
Afterword

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This Afterword is intended as a contribution to an imaginary archive of radical thinking about law, the context for *Legal Education and the Reproduction of Hierarchy* (*LERH*). It includes notes on the author (me), on Critical Legal Studies in 1983, on the publishing history of *LERH* and the hidden meaning of its form, a remark on “radicalism” as it figures in *LERH*, a few words on the current status of legal hierarchy (it’s doing better than ever), and an account of what happened to CLS after 1983. The pieces can be read separately, according to taste.

The Author

I graduated from Yale Law School in 1970, having participated in a small-scale collective student project of institutional reform, coupled with attempts at analysis of how our legal education fit into the larger picture of the politics of the moment. The politics included the war in Vietnam, the disintegration of the civil rights movement, the failure of the War on Poverty, and the first stirrings of second-wave feminism. It was radicalizing for many of us.

After a year clerking on the U.S. Supreme Court, I started teaching at Harvard Law School in the fall of 1971, and got tenure in 1976. By 1981, when I wrote *LERH*, I had taught Contracts for five years and Torts for four, in classes of about 140 (as well as Legal Process for a year, Trusts for two years, and a course on the History of Legal Thought for eight). I had spent the academic year 1980–81 working as a paralegal (I am not a member of the bar) at the then brand-new Legal Services Institute (now the

Hale and Dorr Legal Services Center) in Jamaica Plain, Boston, and teaching a course there for students doing an experimental one-year full-time program of preparation for legal services practice. Aside from a student summer at Debevoise, Plympton, Lyons and Gates in 1969, I had no law practice experience.

During the seventies, I participated in the general “softening” of the traditional Socratic method in large law school classes. I worked, along with a fluctuating group of about ten colleagues, on internal law school reform issues, including reducing first-year class size, pass/fail in the first year, and the “no-hassle pass”; expanding clinical opportunities, a liberal policy of promotion to tenure, affirmative action for women and African Americans in entry-level faculty appointments, and introducing more race- and gender-oriented material into the curriculum. We also tried self-consciously to inflect the growth of the faculty away from what we saw as intellectually mediocre mainstream appointments toward people doing left (and occasionally right) innovative work. These activities involved collaboration with law students in a sixties-influenced mode of strategizing and acting together that violated conventional ideas about the proper boundaries between faculty and students.

Starting in 1976, I participated in what we called the Marx Study Group (not the *Marxist* study group), organized by Karl Klare, which had a core group of six male and female lawyers and academics. We read and passionately discussed a good deal of Marx’s work and that of the “critical” or Western European Marxist current of the twentieth century. In 1980, I helped organize a short-lived venture self-mockingly called the League of Left Study Groups, consisting of about forty Harvard law students interested in the rich left-wing theoretical writing that was then a feature of the American intellectual scene, and in the brand new legal literature that we had begun to produce in the late 1970s in the context of Critical Legal Studies.

Critical Legal Studies in 1983

Along with law students in general, the intended audience for *LERH* was the group of younger legal academics who participated in the Conference on Critical Legal Studies. CLS began at a conference at the University of Wisconsin Law School in Madison in 1977. The idea of the conference, as David Trubek and I initially conceived it, was to explore the possibility of

an alliance between “law and society” scholars and a younger group of more assertively leftist legal academics and soon-to-be academics. These included participants in the activist moment at the Yale Law School that I mentioned above, several of whom had by then gotten tenure at law schools here and there, the Marx Study Group people, the new group of Harvard professors and their recently graduated left students, and a scattering of New Leftists who had up to then been isolated in their institutions.

The idea of an alliance with the law-and-society scholars was short-lived, but the “rump” consolidated, and over the next fifteen years CLS members from different law schools volunteered to organize a dozen large conferences (one hundred to seven hundred participants) and ten or so “summer camps” in which groups of ten to twenty spent from a few days to a week studying and discussing left legal and general social theoretical literature together.

The conference turned out to be an idea whose time was then. Growth occurred as people who had been out there all along “discovered” CLS, as students of the CLS core group went into law teaching, and as people entering law teaching with a generally progressive orientation looked around to find who in their new discipline they could affiliate with. The big conferences were intense, energized by the continuing political interaction of the expanding group of regulars, a fluctuating group of law professors who were curious about what was going on, students at the host institution, and students who traveled from other schools where they had been engaged by one of the crit regulars. The summer camps, with a sampling of the same personnel in an intimate setting for a longer time, were even more intense.

I’ve been asked a million times why CLS “failed,” but it seems a more interesting question how such an overtly leftist, anti-mainstream academic movement, with no outside funding of any kind, could take off, expand so quickly, and last for about fifteen years as a highly visible factor in legal academia (of all places). I’ll have a shot at explaining the downside as an afterword to this Afterword. Here’s an account of the upside, the milieu at which *LERH* was aimed.

CLS came into existence in the full swing of one of the most dramatic moments of change in the history of U.S. legal education.¹ Between 1970 and 1990, the number of ABA-accredited law schools expanded from 146 to 175; the number of law students at those schools, from 82,041 to 135,518. Between 1975 and 1990, the number of women students grew

from 7,031 to 55,818, which was from 8.5 percent to 42.1 percent. Between 1975 and 1990, the number of students of color grew from 8,712 (7.8 percent) to 17,330 (13.6 percent).

More important for CLS as an organization, the number of full-time faculty grew steadily over the whole period between 1970 and 1990, from 2,873 to 5,366, and then leveled off. Between 1975 and 1990, the number of full-time women faculty rose from 517 to 1,338, and then leveled off. From 1985 (first year with figures) to 1990, the number of full-time minority teachers rose from 301 to 512. These developments created an opportunity, just because there were so many people entering the system without preconceptions about how it was and had always been organized. By 1990, the wave of change had passed: the system was growing slowly, if at all, and almost everyone in it had been exposed to or heard about CLS and decided on an attitude toward it. Whereas the average age of law teachers must have plummeted in the late seventies and eighties, it must have begun to rise again, rapidly, after 1990.

The growth in the number of law teachers occurred through entry-level recruitment, by and large, of people who were in their late twenties and early thirties. The opening of this large market coincided with the collapse of the market for PhDs in the humanities and the social sciences. Many people who might have chosen English or history or sociology or political science as an academic career ended up in law instead. For many of them, the next best thing to being an academic in the humanities or social sciences was to enter the real world and pursue social justice through law.

But faith in the possibility of transforming American society through civil rights litigation was beginning to wane around 1980. The Warren Court had made it seem that constitutional law was intrinsically on the side of the weak and the oppressed; the Burger Court was slowly but steadily undoing that sense. The Democratic Party had begun its long opportunist slide to the right. Reagan was elected in 1980, shadowing the dream that if one couldn't be a civil rights litigator, one could be a progressive government lawyer.

Some detracked graduate students and would-be civil rights lawyers had studied in leftist undergraduate programs in the late sixties and seventies, and perhaps tried a master's program for a year or two. Many had been activists or counterculturalists of one kind or another and/or had been exposed to critical theory in the humanities or social sciences in one of its myriad American forms of the 1970s. They were baby boomers, born after 1947, and a significant minority of them were New Left baby

boomers, arriving on the teaching market for law schools starting around 1977 (and gone from the teaching market by the early 1990s).

Feminism was developing fast, branching out into liberal, cultural, socialist, and radical variants. The small numbers of women on law faculties were willy-nilly players in local gender politics, and they had an audience as law reformers and academic writers. After the unutterable downer of the disintegration of the civil rights movement around 1970 and the descent of the northern urban ghettos into a kind of hell, there were new possibilities as African Americans and other minorities of color entered all kinds of middle-class and intelligentsia job markets.

Law teaching seemed to offer a way out of the impasse—it allowed activist engagement without having to be a full-time lawyer and a milieu that was intellectually exciting and increasingly politicized, without the disciplinary fetishes of the Ph.D. world. It was rare for a faculty to require more than one published article for tenure, and the article was typically published in a student-edited (not peer-reviewed) journal. The number of such journals increased even faster than the number of schools, from 374 in 1975 to 569 in 1990, with the emphasis on “law and . . .” publications tailored to the output of the younger academic generation.

The intellectual poverty of mainstream legal education created an opportunity, with risks. Quite apart from the complete ignorance of critical theory, there was a general atheoretical, or more commonly anti-theoretical, attitude among the influentials on most law faculties, and among the mass of professors on all faculties. Those who did see themselves as theoretical, and were sometimes powerful though few in number, were likely to be sharply hostile to any form of theory that emerged on their left. They were basically the older legal-process intellectuals, the older law-and-society intellectuals, the founders of law and economics, and the new generation of liberal constitutional rights theorists, who were only a few years older than the crits, much in rebellion against legal process, dismissive of law and society, and ambivalent about law and economics. Ronald Dworkin was their figurehead. They were the opposite of countercultural and the furthest possible thing from critical theory.

Don't forget the brilliance of the CLS scholarship and the creativity of the organizing strategy, which eschewed both formal organizational structure and the development of any kind of CLS program or manifesto but nonetheless managed to avoid being co-opted by the smug liberal elitists or destroyed by the authoritarians and random crazies who are drawn like flies to honey by apparently unboundaried left ventures.

CLS events of this golden age had an over-the-top quality without (usually) being over the edge, and what was more, we tried to “process” what happened, subjectively, confrontively, rather than living in denial and bureaucracy. We had some good speakers, too; charisma spread through the ranks (for a sample of one style, see Peter Gabel’s piece, above). There was a strong anti-elitist internal ethos, aimed against status differences based on what law school you taught at, or for that matter studied at, and an ethic of support for beginning scholars from veteran scholars.

But perhaps just as or more important was that many law schools at all levels of the law school pecking order permitted virtually unlimited long-distance telephone calls and virtually unlimited reproduction of documents. Most schools would pay for a trip to an academic conference if you were “giving a paper” (one of the origins, along with egalitarianism, of the CLS conference mode, in which there were two hundred attendees and one hundred papers). Law school deans not uncommonly saw CLS events at their schools as a plus in the scramble for reputation.

The white male lefties who set out to take advantage of the opportunity were drawn from two main sources. There were post-Marxists, disillusioned by the decline of the student left of the 1960s into many kinds of sectarianism, often including fanatic adherence to some form of “materialism” or “base/superstructure” thinking. And there were postliberals, equally disillusioned, but with a completely different group: the liberal leaders of the war in Vietnam, the liberal equivocators who let the ghettos burn and the Black Panthers die in police ambushes, the liberal labor leaders who watched the labor movement go down the tubes, and the liberal patriarchs who loved to promote women who made them feel good as guys. We were countercultural, but generally cautiously so. We were into ultraradical theory, but mainly in the mode of excavating and then cherry-picking bodies of ideas to which we felt we’d been denied access by the homogenized Cold War modes of 1950s and early 1960s elite education. And we were aesthetic modernists, by and large.

I venture that an issue for many of us was shame or abjection, not around the question “What did you do in the war?” but around the question “What were you doing when your contemporaries were getting arrested in Mississippi or Oakland?” There was also the insistence of both liberal activists and Marxist and post-Marxist and black radical activists that theory was bullshit and academic or school politics was bullshit squared; that the only real politics was some form of state-oriented politics or some kind of community organizing. White men in particular

could be radicals only in so much as they somehow managed to act both on behalf of and in full subordination to some group, of which they were not members, that was “really” suffering.

In the various attempts to reconstruct the politics of the time, it is sometimes said that we were Marxists and therefore preoccupied with class at the expense of race and gender issues, and that this explains the demise of the movement. This is pretty far off. One of the main reasons the post-Marxists were “post” was that the people who were proprietary about Marxism thought economy + class was the one and only key, and the CLS people did not. They were, along with the postliberals, very much preoccupied with race, and a large part of the foundational CLS scholarship of Alan Freeman, Mark Tushnet, and Karl Klare was on race issues. This was also the moment when Richard Delgado was inviting the white liberal constitutionalists *not* to write about race.

White feminists were part of the scene from the beginning, since their numbers in legal academia had begun to increase in the mid-1970s, and some of them were crits and some were not, not at all, thank you. It was obvious that CLS conference programs should devote sessions to race and gender, more sessions than to labor law, but it was also the case that the central project was, first, “theory,” and, second, aimed at developing a position about and within law that would be just plain left, rather than an African American left or a feminist left position.

Before moving on to the publishing history of *LERH*, it is worth noting that in 1983 what we now call identity politics was barely coming into existence, that there was no American postmodernism anywhere in the vicinity of the legal academy, and that the “linguistic turn” was barely beginning in what was not yet called just “theory.” Boomer leftists were just beginning to have children and renew their religious roots, but the turn to domesticity was not yet. Married crits with children didn’t hesitate, whether they were mothers or fathers, to commit to one-week summer camps and smoke dope.

Publishing History

In 1981, David Kairys came up with the idea of a joint project between the National Lawyers’ Guild’s Theoretical Studies Committee and the Conference on Critical Legal Studies. He proposed to edit a collection of radical writings about law, to be published by Andre Shiffrin, then head of the

New Press (soon to be acquired by Pantheon). The conference had only the most minimal existence, and a constant internal argument went on about whether we should have officers and elections or continue with the wholly informal arrangement in which Mark Tushnet was the “Secretary,” in charge of the mailing list and the bank account, with no rules at all. It turned out that the book project, somewhat to David’s disappointment, didn’t oblige the conference people to adopt a formal organization, because we were all (as I remember) more than willing to delegate to him full responsibility for everything. He asked me to write a chapter about legal education.

In July 1981, in a spurt over about three weeks, I wrote just about all of the pamphlet you have before you. I revised it a bit and submitted it at the beginning of September 1981, but of course it was too long, so we agreed that the book, *The Politics of Law*, would include chapters 1, 2, 5, and 6 only. The book appeared in 1982; there was a second edition in 1990; and a third, for which I somewhat revised my chapter, in 1998. I submitted the manuscript to the *Journal of Legal Education*, and they published a short version in 1982 shortly after the book came out.

In the winter of 1982–83, I decided to self-publish the full manuscript, more or less exactly as it was in September 1981, as a pamphlet. I was reading lots of books about revolutionary movements at the time, trying to figure out how they worked before they became oppressive governments, and so was exposed to pamphlet literature as an idea. Through an Office of Information Technology, Harvard Law School was for the first time making word processing available to its faculty. I was influenced by the cult of the handmade artifact, in which I was indoctrinated at Shady Hill School in Cambridge in the 1950s, and by the ideology of the pamphlet itself, my own ideology of the time, affirming the desirability and possibility of the “revolution of civil society,” carried out without official media, “interstitially” rather than from above or below the institutions where we work.

I think I paid about \$3 per copy for one hundred copies (it would cost less per copy when I got up my courage to order larger lots). I sent it in boxes to the Conference on Critical Legal Studies held at Georgetown University Law Center in March 1981, for free distribution. But—bummer—it didn’t get there in time for display at the registration desk. In the end, only about fifty copies were picked up, and I had to pay to ship the other fifty back to Cambridge. The Harvard Book Store in Cambridge sold pamphlets, in the grand tradition of left-wing bookstores. They put it

on display, with a small markup, and it almost immediately began to sell steadily, if modestly. After that, self-publication was pure pleasure.

A Reading of the Form of the Pamphlet

The IBM Selectric was the state-of-the-art typewriter of the time. It allowed accurate correction of typos and produced copy that was much better looking than what had preceded it. But unless you got a special ball, it had only one type face, twelve point Courier, and, of course, you couldn't use italics or righthand justify. This meant that, for people who wrote things, there was an enormous difference between the look of even the most professionally produced "manuscript," more properly "typescript," and something actually *in print*. Once you had a typed manuscript, by 1981 you Xeroxed it (rather than having to mimeograph it), and it was often possible to find free Xeroxing because copiers were multiplying in office bays.

Here is my reading of the "artifact," opportunistically combining what I remember I intended with other people's interpretations and my own search, after it was out, for unintended or maybe unconscious meanings in it. The pamphlet tells us that it is an artifact because it is much more *in print* than a typed manuscript, while definitely not appearing to have been commercially produced. *LERH* was accordingly square, 7" x 7", so that it could be made of 8 ½" x 14" (legal-size) sheets folded in half and then cropped. Each 14" x 7" sheet had two side-by-side pages on each side, which had to be numbered so that when they were stacked up, saddle-stitched (stapled through the middle), and folded, they read in sequence. A square bound back would have cost a lot more and suggested publication, sale on bookstore shelves, and placement in libraries, rather than distribution in the street. The original was photocopied, as opposed to typeset and printed, using another new technology that was cheap and produced a look that was, again, betwixt and between Xeroxing and *in print*.

The front and back covers are hand-lettered, using Letraset stick-on letters and graph paper, with minimal adjustment of letter size to space, just as Janet Halley observed. The cover looks a little like the layout of pre-World War I French socialist poster art and a little like Mao's "Little Red Book," in the mode of self-mockery. The Broadway typeface contradicts the Commie red. My name in Times New Roman is a reassuring gesture. AFAR might mean that the author is coming from a place that is a

long way from “the mainstream,” as in Janet Halley’s reading, and it might be a reference to Lenin’s “Letters from Afar,” written in Switzerland before the Germans sent him back to St. Petersburg in a sealed train to screw up the Russian war effort, a stay abroad brilliantly described by Alexander Solzhenitsyn in his *Lenin in Zurich*² (found in the author’s library with date 1980 in his handwriting on the flyleaf). But another possibility is an acronym like those of the guerilla groups that multiplied in Latin America in the sixties and seventies (e.g., the FARC): perhaps “Armed Forces of Anarchist Revolution” or more consistent with the text, “American Front for Anarchist Resistance.”

The typescript was turned into an original for photocopying in the Information Technology Office, with patience and humor, by one D— G—, who seemed to enjoy diverting Harvard’s resources in an unexpected way. It is in twelve point Courier, to give a typewritten look, and uses underlining, though italics were available. But it is righthand justified and the word processor fits the letters together, as Janet Halley points out, instead of giving each letter, whether *i* or *m*, the same amount of space, again placing the pamphlet halfway between typed and *in print*. The back cover represents visually the argument that hierarchy in advanced welfare corporate capitalism is diamond-shaped rather than pyramidal. (See page 000.) The endpapers are a picture of Saturn in a hand-drawn black circle representing outer space. As Halley suggests, this reads like “from outer space,” and goes with AFAR, or “spaceshot,” but Saturn with its rings is also mysterious and diffusely symbolic. *Saturnine* means “stubborn.”

Janet Halley’s account of the illustrations from Beatrix Potter’s *The Tale of Two Bad Mice* is perfect. I would add only that the two illustrations suggest the two dimensions of critical post-Marxist thinking about domination. In the first illustration, the threat is death by the material, violent means of the mousetrap, representing the use of physical force to sustain the status quo (not “state force to sustain capitalism”; see page 000). It amused me that the job of explaining how this works falls to the father, with the mother as spectator and the children alarmed. In the second illustration, the mother is allocated the task of explaining that what looks like a “real” policeman is only a doll, and the older children have already slipped by him to peek in the window of the dollhouse. Although *LERH* is Gramscian in inspiration, the picture suggests the Althusserian theory of interpellation in *Ideology and the Ideological State Apparatuses (Notes toward an Investigation)*,³ in which the policeman constitutes the citizen by yelling “Hey, you” at him, and resistance is in the mind rather than on the

picket line. *LERH* might be understood as an attempt to continue the symbolic work of the mother.

The mice live in a cozy burrow in the wall of the little girl's very bourgeois establishment, and they forage. The whole thing evokes (for me) a very different relationship to the class system than the complete rejection and outsideness that was boringly claimed in the radical milieu of the time. The mice are modeling a relationship of parasitism, subversion, and appreciation of the finer aspects of bourgeois living, and even of bourgeois art as represented by Ms. Potter herself, while keeping in touch with their inner rage and sustaining a counterhegemonic enclave. (See page 137.)

The page layout of the body of the text is unusual. The square format produces, when you open the pamphlet, a 14" wide, 7" high double page. The large bottom margin, along with narrow side margins, with page numbers in the running head, accentuates the effect, producing a block of text that is 4 ¾" high but 11 ½" inches wide. The whole evokes (for me) the horizontal, long and low "strip" effect that is so important in modernist residential and commercial and industrial architecture, furniture, cars, and appliances—all in opposition to the vertical look of "classical" design.

Does all this have a "political subtext?" Perhaps that *LERH* combines two rebellious, avant-garde strands from the pre-World War II period, the leftist and the modernist, without subordinating one to the other.

"Radicalism" in LERH

I use the term *radical* often in the pamphlet. In 1981, an important aspect of the world of academia in general, and of big cities and small university towns, was that there was a radical identity, a political rather than a cultural or racial identity. It was partly negative, grouping people who didn't believe that the established politicians, social and political commentators, and academics who defined themselves as liberals against conservatives were serious enough about change to merit allegiance.

The sixties had discredited the liberals' traditional social program (labor unionization, public housing, the welfare system, supplemented by the compromised and ultimately failed War on Poverty and by the compromised and ultimately stalled push for a colorblind version of civil rights). The same for their international program, which, as we saw it, was

the Cold War “containment” alliance with right-wing regimes everywhere, culminating in the Vietnam War, which became more rather than less murderous as the Soviet threat faded after 1968.

There was no single positive radical programmatic idea, and the continued existence of this tendency was already very much in question as the “preppie look” caught on, signaling the cultural counterrevolution. Radicals might turn out to be orthodox Marxists, counterculturally inclined anarchists, social Catholics, radical feminists, black nationalists, or people who rejected all of the above but were interested in any kind of initiative that might shake up the seemingly stalemated “system.”

There were still organizations whose members thought of themselves as animated by radical politics in this sense, and their ideologies were what produced the internal life and conflict and evolution of organizations that were devoted to such causes as labor, pacifism, the environment, grassroots community organizing, feminism, and legal services for the poor. There were “tendencies” within feminism—liberal feminism versus socialist feminism—or among environmentalists—Greenpeace direct-action people versus liberal incremental litigators. African Americans who were politically active were quite deeply split between those who identified with the integrationist “civil rights establishment” and those who were more or less “race conscious,” or for that matter separatist or black nationalist or direct-action oriented; more or less willing to work with white people; and so forth. One could live a full life following and participating in these internecine battles.

The liberals were immensely more powerful and more “established” everywhere than they are now. It still seemed plausible that the agenda was to drive them to the left, while swelling our ranks with theirs. They were losing, however, not to the left, which had destroyed itself in McGovern ineffectualness or Black Panther and Weather Underground failed terrorism or party-building delusions, but to the resurgent right represented by the Richard Nixons and the Ronald Reagans. The liberals were, accordingly, solely and obsessively preoccupied with the question of how much of their historic program they had to give up—just surrender or repeal or roll back—in order to retain enough votes to stay in power. The liberal establishment in the media, academia, and the legal profession was as worried about this as the politicians themselves, because the liberals overwhelmingly believed in the liberal welfare regulatory state as the main vehicle through which good could be done in the world.

Many students who did not, would never have called themselves radicals situated themselves between radicals and liberals, picking and choosing among the positions of the two sides according to the issue. *LERH* was an appeal to liberal students and in-between students to move to the left, as well as an appeal to radical students to grope forward in a particular direction. It was just as much an appeal to the generation of boomer activists just then entering legal academia as assistant professors to adopt a radical attitude within their institutions. As the right got stronger and the liberals gave more and more ground, it seemed feasible to try to define an alternative—radical, egalitarian, and anarchist, with a dose of “premature postmodernism” in the argument that power is productive of hierarchical selves, rather than merely repressive.

We were looking to form a new minority, rather than the new majority the liberals were desperately seeking—a minority that would renounce state power and do what we self-mockingly called “the Long March through the Institutions” (by analogy to Mao’s Long March through the countryside when the forces of Chiang Kai-shek defeated the Chinese Communists in the cities). The single most provocative thing about *LERH*, it turned out, even more provocative than “equal pay for janitors,” was the insistence that it was not meaningless to “resist” even at “bourgeois dinner parties,” and by obvious extension in legal education and large corporate law firms.

The Current Situation

The system described in *LERH* has gotten tighter in the ensuing twenty years,⁴ and mainstream scholarship on the legal profession now acknowledges things that only mavericks like Rick Abel⁵ and Carrie Menkel-Meadow⁶ used to talk about. The bar is even more highly stratified than it used to be, with greater differences in incomes but also in the organization of firms and in the class origins and current prestige of practitioners. The system rigidly determines a place for everyone and everyone in his or her place. If it is her place, then keep in mind the recent study that showed that law firms with lots of women partners pay their women associates better than firms with overwhelmingly male partners,⁷ and you might mention that to the partner at the firm dinner when he puts his hand on your leg under the table. African Americans don’t make partner, or not much.⁸

Behind the hierarchy of law firms, there is the feeder system of the hierarchy of law schools. As one researcher recently put it, “the identity of the institution from which a graduate receives the J.D. degree may be the single most important factor in the graduate’s career path.”⁹ Average student indebtedness has increased to an amount well over \$85,000 for the maybe 80 percent of law students who borrow.¹⁰ Job security for associates has gone out the window as their first-year compensation has increased, so the chances that you will be let go or that your firm will go under or merge into an entity that no longer needs you are way up, and the chances that you will end up a partner in your first employer are way down.¹¹

Radicalism does *not* mean believing that by forming law student study groups you can abolish this system. It does mean finding some way to rebel in law school, maybe starting from the description of Third World Coalitions and law review reform struggles that Harris and Maeda provide in their chapter above. It means recognizing the system for what it is when, all around you, your fellow lawyers are denying that it exists or glorying in what they happen to be getting out of it at the moment. It means rejecting it as both unjust and socially unnecessary. It means trying to locate other people who feel the same way, without getting yourself fired. It means looking for small enactments of rejection and resistance that affirm that one is a person of moral substance. And it means looking for the targets of opportunity that might allow building a minoritarian alliance over time that could sustain itself. After graduation, it seems to me to mean first of all trying to find a morally tolerable law firm to work for, or to move to from whatever firm one is forced into working for by the status degradation ritual of the law school placement process.

What Happened to Critical Legal Studies

What happened to Critical Legal Studies may not be of much interest if you are a law student. It does seem to intrigue quite a few legal academics. There are two narratives about what happened. The first is the narrative of organizational expansion and disintegration, and of disaffiliation. The second is that of the survival of CLS as a body of literature, as a “school” of legal thought still producing through “successor networks,” and as a pervasive influence on legal scholarship not just in the United States but worldwide. When we left the story a few pages ago, what was happening was the flooding into CLS of white women law teachers (American and

Canadian) and African American and other law teachers of color, both men and women. There also arrived a new generation of white men, much more graduate student-like than their predecessors (who were now dubbed the “old white male heavies”).

It would be wrong to homogenize the newcomers under the rubric of identity politics, although that was an important element. The white women and African Americans were highly various politically and theoretically, and they were as much in conflict among themselves as with the old white male heavies. The younger white men were postmodernist, either in a leftist Foucauldian mode or in a dandified, defiantly politically incorrect Derridean mode. There was an initial alliance of the po-mo young with white women and minorities against the frumpy universalist phallogentrism of the old white male heavies. It was not to endure.

The combination of generational, gender, racial, and theory agendas of contradictory kinds produced what was, for me, the most exciting and fertile moment of intellectual, political, and intimate social life that I’ve experienced. What was great about it for many of us was that it was the first time in our lives that we engaged our “others,” whoever they might be, in very straight talk about the dynamics of power that existed, not just in the society writ large but in the smallest social interactions. This straight talk was in a context of commitment and hope for a transformation of our common professional space, and it included not just frankness but also commitment to talking through rage toward reconciliation.

There are many reasons why it was short-lived. The context was the one well described by Pierre Bourdieu in “The Academic Field.”¹² Each of us was not only a group member but also an entrepreneur on the ladder of academic jobs. Some of us were tenured, with our chances of lateral movement hostage to CLS; and some of us were untenured, with our tenure hostage to CLS. Some of us were beneficiaries of affirmative action, and some of us of negative action. CLS might be one’s only chance to get on the map, but once there, one might be stuck or destroyed as a result. No one was accountable for the microdecisions that determined what CLS looked like to the mainstream that controlled tenure and lateral hires. This was particularly true after the national media decided that Harvard Law School was a “story,” the story of sixties radicals reemerging with tenure to disrupt everything good and true.

CLS was partly destroyed by repression. One can get a sense of how time changes all things by contrasting Paul Carrington’s famous call for CLS professors to “depart the academy,” because they were morally un-

sued to teach law,¹³ with his piece in this volume. He was the dean of Duke Law School at the time. A bunch of assistant professors associated (in reality or in the eyes of their colleagues) with CLS were denied tenure, in circumstances suggesting that they would have gotten tenure without the association. There was a none-too-subtle attempt by a number of entry-level hiring interviewers to get a sense from applicants of whether they were “sound,” meaning hostile to CLS. And a great deal of really silly, but intimidating, red-baiting nonsense was written about CLS by people who knew better.¹⁴

Given this setting, it is fanciful to imagine that the “question that killed critical legal studies” was: So, what’s your alternative vision?¹⁵ The refusal to formulate an alternative vision was what allowed CLS to exist as a “location” for exhilarating encounters.¹⁶ Along with the ethical tensions of entrepreneurship and repression, what happened was that the participants in the cross-generational, cross-racial, cross-gender discussion came to find it unbearable.

It was partly a matter of substantive disagreements about things like the CLS critique of rights; or the relative importance of developing a specifically legal kind of critical theory versus the effort to develop new theories of how race or gender worked themselves out through law; or the implications, constructive or destructive, of “fancy” theory for law reform work.

It was also partly a matter of the substance in style. Cultural and radical feminists who were interested in coalitions with white men were also committed to confronting them very hard about their whole gendered mode of being, and minorities were no less committed to getting the issues of unconscious racism and silencing on the table. The old white male heavies were no less committed to avoiding what many of them saw as the worst aspect of seventies leftism: the tendency of nonsectarian white male radicals to just shut up and take race and gender denunciation without daring to talk back. The whole idea of “process orientation” was to surface this kind of conflict. It was often very painful for all concerned, partly because everyone felt that CLS should be a “refuge,” and everyone got mad that it wasn’t.

A second divisive emotional structure had to do with theory needs—the “anxiety of influence” of the newcomers and the “anxiety of proprietorship” of old-timers. For many of the white women and minority profs interested in CLS, it was an important article of faith that women and minorities had a specific intellectual contribution to make. The alternative to assimilation into the mainstream was to assert that there were specific

failings of white male scholarship in general, including that of the left and right margins of the mainstream. One failing was the “neglect” of gender and minority issues. Nonassimilating women and minorities set out to write about “their” issues and had a relatively unproblematic open space to move into.

Both for radical and cultural feminists and for minority scholars, there was another necessary claim—that they had a different methodology, a different kind of theory. They wanted to operate not just on neglected subject matters but also with tools that were their own rather than those that had built the white male master’s house. This claim was endlessly and interestingly problematic. It could have a wide variety of proposed contents, ranging from the claims for “narrative” as the essence of outsider jurisprudence, to the assertion that there is a “black point of view” or a “woman’s point of view” that white men “just don’t get,” all the way to the claim that advanced postmodern theoretical techniques, inaccessible to the vast majority of white male law professors (though of course wholly the invention of dead white male European non-law professors) were necessary to capture minority or women’s experience.

The younger pomo guys had their own theory narrative, in which the old white male heavies were what Italians call *vecchio* Marxists, essentializers in lots of different ways. Their need to be theoretically new was just as intense, in the oedipal mode, as that of the feminists and minorities. And came up just as sharply against the need of the old white male heavies to understand themselves as the proprietors of a radically new, anti-mainstream critical theory of law that anticipated just about any idea that a feminist, a race-conscious minority professor, or a smart-ass pomo kid thought they’d come up with on their own. Of course, many of us on all sides struggled against this emotional dead end. Kim Crenshaw, Mary Joe Frug, and I pushed for a coalition concept, with only limited success.

The modes of disaffiliation were various. Many of the first generation of white males were tentative to begin with. They simply faded away. Many of the first generation who participated enthusiastically into the mid-1980s dropped out because of the opening up of new opportunities in the mainstream and their reaction against the combination of process orientation and dramatic identity and generational politics. For the young pomos, the failure of alliance with either white feminists or African Americans and the disgruntlement of sonship led in the same direction. There must be fifty tenured profs around the country at more or less prestigious schools who would be unlikely to mention that CLS was the formative

moment of their academic youth, almost like having been, however briefly, a Communist in the 1930s.

African American along with Latino/a and Asian American law teachers formed the Critical Race Theory network, beginning at a meeting in Madison in 1989. This network combined people who were aiming to create a minority organization that would participate in CLS as a coalition partner with left-of-liberal white men and white feminists, those looking to create a milieu for a distinctively minority “outsider” scholarship, and those looking to create an ideologically moderate “safe space” within which to work on how to deal with the white faculties where they experienced themselves as tokens, but tokens facing tenure writing requirements that were getting stiffer every year. Safe space seemed to win out, and Critical Race Theory split along ethnic lines. It remained a name for a style of scholarship rather than a movement. Only the LatCrits continue to hold big, multidimensional conferences at regular intervals and keep theoretical and practical concerns in fruitful tension.

Nothing like Critical Race Theory came into existence for feminist law professors interested in theory, not because they already had the Women in the Law Conference but because, at the same moment when many of them were becoming fed up with the old white male heavies, they were bitterly and permanently split by the anti-pornography campaign. Feminist legal theory is an umbrella term for a wildly diverse, far-ranging set of approaches, sharply challenged on one side by black feminist scholarship and on the other by queer legal theory.

By 1992, it was clear that the “movement” had become “just another academic conference,” as Mark Tushnet put it at the Crit Networks Conference, a coalition event of CLS, Critical Race Theory and the “femcrits,” held that year at Harvard and Northeastern Law Schools. It was a place for young scholars to present their left-wing or, more specifically, CLS-influenced work to a still very substantial audience. But it had fragmented in terms of theory into a half dozen approaches, and the approaches were no longer confronting each other. The idea that the strong emotions released in a big or small meeting would have to be processed in a self-conscious, psychologically sophisticated way so that the movement could continue to grow and advance seemed utterly of the past. Likewise the idea that radical law professors should organize permanent challenges, school by school, to the reproduction of legal hierarchy. People were more concerned with keeping bitter disagreements and conflicting views of the history from surfacing and disrupting the diffuse good vibes than they were with yet

another hashing out of disagreements that seemed insurmountable. Legal education had reequilibrated.

Before moving on, I note without regret that the above account is no more neutral or merely factual than any of the other attempts at histories of CLS.

What's Left

There are several hundred CLS-inspired articles on just about every area of law. They are the main existing alternative to the mainstream liberal and right-wing libertarian stuff that fills the reviews. This literature is still expanding, slowly but steadily, because CLS is still very much alive as a "school." CLS literature is also expanding because there are two successor networks: INTELL,¹⁷ which focuses on labor law worldwide, and the European Law Research Center,¹⁸ which focuses on international law, comparative law, and law and development. Recognizably "crotchety" literature continues to appear for another reason: academics who have never met a crit in their life read the canonical works of the movement and set out to contribute. Many crit ideas, and particularly the notion of the "indeterminacy" of both classical legal analysis and of policy analysis, have become part of American legal academic common sense. Much of the institutional agenda of CLS has been adopted, little by little, by law schools at all levels of the status hierarchy.

The white women and minorities and rebellious young, and most of the old white male heavies, have made their peace, joining the diffuse liberal to left-liberal alliance that confronts a similarly diffuse conservative alliance in legal education. It would not be too much to say that CLS succeeded, against the odds, in politicizing legal theory and legal education, while failing, according to the odds, to radicalize either.

There are CLS critiques of most of the modes of the mainstream, and a particularly elaborate critique of law and economics. The CLS critique of rights remains alive and influential and is the most galling for liberals and identity-politics devotees. But there are also critiques of mainstream law and society thinking, of depoliticized versions of postmodernism, and of liberal and radical feminist legal theory. Of course, a good number of the authors of these critiques might disavow them today. For unreconstructed crits like myself, they remain powerful, interesting, and too soon abandoned.

A striking aspect of all this is that it is international. Globalization, as Ugo Mattei and Anna di Robilant point out,¹⁹ creates a global market for American law and a global market for modes of resistance to American law, of which CLS is one. There has been a British Critical Legal Studies network for almost as long as there has been an American one, combining Marxist and postmodern tendencies, and a Continental European one likewise, and now there is a South African one. There is no American organization with which they can have uneasy diplomatic relations, and there is nothing like a sense of a common transnational line. But the sun never sets on Critical Legal Studies.

The upshot is that there is a lot of radical legal scholarship and scholarly activity still around for the student who is willing to look for it, even if there is not the sense of an all-inclusive, open movement to join or rebel against. It's time for something new here, too.

NOTES

1. All the statistics that follow are from Carl Auerbach, *Historical Statistics of Legal Education* (Chicago: American Bar Foundation, 1997). Thanks to Alejandra Nunez for research help.

2. Alexander Solzhenitsyn, *Lenin in Zurich: Chapters* (trans. H. T. Willetts, New York: Farrar, Straus & Giroux, 1976).

3. Louis Althusser, *Lenin and Philosophy, and Other Essays*, trans. Ben Brewster (New York: Monthly Review Press, 2001).

4. See John P. Heinz, Robert L. Nelson, Edward O. Laumann, and Ethan Michelson, *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 *Law & Soc. Rev.* 751 (1998).

5. Richard Abel, *American Lawyers* (New York: Oxford University Press, 1989).

6. Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 *Berkeley Women's L.J.* 39 (1985).

7. Elizabeth Chambliss and Christopher Uggen, *Men and Women of Elite Law Firms: Reevaluating Kanter's Legacy*, 25 *Law & Social Inquiry* 41 (2000).

8. David Wilkins and Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Firms? An Institutional Analysis*, 84 *Cal. L. Rev.* 493, 502 (1996).

9. Mary C. Daly, *The Structure of Legal Education and the Legal Profession, Multidisciplinary Practice, Competition, and Globalization*, 52 *J. Leg. Educ.* 480 (2002).

10. John E. Sebert, *The Cost and Financing of Legal Education*, 52 *J. Leg. Educ.* 516, 522 (2002).

11. David Wilkins and Mitu Gulati, *Reconceiving the Tournament of Lawyers*, 84 *Va. L. Rev.* 1581 (1998)

12. Pierre Bourdieu, *Homo Academicus* (Paris: Editions de Minuit, 1984).
13. Paul D. Carrington, *Of Law and River*, 34 J. Legal Educ. 222 (1984)
14. Gerald Frug, *McCarthyism and Critical Legal Studies*, 22 Harv. C.R.-C.L. L. Rev. 665 (1987).
15. Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 Law & Social Inquiry 779 (1992).
16. Mark Tushnet, *Critical Legal Studies: A Political History*, 100 Yale L.J. 1515 (1991).
17. Reachable through Professor Karl Klare of Northeastern Law School or Professor Michael Fischl of the University of Miami Law School.
18. Reachable through the Harvard Law School Web site.
19. Ugo Mattei and Anna di Robilant, *The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe*, 75 Tul. L. Rev. 1053 (2001).