many CLS writers have tried to change standard conceptions of legal writing by adopting modernist literary techniques. See, e.g., Hutchinson, *Indiana Dworkin and the Temple of Doom* (Book Review), 96 *YALE L.J.* 637 (1987) (this review of Ronald Dworkin's *Law's Empire* is an example of modernism in Hutchinson's own work); see generally Luban, *Legal Modernism*, 84 *MICH. L. REV.* 1656 (1986) (advocating that the CLS movement can be considered the legal counterpart of the modernist movement in other fields).

Hutchinson includes no examples of this writing in the collection. Not even Gabel and Kennedy's famous and influential dialogue, *Roll Over Beethoven*, is included. Gabel & Kennedy, *supra* note 10. Of course it would be difficult to find a place for such work in an anthology like Hutchinson's, since Kennedy's comments explicitly reject any attempt at institutionalization.

13. "CLS must strive to dwell on the threshold [of the pluralistic legal academy]; it must decline any invitation to step inside as well as resist the temptation to withdraw to the political wilderness of resigned irrelevance." P. 9. Apparently Hutchinson believes that producing a CLS treatise is not "stepping inside" the system, but he fails to justify that belief. Hutchinson also states: "The difficulty is to develop a professional *modus vivendi* that works within the system by allowing the radical to function as a lawyer, but does not become captive to the very system it strives to overcome." P. 289 (Hutchinson's preface to the collection's final section on building a critical practice). This collection has become captive to the system in its most fundamental approach.

14. Pp. 95-97 (Gordon, *Critical Legal Histories*). Actually, the attack may be better characterized: does law exist independently at all, and, if so, in what form?

exclusively of law review articles<sup>15</sup> written by law professors<sup>16</sup> about legal thought. This editorial decision hardly serves to blur the law/society distinction and instead validates the elitism which CLS challenges.

Certainly it is possible to imagine alternatives. Hutchinson himself lists philosophers, linguists, economists, and other theorists among the important influences on the CLS movement.<sup>17</sup> Yet the work of these scholars does not appear in the collection and there is no justification for the omission. If anything, it is probable that the students and "legal" scholars most likely to read Hutchinson's collection are less familiar with these other important thinkers than with the included writers. Juxtaposing Gerald Frug's article with a piece from Jacques Derrida would not only make both works richer and more comprehensible,<sup>18</sup> it would also allow the editor to promote the CLS project of blurring the distinctions between traditionally different academic disciplines. Furthermore, potential users without traditional legal training (in keeping with the Derrida example, perhaps literary theorists) could read the collection and see connections between areas of knowledge familiar to them and the critical insights of the legal writers.

Another disturbing aspect of Hutchinson's editing is the demographic similarity between the scholars represented in this collection and the general makeup of the legal academy. If one goal of the CLS movement is to build an unalienated political consciousness by increasing people's understanding of their personal and political power (p. 304), the editing of this collection does little to further that goal.

Of 19 selections, only four are written by women,<sup>19</sup> a particularly low number for a movement that prides itself on its anti-discriminatory and empowering philosophy.<sup>20</sup> Furthermore, three of these four excerpts deal explicitly with family law and the role of women in soci-

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15. Of 19 articles, only four are not taken from legal periodicals: Unger's *Liberal Political Theory*, MacKinnon's *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, Horowitz's *The Triumph of Contract*, and Unger's *The Critical Legal Studies Movement*. Actually, Unger's work appeared in the *Harvard Law Review* before publication as a book. Only MacKinnon's piece, excerpted from *Signs: Journal of Women in Culture and Society*, was taken from a non-law journal.

16. Once again, the only exception is Morton Horowitz, a historian so long identified with the legal academy as to have all but attained membership in that exclusive group.

17. Adorno, Horkheimer, Marcuse, Foucault, Derrida, and Habermas are some of the scholars Hutchinson mentions. P. 10, n.12. Undoubtedly, he could have included many others.

18. Frug's excerpt relies heavily on Derridean theories of deconstruction and he uses Derrida's term "dangerous supplement" to analyze the relationship between subjectivity and objectivity. P. 186 (citing J. DERRIDA, *ON GRAMMATOLOGY* 141-64 (1976)).

19. Dalton, *An Essay in the Deconstruction of Contract Doctrine* (p. 195); MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence* (p. 56); Mensch, *Contract as Ideology* (p. 148); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform* (p. 256).

20. There is a popular conception that most CLS scholars are white male law professors teaching at prestigious law schools. Hutchinson does little to dispel that myth: women and minorities are poorly represented in this collection. The omission of many important minority

ety, traditionally "feminist" topics.<sup>21</sup>

The message lurking behind the editing is subtle, yet extremely important: the major contribution of women to CLS is their feminist perspective.<sup>22</sup> By this implication, Hutchinson does not offer a progressive or empowering editorial perspective but merely another form of institutionalization. While it is true that most collections contain some element of stereotyping, an editor with the mind and radical sensibilities of Allan Hutchinson must be held to a higher standard.

Hutchinson's editorial work is hardly radical, but this is not to say that the resulting collection is not a very good and important book, one that is likely to change many readers' perceptions of law. Because the articles themselves, like much of CLS, need to be read, the book easily stands on their strengths alone. Hutchinson, like any editor, does make some technical mistakes, but they occasionally create inadvertent humor.<sup>23</sup> Although *Critical Legal Studies* does co-opt the

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scholars, including Derrick Bell, Patricia Williams, and Mari Matsuda, to name a few, denigrates the value of (and interest in) their work.

Interestingly, both minority and feminist radicals have attacked much of the CLS program for failing to address demographic interests. See, e.g., MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence* (rejecting neo-Marxist theory as well as liberal theory for failing to account for gender concerns adequately). P. 56. Kennedy's recantation of the critique of rights in *Roll Over Beethoven* can be seen, in part, as a response to these scholars. Gabel & Kennedy, *supra* note 10, at 36-41.

21. MacKinnon's *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence* questions the assumptions of mainstream male-oriented thinking; Dalton's *An Essay in the Deconstruction of Contract Doctrine* reassesses cohabitation contracts; and Olsen's *The Family and the Market: A Study of Ideology and Legal Reform* investigates the appropriate relation between market-based and family-based approaches in remedying gender dichotomy. All three are first rate, thought-provoking excerpts worthy of inclusion in any collection, but they also focus primarily on the role of women in society. Only Mensch's *Contract as Ideology* represents women in CLS writing about topics not traditionally related to gender.

22. It should be noted that this criticism of the limitation of women scholars to the role of feminist is directed at Hutchinson as editor, not at the particular women excerpted. While each individual writer freely follows her own views in her work, Hutchinson has chosen, from a vast literature of legal scholarship by women, to include a large number of gender-related pieces.

23. My personal favorites are the mistakes in the very first footnote. Hutchinson not only gets the page of the article cited wrong, but also calls Paul Carrington by the name John. P. 10 (citing Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984)). This is particularly humorous given Carrington's response to Robert Gordon's letter in correspondence criticizing the article cited: "So I can elate a bit [at not being ignored], along with the politicians who ask only that their name be spelled correctly." Correspondence, *"Of Law and the River," and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1, 10 (1985) (emphasis added).

Unfortunately, the reader soon tires of technical mistakes in editing. Hutchinson gives no information on the methods he used to choose which footnotes to include, and in some cases the omissions are glaring and the inclusions are useless. To make matters worse, the footnotes included are sometimes misnumbered and even inconsistent with the numbers in the edited text. See, e.g., Kennedy, *Form and Substance in Private Law Adjudication*, n.80 (or is it 86?). P. 42.

radicalism of the movement, for what it is — a mainstream anthology — it serves very well.<sup>24</sup>

— *Michael F. Colosi*

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24. Of course the question remains: whom does it serve?