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Aftermath and Legacies: A Few Critical Thoughts

In considering the question of CLS aftermath and legacies, I begin by considering CLS as both a movement in the legal academy and a mode of thought. From this perspective, there are two major, and to some extent, contradictory patterns that might be observed. The first is the ongoing promulgation of “critical” analysis through the work of various legal scholarly and intellectual projects; the second is the virtual disappearance of CLS as a movement, as a source of contemporary scholarship and debate or as a presence in legal pedagogy. Since the world is dialectical, as a wise friend often reminds me, these apparently opposing observations may not be surprising. But hopefully, they can be instructive.

To the first observation, in the aftermath of CLS, the claim to a “critical” stance in various bodies of scholarship and work persists. What is at stake in claiming a “critical” stance is obviously up for contention, but to the extent that it is a signal, it may be fair to read it as one of opposition to mainstream accounts of the legal system and legal theory. While political liberals and conservatives differ sharply over the proper role of the state vis-a-vis the market and dispute the scope and enforcement of rights as conventionally articulated through constitutional doctrine, both sides often cohere in acceptance of the status quo as a neutral baseline, departures from which must be justified. Law performs the function of naturalizing what are, in fact, contingent and political choices and in so doing, impedes change. This critical and deeply skeptical stance towards neutrality might be identified as one legacy of CLS that has survived through other critical projects. If any body of work is to take up the *nom de guerre* “critical,” it must at some point contest or at least contend with the assertion that law is predicated on neutral principles derived from some external sphere. Of course, where one goes from there is an open question.

But while “critical” is a prevalent marker within contemporary scholarship and legal pedagogy, the afterlife of CLS per se is largely marked by absence. Of course, it was never the case that CLS crossed some threshold of recognition in the formal domains of law and the legal academy. Even at its peak, CLS was not the prevailing analytical framework. Moreover, it is not clear that this was even an aspiration.¹ But at a particular historical juncture, CLS achieved some prominence, both as a body of work and as a target of vociferous criticism in the pages of various law journals and the press. Given the cavernous distance between traditional legal scholarship generally and popular political discourse, it could be considered remarkable that CLS was cognizable, even as an object of intellectual disdain. From the late 70s to the late 80s, there were reams of paper and many journal articles regarding CLS, debating key concepts like indeterminacy, and the impossibility of objectivity, as well as the interests served by the highly contestable claims to both. By the mid-1980s, the leading opinion writers and newspapers were weighing in, ² almost uniformly negatively, and most often through the framework that CLS was a debate among irrelevant elites. Trashing the trashers was a favorite pastime. But at some point, CLS no longer occupied pride of

¹ As Roberto Unger has pointed out, attaining the status was not the point. See Roberto Unger, *THE CRITICAL LEGAL STUDIES MOVEMENT*, 24 (noting that CLS was “never meant ..to become an ongoing school of thought or genre of writing” but was rather an intervention at a particular juncture.)

² See e.g. Louis Menand, *Radicalism for Yuppies: What is Critical Legal Studies*, *New Republic*, March 17, 1986, at 20; David Margolick, *The Split at Harvard Goes Down to Its Foundations*, *N.Y. Times*, Oct. 6, 1985, § 4, at 7, col. 1

place as the latest leftist lunacy. By the mid-1990s, some writers were marking CLS in the past tense.³ And undoubtedly, while this is subject to dispute, as the call to the conference noted, as a movement CLS largely receded. As far as I am aware, while certain CLS authors appear on various syllabi, CLS as a body of work is not taught, nor has it served as a banner for organizing intellectual inquiry inside or outside the legal academy.

Rather than speculate about the causes for the denouement, I'll briefly map some of what has followed in its wake. Whether these constitute intentional or unintentional legacies, I also will leave aside for the moment.

In the absence of a visible CLS platform, there has been an out-migration of some of its leading proponents into other arenas and ventures, including constitutional law, political theory, law and society, legal history, international law, and the like. With some exceptions, the intellectual insights of CLS became subtext within broader legal discourses and debates.

To some extent, the end of CLS as an explicit project coincided with the decline of the liberal legal consensus in the academy⁴ in the wake of the assault by a well-oiled and well-funded conservative legal apparatus that claimed territory in the judiciary, in legal doctrine, and popular conceptions of legal norms and concepts. Moreover, the ascendancy of conservative politics demonstrated the problematic nature of the law/politics distinction, but in deeply ironic ways. As Elizabeth Mensch argued, "[t]he key message of CLS.. that law is politics [is a] point that has been proved best by the political right, with Reagan's 'litmus test' approach to judicial appointments demonstrating that explicit attention to particularized and detailed political agendas (e.g., opposition to affirmative action) can produce politically desirable judicial decisions."⁵ The rise of conservative political power, to a great extent, predicated on politics of racial resentment and panics, such as the War on Drugs, and the unleashing of neo-liberal reforms which undermined basic social welfare systems were consolidated through major shifts in institutional arrangements, including in law. Yet, the response was largely crafted through internally conflicted liberal arguments which sought to condemn white supremacy as an example of the distorting nature of racial consciousness for which race neutrality was the cure, while weakly defending race-conscious interventions like affirmative action as justifiable, but temporary deviations from normal processes.

The holes in these arguments were not only big enough to drive proverbial trucks through; they also enabled conservative advocates to claim a return to the original civil rights vision of colorblindness, and, simultaneously, a faux populist-inflected concern with "real" inequality as structured through class. A key example of the conservative version of this argument featured prominently in the debate over Proposition 209, which ostensibly ended race-conscious affirmative action programs in California over twenty years ago. Ward Connerly, the erstwhile black face in charge of the campaign, repeatedly asserted that the end of race-conscious affirmative action would free up state resources to attend to class inequality. The bankruptcy of this position was clear from the alignment of conservative forces with massive shifts of power and resources to corporations and finance capital. But the pushback from most white liberals and progressives inside and outside the academy largely did not center or make prominent the role of racial hierarchy in constructing class inequality. Early CRT analysis that pointed towards the problem of the lack of a sophisticated analysis of race was largely unwelcome.

³ Roberto Unger, *THE CRITICAL LEGAL STUDIES MOVEMENT*, at 24 (noting that the movement as such continued only until the late 1980s).

⁴ The demise of political liberals did not come with the demise or influence of classical liberalism as a concept.

⁵ Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW*, at 33.

While there were many intervening events and upheavals, the lack of a clear CLS position on the race/class interaction created a lacuna at a crucial juncture. While the class over race position was (and remains) a prominent conservative critique of race-attentive policy and analysis, subsequently, we have seen the recuperation of class not race as an ostensibly progressive project under colorblindness/ post-racialism in which the argument is that race is not the correct political grounding for analysis, mobilization or intervention. The prevailing post-mortem on the 2016 presidential elections as well as projections regarding the upcoming elections rehearse these themes about the primacy of class (read white) inequality over racial subordination, while the right pursues white identitarian politics on steroids. This is not a legacy we can afford.