

Unmasking Jargon as Substance: How the Crits Have Made a Dialect out of Dialectic

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The increase in popularity of the Critical Legal Studies movement has barely kept pace with the increase in attacks on it. Most of these attacks stem from the movement's association with the intellectual left. While the founders of the CLS movement and most of their followers (who refer to themselves as "crits") place themselves to the left of any law school faculty's center, the movement claims no unified political content. Roberto Mangabeira Unger—a prolific crit and arguably the movement's foremost philosopher—expressly disavows any connection with Marxist ideology in his CLS manifesto, *The Critical Legal Studies Movement*. In contrast with the variety of incoherent proposals that crits suggest as alternatives to the current American legal system, the jargon of crit scholarship is remarkably uniform. Unfortunately, uniformity is no guarantee of clarity. The true threat of the CLS movement is not its vaguely leftist politics but its truly obscure polemics, because nothing disguises unoriginal thought more cleverly than revolutionary language, and nothing smothers discussions of legal reform more completely than the metaphysics of long-dead German philosophers.

Most crit scholarship examines the language and reasoning of current legal decisions with the goal of unveiling a legal discourse that sustains an oppressive, reactionary status quo. The most popular method is deconstruction, a process the crits have borrowed from contemporary literary the-

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ory. The logic of deconstruction, in its simplest form, is that all arguments consist of a series of oppositions, in which certain oppositions are favored over others. A successful deconstructionist first identifies this hierarchy of oppositions and the policy concerns that justify it, and then inverts the hierarchy to show that the same policy concerns could justify the opposite hierarchy. Books and articles by Jacques Derrida and Paul DeMan, two pioneers of deconstruction in literary interpretation, illustrate the extent to which intellectual debate can succumb under the weight of tangled rhetoric and haphazard syntax. Derrida, for example, writes in *Of Grammatology*: "If the nonphonetic moment menaces the history and the life of the spirit as self-presence in the breath, it is because it menaces substantiality, that other metaphysical name of presence and *ousia*."¹

A method that has generated almost incomprehensible scholarship, deconstructive theory is a weapon suitable for many targets. Legal writing, with its reliance upon formal logical reasoning, is an especially enticing target. One hint at the crits' goal in deconstructing legal opinions is their term for it: trashing. By inverting the hierarchy that current opinions favor, the crits demonstrate that the formalism of Langdellian jurisprudence has no independent logical force, that it exists merely to perpetuate property relations favoring those in power. Whether Marxism provides an alternative to the oppressive status quo depends upon the political convictions of the individual writer, but by sharing the mechanics of deconstruction, crits also share its rhetoric. That rhetoric, in its choice of language and in its logical approach, is fundamentally Marxist.

The rhetoric of Marxism originates for the most part with Hegel, the philosopher who most influenced Marx. The irony of this ancestry is that Hegel posited an objective, de-

1. J. DERRIDA, *OF GRAMMATOLOGY* 26 (1974).

ducible reason that ordered all relations among things and ideas. The crits have implicitly adopted Hegel's process, but with the goal of ridiculing objective reason. Goals aside, the rhetoric of Marxism and of CLS relies heavily on the Hegelian dialectic. The three parts of the dialectical process are commonly called thesis, antithesis, and synthesis. Two contradictory categories oppose each other as thesis and antithesis. Hegel's logical process reconciles this contradiction in the synthesis, a category that simultaneously replaces and retains (in Hegel's terms "sublates") the original opposition. An example of the dialectic is the first step in Hegel's *Logic*, in which the thesis is Being and the antithesis is Nonbeing, or Nothing. Hegel argues that the logical synthesis of these opposites is Becoming: a category that transcends Being and Nothing, but retains the two because it presupposes some transition from Nothing into Being or from Being into Nothing.

Marx took the rhetoric of the Hegelian dialectic, but claimed to "stand Hegel on his head." Instead of reasoning from the subjective world to objective reason, the rhetoric of Marxism purported to bring philosophy down to the level of everyday life. The language that Marx and his followers use reflects their assumption of dialectical opposition, as well as the inversion of Hegel's hierarchy. This language reveals recurrent rhetorical devices—parts of an entire argumentative strategy—that typify and identify Marxist writing. The writers of the CLS movement have adopted this strategy almost uniformly, though not all crits have adopted the economic, historical, or political philosophies that Marx originally devised. The Marxist jargon that the crits favor is empty. Without the substance of Marxist philosophy, this jargon cloaks the deficiencies of CLS scholarship as effectively as current legal discourse, from the crits' perspective, is said to cloak oppression.

The most apparent rhetorical device in Marxist writing is the pairing of opposites. In *The Communist Manifesto*, for example, Marx describes the history of class struggle through a series of pairs: "Freeman and slave, patrician and plebeian, lord and serf, guild-master and journeyman, . . . oppressor and oppressed, [who] stood in constant opposition to one another."² By setting pairs of opposites against each other, Marx described a society in perpetual conflict as opposing forces asserted their claims to the means of production. The conflicts, Marx wrote, would accelerate and culminate in a revolution that would replace the former class antagonisms with a dictatorship of the proletariat.

The idea of conflict or contradiction is at the core of virtually all crit scholarship. In *The Structure of Blackstone's Commentaries*,³ one of the earliest and most influential CLS tracts, Duncan Kennedy based his critique of Blackstone's scholarship on the "fundamental contradiction" between autonomy and community. This contradiction forces the individual within society to submit to oppressive social hierarchies under the illusion of voluntary submission. The responsibility of those who understand the coercive nature of the status quo (the crits claim a monopoly on this understanding) is to convince the oppressed of their delusion. In Kennedy's terms, the crits' responsibility is to "forc[e] them to be free."⁴ The contradiction between autonomy and community is at the rhetorical heart of Kennedy's argument, because it provides the tension Kennedy needs to justify a change.

Unger uses contradiction for a similar effect in his manifesto. In his first chapter, he opposes formalism to legal realism. He seeks to preserve the critique of the realists and

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2. K. MARX, *The Communist Manifesto*, in THE PORTABLE KARL MARX 204 (E. Kamenka ed. 1983).
 3. Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209, 212 (1979).
 4. *Id.*

to develop from it a positive program that would replace the formalist status quo. The discovery of this program is Unger's version of Hegel's synthesis. The mere existence of contradiction and resolution is not all that unites Unger's analysis with Marxist rhetoric. Like Hegel and Marx, Unger sees the contradiction as a dynamic force that moves by itself toward synthesis. Hegel's dialectic progressed by necessity from one step to the next, and Marx's class struggle moved toward revolution by its own force. Unger's ideas also develop of their own accord: "When we took the negative ideas relentlessly to their final conclusions, we were rewarded by seeing these ideas turn into the starting points of a constructive program."⁵

Another dynamic aspect of these contradictions is their power of self-subversion: The inherent inconsistencies of the contradictions destroy the logic of the system that they were meant to support. Identifying self-subversive contradictions is the crit's goal, since the inconsistencies become tools for deconstructing traditional legal scholarship. Unger claims to have reached this goal in the context of contract theory: "The attempt to defend the heartland of contract theory by dispensing special treatment to the intractable problems of the employment relation *turns against itself*. It ends up casting a critical light on the very core zone of contract that it had been expected to seal off from further attack."⁶

Unger not only uses contradiction as the basis of his critique, he also associates images of inconsistency and conflict with the legal arguments that he attacks. The modern jurist, for example, is "an outsider and an insider at the same time" who cannot reconcile a formalist vision with its realist critique; the modern legal system is a "dream on the verge of

5. R. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 14 (1983).

6. *Id.* at 73 (emphasis added).

awakening"; and the North Atlantic countries "sacrifice a community of families for a hierarchy of technocrats."⁷

If the enemy is torn with conflict, the saviors are united. Unger habitually uses the imagery of unification in referring to proponents of CLS. The "deviationist scholars," he writes, can find a broader doctrine that encompasses the disharmonies of "principles and counterprinciples." (Unger's characterization of crits as deviants may be apt, though not in the sense that he intends.) In one abstract description of the CLS movement, Unger pairs opposites in a manner reminiscent of *The Communist Manifesto*; he advocates "remak[ing] all direct personal connections—such as those between superiors and subordinates or between men and women—by emancipating them from a background plan of social division and hierarchy."⁸ One surprising consequence of this emancipation is Unger's suggestion that people unite male and female stereotypes in a single character.⁹ It would be harder to take the imagery of unification any further.

Through the concept of unalienated relatedness, Duncan Kennedy and Peter Gabel evoke similar imagery of synthesis.¹⁰ Neither author bothers to define the concept, but the coupling of alienation and relation suggests a polar union comparable to that in Unger's work.

Another hand-me-down Marxist device is inversion, a technique that follows logically from the crits' adoption of the Hegelian dialectic. Just as Marx claimed to invert the Hegelian dialectic by standing it on its head, CLS writers claim to invert the current social hierarchy. Unger displays the technique most clearly when he writes: "The implication of our critique of formalism is to turn the dilemma of doctrine

7. *Id.* at 11, 14, 17.

8. *Id.* at 26.

9. *Id.*

10. Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 3 (1984).

upside down."¹¹ Because the image of complete inversion suggests radical—if not violent—change, it is common in crit scholarship. Kennedy refers to inversion as “doing flips.”¹² As another commentator notes, crit writers advance individual liberty by “identifying and overturning the extant forms of legal consciousness.”¹³

The radical implications of such inversion may account for the CLS movement’s inability to devise a persuasive alternative program. Any solution that worked within the status quo would be inconsistent with a “revolutionary” critique, for the same reasons that Marx thought revisionist programs to be inconsistent with his revolutionary ideology. On the other hand, to offer a solution that completely rejects the status quo requires intellectual risk: A concrete solution could subject its proponent to concrete criticisms. The obscurity of abstract rhetoric is much safer, because its vagueness prohibits a meaningful reply. What is there to say to someone whose political program is to unveil unalienated relatedness? The language of CLS scholarship obscures and replaces, rather than clarifies and supports, the substance of the theory that it expresses.

Crits have also appropriated the Marxist image of unmasking, or revelation. In *The German Ideology*, Marx used revelation imagery in stating the goal the work: “The first volume of this present publication has the aim of unclocking these sheep, who take themselves and are taken for wolves; of showing how their bleating merely imitates in a philosophical form the conceptions of the German middle class.”¹⁴ The power of unmasking in Marxist rhetoric is that it suggests

11. R. UNGER, *supra* note 5, at 15.

12. Gabel & Kennedy, *supra* note 10, at 23.

13. Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 217 (1984).

14. K. MARX, *supra* note 2, at 162.

the deception of traditional philosophy, which conceals its true nature to such an extent that the arguments of its adherents must be untrustworthy.

The crits employ identical imagery to the same ends. Unger accuses traditional legal theorists of concealing the dominant assumptions behind their ideas, because they know those assumptions to be fundamentally flawed.¹⁵ As the writing of another crit demonstrates, the rhetoric of unmasking encourages liberal use of metaphors:

The CLSers seek to uncover this deception and to awaken the audience from its reverie. They claim to see the play for what it is—a travesty of the human condition, at times comedy, at times melodrama. From their vantage point backstage, they know of the props, the scenery, the prompting, and the rehearsals. They recognize it as nothing more than a long-running farce. The CLSers want to introduce the idea of experimental theater based on improvisation and audience participation. Audience and actors will intermingle. Drama will become life, and life, drama. In the midst of this jurisprudential theater, such alternative performance demands and deserves review.¹⁶

Similarly, Kennedy awaits the day when liberal legal thought will awaken to the nightmare of reality.¹⁷ Other commentators have noted the frequency with which crits refer to the mask image, but without elaboration on its Marxist origins.¹⁸

Two Marxist images that crits especially favor combine rhetorical aspects of both contradiction and revelation. These images are the opposition of substance and form, and of kernel and shell. Marxist rhetoric uses these oppositions both

15. R. UNGER, *supra* note 5, at 88.

16. Hutchinson & Monahan, *supra* note 13, at 202.

17. *Id.* at 225.

18. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 414 (1984).

defensively and offensively. In defense of Marxist analysis, writers often accuse their critics of attacking only the form or shell of Marxist analysis, while leaving untouched the substance or kernel of the analysis. As an offensive weapon, Marxist writers claim to cut through the shell of bourgeois society to expose its oppressive kernel. In *The German Ideology*, for example, Marx reveals that "[t]hese innocent and childlike fancies are the kernel of the modern Young-Hegelian philosophy."¹⁹

In CLS scholarship, the opposition of substance and form serves a mainly offensive "trashing" function. In dismissing a rationalist critique of law, one critic accuses the rationalists of insincerity in their combination of "rationalist form and modernist substance."²⁰ Similarly, Unger characterizes the framer of a contract as one who knows that "content cannot be deduced from empty form."²¹ This opposition also qualifies the CLS attack on traditional legal scholarship, in that it acknowledges the existence of some truth in traditional arguments. As David Trubeck writes, "there is a kernel of truth in any world view that has become dominant in any society."²² Naturally, a critic can characterize any legitimate aspect of traditional legal doctrine as that one true kernel.

Opposing form with substance implies the rhetorical superiority of the latter, because substance is real and has content, while form is empty and deceptive. References to the emptiness of form reflect ironically upon CLS scholarship. Because the only unifying characteristic of the movement is the form of its critique, the critique cannot by itself have any

19. K. MARX, *supra* note 2, at 162.

20. Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEXAS L. REV. 1195, 1226-27 (1989).

21. R. UNGER, *supra* note 5, at 101.

22. Trubeck, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 592 (1984).

substantive political program. In the words of a commentator friendly to the CLS movement, crit theory is "impotent" as a theory for political action.²³ Unless someone discovers some substance behind the crits' rhetorical form, the opposition of form and substance can only attack crit theory itself.

Crits commonly reply to accusations that CLS scholarship lacks coherent vision or direction by saying that substantive coherence is not their purpose. By attacking the form of traditional legal discourse, the crits claim to "change society through the transformation of legal consciousness."²⁴ This defense raises a troubling question: If the crits themselves cannot devise practical schemes for societal change, why should they expect their readers to do the job?

The question is all the more puzzling since all converted readers labor under false consciousness. Marx used false consciousness to describe the inability of some workers to acknowledge their oppression, and the unwillingness of "petty-bourgeois socialists" to recognize the historical inevitability of the communist revolution. In particular, Marx calls the false consciousness of some socialists an "intoxicating . . . self-deception."²⁵ In CLS writing, the notion of false consciousness explains the blindness with which most legal scholars accept an oppressive legal system. The crits' aim is to reveal liberal consciousness for what it is (a collection of self-contradictory assertions) and to replace it with a "Critical consciousness."²⁶ This new consciousness would not be as deceptive as the liberal consciousness, however, because it would leave the scholar free from the restraints of any ideology and thus able to evaluate any legal argument objectively.

23. Hutchinson & Monahan, *supra* note 13, at 229.

24. Trubeck, *supra* note 22, at 591.

25. K. MARX, *supra* note 2, at 232.

26. Hutchinson & Monahan, *supra* note 13, at 229.

The false-consciousness argument is useful both as a defense to scholarly attack and as a justification for CLS scholarship. Crits can answer almost any attack with the assertion that the attacker labors under false consciousness. The defense of false consciousness also explains why those whom the crits see as oppressed would support the status quo. While liberal scholars support predetermined legal positions because of their delusions, the crits approach argument knowing that they can no longer be deluded. Of course, CLS scholarship never explains how the crits were able to escape or transcend the false consciousness that so completely envelops the rest of the legal community.

In addition to its defensive function, the false-consciousness argument gives meaning to the CLS movement. Rather than simply adding to a growing body of legal scholarship, the crits further their revolutionary goal just by writing. If CLS scholarship can help to free liberal scholars from their false consciousness, then the writing has intrinsic worth. This justification illustrates why crits are not necessarily troubled by the movement's lack of a unified positive program. If the writing itself furthers a legal revolution, then elaborating what sympathetic lawyers should do to further CLS is less important.

By adopting rhetoric and language unique to Marxist criticism, crits identify themselves with more than a style of argument. Much of the writing of the CLS movement reads as if it advocated a Marxist program, even if it explicitly disavows that program. That crits would adopt a style of argument as powerful as Marxist rhetoric is understandable. The mystery of it, though, is that the object of Marxist rhetoric was to further just the kind of comprehensive ideology that most crits want to expose and reject. Unger's explicit denial that his project is Marxist cannot counteract the Marxist origins of his rhetoric. If the object of the CLS movement is to liberate legal scholars from their traditional liberal assumptions,

then the crits' language should reflect this liberation rather than the rhetoric of a movement that is a century and a half old.

More troubling than the crits' choice of jargon is the manner in which they use it. CLS scholarship is not dense because it has to be; it is dense because its authors want it to be. Once translated into clear prose, most CLS arguments are neither profound nor revolutionary. No realistic scholar would deny the political component of judicial decision-making, for example, or the law's historical bias in favor of wealth.²⁷ Likewise, deconstruction is an unnecessarily complex proof of the self-evident proposition that any argument is based on assumptions that, if inverted, could justify the opposite conclusion. True reform, or even revolution, in the American legal system can come only from dialogue that clearly and persuasively attacks the foundations of that system—from dialogue directed at those not already converted. It is blindly naive and hopelessly optimistic to think that reform will come from dialogue such as this:

Peter:

I want to discuss the issue of negation, as when it gets equated with "alienation is ontological," which I believe it gets equated with, in your use of the concept "nothingness is the worm at the heart of being."

Duncan:

Nothingness is the worm at the heart of being means both more than that, because it goes for . . .

Peter:

The totality.

27. Schwartz, *supra* note 18, at 432.

Duncan:

... the totality of experience, and less than that, because ... "alienation is ontological" is a reified abstraction, but "nothingness is the worm at the heart of being" is an example of poetry. It's not an abstraction. "Alienation is ontological" is my impoverished statement of what I would rather put in the form of "nothingness is the worm at the heart of being."²⁸

Is this babble to raise our consciousness?

28. Gabel & Kennedy, *supra* note 10, at 18-19.

