

## BOOK REVIEW

A GUIDE TO CRITICAL LEGAL STUDIES. By Mark Kelman.\*  
Harvard University Press, Cambridge, Massachusetts and  
London, England, 1987. Pp. 360. \$30.00.

*Reviewed by David L. Gregory†*

### I

*A Guide to Critical Legal Studies*,<sup>1</sup> written by Professor Mark Kelman of Stanford Law School, definitely has merit but will nonetheless disappoint many. For those unfamiliar with the academic legal literature of the Critical Legal Studies (CLS) movement, the book fails as an announced guide. At the same time, for those who are more informed, the book does not say enough that is new. The book is grossly mistitled; no attempt is made to initiate the novice gradually into the complexities of critical legal theory. Professor Kelman, a very sophisticated and erudite scholar,<sup>2</sup> makes the mistake of presuming that his audience will already be familiar with the major tenets of critical legal theory. The previously uninformed but intellectually curious prospective reader will find the book an intimidating baptism by fire, more closely akin to total immersion than to serving as any sort of road map or guide. These readers are better advised to explore critical legal studies literature through prior law review articles; Professor Kelman's extensive footnotes<sup>3</sup> handily refer the

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1. M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987).

2. See, e.g., Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769; Kehnan, *Comment on Hoffman and Spitzer's Experimental Law and Economics*, 85 COLUM. L. REV. 1037 (1985); Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981); Kehnan, *Misunderstanding Social Life: A Critique of the Core Premises of "Law and Economics,"* 33 J. LEGAL EDUC. 274 (1983); Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN. L. REV. 831 (1979); Kelman, *Time Preference and Tax Equity*, 35 STAN. L. REV. 649 (1983).

3. These sources include: D. KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983); *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairys ed. 1982); Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984); and a collection of CLS articles in 36 STAN. L. REV. 1-674 (1984). For reviews of Kennedy's book see Bloomfield, *Book Review*, 45 LA. L. REV. 1329 (1985); Coles, *Hierar-*

reader to several excellent background sources.

Professor Kelman expressly disavows any rehash of the ongoing political debates in the popular press concerning the fractiousness over CLS within legal academe, perhaps most egregious in the internecine tenure warfare afflicting Harvard Law School.<sup>4</sup> Furthermore, the purpose of the book is not to introduce CLS; that has already been done in an impressive array of law review articles, symposia and collections of essays.<sup>5</sup> Even for the more informed readers, however, this "guide" to CLS misses the mark. As an intellectual synthesis it is incomplete. Rather, the reader is treated to the further elucidation of the author's particular positions, demonstrating continuing variance with other prominent CLS writers.

Unquestionably, Kelman's writing style is academically elegant. Because Kelman uniformly chooses a sophisticated discourse, the most radical leftist wing of CLS is likely to poke fun at the perceived pretentiousness and pomposity of the book; nonetheless Kelman is wise

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*chy and Transcendence* (Book Review), 97 HARV. L. REV. 1487 (1984); Book Review, 82 MICH. L. REV. 961 (1984).

*The Politics of Law* has been extensively reviewed. See Bachmann & Weltchek, Book Review, 30 UCLA L. REV. 1078 (1983); Ball, Book Review, 51 GEO. WASH. L. REV. 309 (1983); Beyleveld & Brownsword, *Critical Legal Studies* (Book Review), 47 MOD. L. REV. 359 (1984); Bohm, Book Review, 76 J. CRIM. L. & CRIMINOLOGY 278 (1985); Caliman, Book Review, 8 BLACK L.J. 462 (1983); Chevigny, Book Review, 11 N.Y.U. REV. L. & SOC. CHANGE 363 (1983); Dalton, Book Review, 6 HARV. WOMEN'S L.J. 229 (1983); Deutsch, *Corporate Law as the Ideology of Capitalism* (Book Review), 93 YALE L.J. 395 (1983); Forbath, *Taking Lefts Seriously* (Book Review), 92 YALE L.J. 1041 (1983); Gregory, Book Review, 1983 ARIZ. ST. L.J. 205; Hartog, *The Politics of The Politics of Law* (Book Review), 1984 AM. B. FOUND. RES. J. 851; Holly, Book Review, 23 SANTA CLARA L. REV. 1199 (1983); Holt, *A Law Book for all Seasons: Toward a Socialist Jurisprudence* (Book Review), 14 RUTGERS L.J. 915 (1983); Kramer, Book Review, 20 NEW ENG. L. REV. 599 (1984-85); Levinson, *Escaping Liberalism: Easier Said Than Done* (Book Review), 96 HARV. L. REV. 1466 (1983); McKenna, Book Review, 69 A.B.A. J. 798 (1983); van den Haag, *Politics Against Law* (Book Review), 82 MICH. L. REV. 988 (1984); Book Review, 48 MO. L. REV. 849 (1983). In addition, *A Guide to Critical Legal Studies* has an outstanding separate sixty-page footnote section of informative, very well documented sources following the text.

4. See Kennedy, *Are Lawyers Really Necessary?*, 14 BARRISTER 11, 12 (1987) (discussing bitter tenure dispute at Harvard Law School over CLS-identified professors); see also Adams, *Professor Denied Tenure at Harvard to Pursue Sex Discrimination Claim*, Nat'l L.J., Mar. 28, 1988, at 4, col.1. Kingson, *Harvard Tenure Battle Puts 'Critical Legal Studies' On Trial*, N.Y. Times, Aug. 30, 1987, § 4, at 6, col. 1 (noting divisions over tenure of CLS faculty at the Harvard Law School); *Harvard President Reviews Law School Tenure Decision*, N.Y. Times, Aug. 13, 1987, at 12, col. 6 (noting that CLS is "hotly disputed among legal scholars"); *Harvard Scholar in Sit-In Over Tenure Cases*, N.Y. Times, June 9, 1987, at A21, col. 1 (noting divisions over tenure of CLS faculty at Harvard Law School). For an overview, see Frug, *McCarthyism and Critical Legal Studies* (Book Review), 22 HARV. C.R.-C.L. L. REV. 665 (1987).

5. See *supra* notes 3-4; see also *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987); *Perspectives on Critical Legal Studies*, 52 GEO. WASH. L. REV. 239 (1984); *A Symposium of Critical Legal Studies*, 34 AM. U.L. REV. 927 (1985); *Symposium on Critical Legal Studies*, 6 CARDOZO L. REV. 691 (1985).

to ignore this anarchist/nihilist fringe strain of CLS. Fortunately, Professor Kelman does provide a very erudite, selective presentation of some major CLS themes. On this important level, the book is a very serious academic enterprise.

Unfortunately, the presentation is a little *too* selective. While the informed reader certainly will have a fuller understanding of Professor Kelman's own thinking, essentially little new is said. Most of the book retraces already very familiar ground, presenting meticulous reexaminations of leading CLS pieces by Professors Duncan Kennedy<sup>6</sup> and Roberto Unger,<sup>7</sup> or continuing the familiar debate with the proponents of the Law and Economics school. While Kelman's treatment of this material is too advanced for the uninitiated, the informed reader will probably leave the book at least somewhat dissatisfied with Kelman's failure to break new ground. The separate sixty-page footnote section, however, is an excellent resource and may be the most useful part of the book.

As an intellectual history, the book is premature. CLS is now beginning its embattled second decade, and has obviously taken on some of the institutional cultural trappings of a recognized intellectual movement, via law review articles, symposia, and now, books. Of course, these developments send interesting signals as to whether the original radical leftist potential of CLS is being diluted by the very fact of its "establishment" as a recognized intellectual force with most of its primary (hierarchical?) white male figures occupying secure tenured professorships at elite national law schools.<sup>8</sup>

CLS will never lend itself to a uniform characterization. It would be both simplistic and erroneous to portray it in such a fashion. But neither has it come to full fruition as an intellectual movement. While the book wisely is not designed primarily as a retrospective, the book would have been more apt a decade hence. With the advantages of greater historical perspective and opportunity for reflection, *A Guide to Critical Legal Studies* could have been more representative both as a synthesis and as an intellectual history.

Professor Kelman spends several pages in the Introduction to state what the book will not do. It is not a popular press update on the ongoing tenure wars that afflict several law schools, nor is it a rejoinder to

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6. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979).

7. R. UNGER, *KNOWLEDGE AND POLITICS* (1975).

8. See generally *Minority Critiques of the Critical Legal Studies Movement*, *supra* note 5, at 297 (1987) (considering whether there is a place for minorities in the CLS movement and what that place might be).

those urging that CLS scholars be purged from law school faculties.<sup>9</sup> Those battles are well-publicized elsewhere.<sup>10</sup> The book also is not an attempt to locate CLS within the broader trend of critical theory, identified primarily with continental philosophy and the Frankfurt school.<sup>11</sup> Professor Kelman more profitably focuses upon the specifics of the major legal elements of critical theory. The broader critical theory has been elucidated in other works, including some by CLS writers. Moreover, the author does not locate CLS within broader social theory, nor does he replay the debate whether CLS is a post-Realist response to Formalism.

Professor Kelman maintains the CLS/Realist analogy does not suffice, because the Realists were less politically conscious than are CLS proponents. Of course, this assertion would probably surprise Realists such as William O. Douglas and Thurman Arnold, who left legal academics to translate Realist legal theory into practice as prominent members of Roosevelt's New Deal administration. Thus far, there has been no remotely similar entry of CLS theorists into any national political administration.

Finally, Kelman also decides not to explore further the deconstructive literary and linguistic techniques<sup>12</sup> employed by CLS. Instead, Pro-

9. See, e.g., Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).

10. See *supra* note 4; see also Adams, *CUNY Faculty, Administration Struggle over Control of Tenure*, Nat'l L.J., Feb. 1, 1988, at 4 (noting CLS related tenure struggle); Adams, *ABA Accreditation Panel's Power Becomes Evident in Recent Cases*, Nat'l L.J., Dec. 14, 1987, at 4 (noting investigation of the dismissal of four CLS-identified professors at New England Law School); Professors' Dismissal Will Be Investigated by Bar Association, N.Y. Times, Nov. 29, 1987, § 1, at 68, col. 1 (same); Adams, *Four CLS Supporters Fight to Keep Teaching Positions at New England*, Nat'l L.J., Aug. 17, 1987, at 4 (reporting "skirmish" at New England School over firing of four CLS-identified professors).

11. M. KELMAN, *supra* note 1, at 9.

12. For an explanation of deconstruction and its techniques see J. CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (1982); *DECONSTRUCTION & CRITICISM* (1979); Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987).

Deconstruction, always controversial, is now deeply embarrassed as well as perennially embattled. Paul de Man, Yale University Sterling Professor of Humanities at the time of his death in 1983 and one of the modern founders of literary deconstruction, has been posthumously exposed as a pro-Nazi and anti-Semitic racist propagandist. It is ironic, perhaps fitting, that one who taught that language is potentially an instrument of deceit and manipulation was himself a practitioner and devotee of Hitler's Big Lie principle. See *Re-examining a Scholar*, N.Y. Times, Dec. 6, 1987, § 4, at 7, col. 3. Deconstruction in legal textual analysis had already been under assault. See, e.g., Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203 (1985). Deconstruction may now be a literary fad whose time has quickly passed. Professor Allan Bloom may have delivered the coup de grâce to deconstruction in his important book, *The Closing of the American Mind*.

Comparative literature has now fallen largely into the hands of a group of professors who are influenced by the post-Sartrean generation of Parisian Heideggerians, in particular Derrida, Foucault and Barthes. The school is called Deconstructionism, and it is the last, predictable, stage in the suppression of reason and the denial of the possibility of truth in the name of philosophy. The interpreter's creative activity is more important than the text; there is no text, only interpretation. Thus the one thing most necessary for us, the knowl-

fessor Kelman posits that such emphasis would be "serious misinterpretation"<sup>13</sup> of CLS, although, admittedly, "[d]ebates in the world of literary criticism have undoubtedly had some influence on many people writing CLS works."<sup>14</sup>

Many readers familiar with CLS scholarship will be disappointed with the book for not pursuing one or more of these themes. CLS is not monolithic—Kelman recognizes that various CLS camps are forming around the poles of academic politics, the post-Realist legacy, and deconstructive literary technique. It is odd to omit so much that is potentially important from a purported "guide" to CLS.

Given that the book is certainly not an introduction, that it is not a guide, and that it does not address themes that many would regard as very important to CLS, what does the book purport to do? Fortunately, what Professor Kelman selectively does, he does in a very astute, scholarly way. It may first be helpful to put the book in a developmental context.

In the decade since the original January 1977 outreach letter that began the Conference on Critical Legal Studies, much has happened. The number of law teachers, and to a much lesser extent practitioners, identified with CLS has grown significantly. The CLS Conference has assumed structure, institutional coordination, and a definite, somewhat self-conscious hierarchy of leading professors teaching at elite law schools.

From Harvard Law School, the "Rome" of CLS and now perhaps the "Beirut" of American legal education,<sup>15</sup> Professors Duncan Kennedy, Roberto Unger, and Morton Horowitz—three of the original nine members of the first CLS organizing committee in 1977—have powerfully and charismatically proselytized. Professor Duncan Kennedy spent a year as a visiting professor at New England Law School in 1983. Later, in 1986, that school dismissed four CLS-identified profes-

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edge of what these texts have to tell us, is turned over to the subjective, creative selves of these interpreters, who say that there is both no text and no reality to which the texts refer. . . .

This fad will pass, as it already has in Paris.

A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* 379 (1987).

While language and text can be used to deceive, language also has always been used to teach truth; indeed, it is the incarnation of truth. See, for example, the equation of God, Truth, and the Word in the Gospel of John.

In the beginning was the Word, and the Word was with God, and the Word was God. He was in the beginning with God. All things were made through him, and without him was made nothing that has been made. In him was life, and the life was the light of men.

1 *John* 1:4 (King James).

13. M. KELMAN, *supra* note 1, at 12.

14. *Id.* at 13.

15. See *infra* note 18 and accompanying text.

sors, and its accreditation may now be in jeopardy.<sup>16</sup>

Professor Mark Tushnet, now teaching at Georgetown, is another of the original nine members; he is among the most prolific of constitutional theoreticians.<sup>17</sup> Mention must also be made of Professor David Trubek, also of the original nine organizers. Denouncing Harvard as the "Beruit" of American legal education,<sup>18</sup> he left the school when Harvard President Derek Bok vetoed the faculty's recommendation to grant Trubek tenure in 1987, following Trubek's one year visit from Wisconsin Law School.

CLS is now present at several law schools. Indeed, from the 1977 conference inception, Rutgers-Camden Law School has been a center of CLS scholarship.<sup>19</sup> Professor Randall Rosenblatt of Rutgers-Camden was also one of the original conference organizers. At Stanford Law School, Professor Kelman is among a strong CLS group faculty, including perhaps the first prominent law school Dean from those aligned with CLS, Paul Brest.

The significant expansion in the number of legal academics identified with CLS and CLS representation at several law schools<sup>20</sup> during the past decade has fostered a second generation of CLS scholarship. Professor Kelman, a 1976 graduate of Harvard Law School, is one of the leading "second generation" CLS scholars. He expressly acknowledges his debt to Professor Morton Horowitz. CLS never was monolithic—and while blood remains thicker than water, especially when CLS is under attack, the second decade of CLS scholarship has become even more variegated, and occasionally even fractious. Likewise, as with all other intellectual movements, the second decade has witnessed differing tiers in the quality of CLS scholarship.

In spite of the growth of the CLS movement, *A Guide to Critical Legal Studies* fails to take the insights of CLS work to a broader legal audience. It is unfortunate that Professor Kelman missed an opportunity to reach a large potential audience of curious, nonaligned legal academics

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16. See sources cited *supra* note 10.

17. Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 224 n.5 (1981) ("Most of the 'burgeoning' so far has been in articles by one person": Professor Tushnet.) In addition to his many articles and earlier books, Professor Tushnet is now co-author of a leading constitutional law case book. See L. SIEDMAN, G. STONE, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW (1986); see also M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988).

18. See Kennedy, *supra* note 4, at 36.

19. See Feinman & Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875 (1985) (CLS article underwritten by the Rutgers Council on Instructional Development and the Rutgers Research Council and written by two professors at Rutgers-Camden).

20. Professor Duncan Kennedy estimates that "there might be 120 law teachers in the country who have a strong identification with the Crit network." Kennedy, *supra* note 4, at 17.

that could be positively influenced by CLS. So what does the book do? First, it continues to refine certain established CLS theories from the perspective of Professor Kelman. He comparatively distinguishes his positions from those of other prominent CLS scholars. For example, he posits that Duncan Kennedy's CLS critique is preoccupied with the liberal left, while he, Kelman, focuses his CLS scholarship upon the libertarian right. Rather than translate and demonstrate the broad utility of these points to a wider non-CLS audience, much of the book becomes an esoteric academic parlor game within an exclusive CLS parlor. Second, it synthesizes some, but not all of the major CLS themes and, the closing chapters of the book provide a basis for understanding later CLS work.

## II

Professor Kelman sagely avoids an attempt to define CLS in twenty-five words or less. He recognizes that many within CLS would disagree with his views, and he does not claim to capture the essence of CLS or of the work of even those CLS writers he discusses. Instead, Kelman continues what he accurately sees as a core CLS purpose from its inception: "[A] movement attempting to identify the crucial structural characteristics of mainstream legal thought as examples of something called 'liberalism.'"<sup>21</sup>

Kelman posits that mainstream liberal thought is simultaneously afflicted by fundamental insoluble contradictions, internal repression of those contradictions, and assignment of artificial privileged positions to serve elites and the status quo political, social, and economic regimes. Kelman identifies the privileged, elitist status quo that the liberal legal order serves as "the program of a remarkably right-wing, quasi-libertarian order."<sup>22</sup>

The first three chapters of *A Guide to Critical Legal Studies* are devoted to established and familiar CLS expositions of the purported core defects of liberalism. Kelman uses landmark CLS articles, such as Duncan Kennedy's *Form and Substance in Private Law Adjudication*<sup>23</sup> to demonstrate the fundamental contradictions liberalism poses between rules and standards, and between intentionalism and determinism. Liberalism aspires to the objective neutrality of rules, exemplified by the mythic aphorism that we are a government of laws, and not of people. Kelman maintains the politics of liberalism dictate dishonest manipula-

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21. M. KELMAN, *supra* note 1, at 2.

22. *Id.* at 4.

23. 89 HARV. L. REV. 1685 (1976).

tion through rules, and that this liberal manipulation freezes possibilities for progressive change and exalts the current libertarian regime.

Replaying these core CLS themes are the heart of Chapter One, *Rules and Standards*. In this chapter, Kelman quotes Kennedy's core observations at length, criticizes the familiar bifurcation between the public and private realms, and concludes, unsurprisingly, that "[r]ules are the opiate of the masses."<sup>24</sup> Kelman further maintains that doctrinalism is the death mask vainly used by liberalism to coordinate and justify the pervasive corruption of the prevailing legal and political order. According to Kelman, liberal doctrine is neither comprehensive nor coherent; rather, it is dead, and CLS is performing the autopsy of the liberal regime.

Chapter Two, *The Subjectivity of Value*, reworks these central themes as they are presented in what Kelman acknowledges as perhaps the seminal early CLS book, *Knowledge and Politics*, written by Professor Roberto Unger in 1975. Liberalism's supposed distinctions between facts and values, between reason and desire, collapse. Ironically, the status of a "landmark classic" accorded *Knowledge and Politics* is shared by many outside CLS. Yale Law School Professor Bruce Ackerman, one of the most important liberal constitutional theorists today, and long a target of often very unfair CLS barbs,<sup>25</sup> has very high regard for this book in particular, and for Roberto Unger's work in general.<sup>26</sup>

Kelman distinguishes Unger's more ephemeral work from Kennedy's focus on unmasking liberalism's contradictions.<sup>27</sup> He expresses some discomfort with aspects of both positions<sup>28</sup> and ultimately synthesizes the positive insights of a number of commentators who critique the fundamental subjectivity of values. "Finally, we shall see an implicit Hegelian utopianism or hope for synthesis in Unger's work that is wholly absent in Kennedy's work, which is implicitly far more cautionary and tragic, antiutopian in grand theoretic ambition, though by no means more despairing, resigned, or antiutopian in its implications for daily practice."<sup>29</sup> Kelman's prophetic observation has proved accurate. Roberto Unger, dazzling both his critics and his disciples with his new tril-

24. M. KELMAN, *supra* note 1, at 63.

25. See, e.g., Freeman & Schlegel, *Sex, Power and Silliness: An Essay on Ackerman's Reconstructing American Law*, 6 CARDOZO L. REV. 847 (1985); Frug, Book Review, 84 COLUM. L. REV. 1881 (1984) (contending message of Ackerman's book analogous to "I am the way").

26. B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 103-04 & n.32 (1984) (calling Unger's work "the most significant theoretical text" in communitarian critical legal commentary and stating that liberal activists "have much to learn from a serious dialogue with their critics").

27. *Id.* at 65.

28. *Id.* at 81-82.

29. *Id.* at 66.

ogy, Politics, *a Work in Constructive Social Theory*,<sup>30</sup> has, in fact, continued to develop and synthesize his utopian politics.

Chapter Two is largely a comparative assessment of the relative strengths and weaknesses of the Unger and Kennedy critiques exposing liberalism's contradictions regarding the inherent subjectivity of values. Whether one ascribes to Unger's utopianism or to Kennedy's more despairing view of the fundamental contradictions of liberalism, Kelman wants to leave no doubt that liberalism's futile attempt to construct the inherent subjectivity of value has been irrefutably revealed.<sup>31</sup>

Chapter Three, *Intentionalism and Determinism*, completes Kelman's unmasking of liberalism's core faults. Liberalism privileges "intentionalist discourse, just as it privileges a commitment to the Rule of Law, individualism, and value subjectivity."<sup>32</sup> Kelman uses several examples from criminal law to highlight the liberal manipulation of intentionalism over determinism, when, in fact, the liberal privileging of the former is unwarranted.<sup>33</sup> As a result of these liberal false dichotomies, persons are atomized, community is fractured, and individuals rendered powerless.

The three middle chapters focus on the Law and Economics school, which has been CLS's most established and formidable debating opponent in legal academia for the past decade. Kelman correctly identifies CLS's primary foe; it is these two academic camps that are fighting the war for the heart, soul, and future of American law.<sup>34</sup> The two schools have a virtual lock on the literature published by the major law reviews, and they dictate most terms of legal academic discourse. Interestingly, Kelman's book has already elicited a response from "the other side." Richard Posner, a judge of the United States Court of Appeals for the Seventh Circuit and the high priest of law and economics, has reviewed Kelman's book. Although he believes Kelman "goes way overboard," he admits that "[d]espite its serious flaws, it is probably the best book to have emerged from the CLS movement."<sup>35</sup>

The right-wing libertarian Law and Economics Chicago school, not the few battered liberals Kennedy is so preoccupied with, indeed control much of legal debate. Right-wing libertarianism has ascended in the political world during this decade and throughout the tenure of the Rea-

30. R. UNGER, *Politics, A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987). Unger's book has already generated substantial commentary. See *Symposium: Roberto Unger's Politics, a Work in Constructive Social Theory*, 81 NW. U.L. REV. 589 (1987).

31. M. KELMAN, *supra* note 1, at 84-85.

32. M. KELMAN, *supra* note 1, at 86.

33. *Id.* at 88-99.

34. Reidinger, *Civil War in the Ivy*, 72 A.B.A. J. 64 (1986).

35. Posner, *A Manifesto for Legal Renegades*, Wall St. J., Jan. 27, 1988, at 23, col. 4.

gan administration. Concomitantly, Chicago school gurus have had increasing influence on the federal bench<sup>36</sup> while, as of yet, there is a conspicuous absence of any CLS-identified judges. Thus, the Law and Economics school poses the most important intellectual threat to the CLS political and social vision.

Aided by his substantive academic expertise in tax law, Kelman makes an especially astute observation that the libertarian ideology of the Law and Economics school, rather than the Tribe/Dworkin/Ackerman version of liberalism, controls the prevailing legal order today.<sup>37</sup> The conservative political preferences of libertarian Law and Economics advocate the Lockean liberal sanctification of private property, continue to exalt the false god of Efficiency, and perpetuate the liberal artificial bifurcation of the public and private realms.<sup>38</sup>

Kelman follows the two chapters critiquing the Law and Economics school with a final dismissal of the deification of process, a stubborn thirty year legacy enduring since the Hart and Sacks era of Harvard Law School during the 1950s. The legal process school has perniciously seduced society with the illusion of efficacious federalism. In reality, Kelman's counter-assertion reveals in federalism a spectre of totalitarianism. Is federalism ineluctably drawn into central statism? According to Kelman, indicting both CLS and non-CLS legal theoreticians:

One might guess that the mainstream theorists have unconsciously fixed on a clash of insignificant sovereignties to avoid facing the pain of the irreconcilability of *real* clashes: the exaggerated tribute to localism and diversity can be sustained only when no significant local power exists to be exercised, for real local power tends either to be normatively perilous or factually short-lived.<sup>39</sup>

Although Kelman's insights are frequently incisive, the first two-thirds of the book offers nothing new. While they do not replay the debate between the major representative CLS writers, the six chapters merely synthesize their pertinent leading works without much innovative analysis. Kelman's tax law expertise enhances the critique of the Law and Economics school, but there is little that the reader already ac-

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36. See, e.g., Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter*, 40 U. MIAMI L. REV. 1171, 1176-77 (1986) (Judges Posner and Winter are "strongly attached to the libertarian values of the marketplace," and Easterbrook is "a strong advocate of the use of economics in the law."); Wilson, *Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative, Academic Judges*, 40 U. MIAMI L. REV. 913, 958 (1986) (Easterbrook has supplemented Posner's and Bork's assumptions that "judges should defer to the market and to the text or history of laws."); Middleton, *Shaping a Circuit in the Chicago School Image*, Nat'l L.J., July 20, 1987, at 1.

37. M. KELMAN, *supra* note 1, at 114.

38. *Id.* at 151-53.

39. *Id.* at 212.

quainted with the CLS and the Law and Economics literature could have not previously gleaned from the pertinent articles.

The closing chapters are more interesting and provocative. Chapter Seven, *Visions of History*, begins to put more CLS work into perspective. Concentrating on the uses of intellectual history and of legal history, the liberal manipulations of law, politics, and economics are more fully exposed. For example, the original intent constitutional theory of Attorney General Meese<sup>40</sup> is unmasked as a transparent component of the right-wing libertarian agenda designed to preserve the privileged position of the prevailing elites.

Kelman also posits that liberalism exalts a privileged mythic past as a normative Golden Age, coincidentally consonant with the expansion of laissez-faire corporate power. CLS counters this with a vision of history that is indeterminate and contingent and that cries out for the community to take control of its own destiny. Liberalism also puts the nation on the "historical bandwagon."<sup>41</sup> Ineluctable progress and optimism are the liberal order of the day, seeking to steamroll the contingent, indeterminate, more realistic history and politics of life, and of CLS.

Alternatively, liberalism seeks to transcend history by promulgating the artifice of timeless absolutes and universal rules and principles. CLS resists this revisionist antihistory. In fact, Kelman posits that there are no absolutes for CLS. CLS denies universals. The Framers were elitist, slave-owning or endorsing, propertied white males, hardly representative of the collective, then or now. The liberal advocacy of timeless legal universals is a sham with a transparent political purpose.<sup>42</sup>

Chapter Eight discusses various CLS views on the role of law. In many ways, this chapter is a synopsis of the prior two chapters and sets the stage for the final chapter, *Toward a Cognitive Theory of Legitimation*. Epistemology and history both remain very important to CLS. Professor Laurence Tribe, the premier conventional liberal academic of his generation,<sup>43</sup> has dismissed the legitimacy debate as a waste of time.<sup>44</sup> CLS, on the other hand, considers the question of legitimacy to be an important one. In the final chapter, Kelman shows how CLS has ex-

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40. Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987).

41. See M. KELMAN, *supra* note 1, at 222-28.

42. See *id.* at 229.

43. For a discussion of Professor Tribe's illustrious career as an academic and a Supreme Court advocate, see Gregory, Book Review, 60 TUL. L. REV. 437 (1985).

44. L. TRIBE, CONSTITUTIONAL CHOICES 3 (1985). ("Saying anything at all about how constitutional choices in general might be validated as 'legitimate' even if controversial seems nearly pointless these days. . . . When it comes to legitimacy, all has been said already, and what has been said is all so deeply riddled with problems that it seems hardly worth restating, much less refuting or refining.").

posed the legitimacy strategies of mainstream thought.<sup>45</sup> He outlines and critiques various devices liberalism has used to legitimate itself: reification, exaltation of the atomized individual and denial of the contradictions within liberal law.

For example, Kelman focuses on the analytic conventions of Wesley Hohfeld to highlight liberalism's "synthetic individualist" tradition.<sup>46</sup> Tort and contract law recognize the duty to refrain from causing harm, but not the at least equally compelling affirmative duties to help others and to render aid.<sup>47</sup> Why are liberal rights incoherent, Kelman rhetorically asks. Ultimately, the CLS unmasking of these deep anomalies will reveal an insoluble contradiction in liberal legal theory that gives children the right not to be molested, but not public rights to adequate food, clothing and shelter in the private law liberal regime.<sup>48</sup>

Kelman maintains that by denying its own deep, inherent contradictions, liberalism has anesthetized legal consciousness.<sup>49</sup> The transformative potential of law is thus vitiated by the status quo universalism and misguided utopianism of liberalism.<sup>50</sup> CLS seeks to restore both reality and critical ability by revealing that the pathology of liberalism renders everyone "shallow, status-oriented goods junkies."<sup>51</sup> Ultimately, Kelman believes CLS will unpackage the liberal constellation of pernicious and supposedly unproblematic myth systems. Kelman concludes that traditional mainstream legalist practice "makes us passive by making us confused. The critics try to retrace, hoping to see where we first got lost."<sup>52</sup>

These final three chapters are by far the most powerful. They simultaneously offer the only semblance of a "guide" to those previously unfamiliar with CLS work, and more importantly, they coordinate important themes for future CLS work. In particular, these chapters provide an excellent springboard for a better understanding of Roberto Unger's most recent work.<sup>53</sup> Unfortunately, despite its unflinching thoughtfulness and considerable academic worth, *A Guide to Critical Legal Studies* is much less than what it should have been. The book is a sophisticated spin on CLS theory among, by, and for colleagues primarily within CLS.

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45. M. KELMAN, *supra* note 1, at 269.

46. *Id.* at 279-84.

47. *Id.* at 279.

48. *See id.* at 280-82.

49. *Id.* at 286.

50. *Id.* at 290.

51. *Id.* at 292.

52. *Id.* at 295.

53. *See supra* note 30 and accompanying text.

Of course, there is nothing objectionable with this scope, and much that is valuable. Undeniably, the book has synthetic merit.

Nonetheless, after a decade of growing CLS literature, and five years after *The Politics of Law*, the time is ripe for a CLS book that positively reaches, and is readily accessible to, a broader legal audience. Even CLS colleagues, comfortable with heavy polysyllabic jargon, occasionally may be thrown by the frequent paragraph-length sentences.

Kelman's writing style, always scholarly, need not be so convoluted. In fact, it may confirm the simplistic dismissals of CLS by its many opponents on grounds of dense, convoluted, inaccessible stylistics alone. Examples abound. Important points can be sabotaged by the author's style as the eyes glaze over.

The claim, then, that "legalism" blocks transformative, counter hegemonic thought can only mean that the *particular* substantive reifying practices associated with our legal culture have a particular capacity to block thought of specific transformative programs and/or that the usual legal technique or procedure of reification itself solidifies politically conservative practice.<sup>54</sup>

As Duncan Kennedy puts it so aptly, "Like wow, man!"<sup>55</sup> Most non-CLS readers, if they make it to page 270, will understandably be much less charitable in their assessment of Kelman's convoluted stylistics.

Although Professor Kelman's book is somewhat disappointing, his work has considerable merit. For what Kelman does, he does very well. He elucidates, rather than replays, several important aspects of CLS internal debates. The chapters devoted to comparative assessments of Law and Economics, and the closing chapters' treatment of history and ideology are especially thoughtful.

*A Guide to Critical Legal Studies*, while less than what one would have expected from the title, is certainly more than nothing. For any serious lawyer or academic interested in staying abreast of always controversial and occasionally innovative legal theory, and regardless of the reader's personal politics, this new book can provide considerable food for thought—and perhaps even some nourishment.

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54. M. KELMAN, *supra* note 1, at 270.

55. Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1354 (1982) (explaining "loopification" of one's consciousness).