Review Essays

An Exchange on Critical Legal Studies between Robert W. Gordon and William Nelson

Letter to William Nelson from Robert W Gordon

I have been reading the book collecting the bibliographic essays on legal historiography that you and John Reid have been contributing since 1962 to the *Annual Survey of American Law*.[1] Although I'm writing to you because of an outraged response to one of the chapters in your book,2 I must allow that it is nice to see all these pieces in one place, because for years they have provided one of the most useful (if inevitably idiosyncratic) reference guides to current work in our field ("I'm glad," I've often said to myself, "that *somebody* is reading all this stuff").

In its early years the series could also be relied on for an acidic stream of comments on the abuses of legal history by lawyers and the courts; although more recently, as the authorship shifted from Reid to you, I thought I saw a definite alteration in this line. Reid's early essays (for 1962-66) are savagely critical of the two common lawyers' modes of historiography: 1) "originalism," in which the lawyer seeks to establish the "original intent" of the framers of a text as defining its appropriate current meaning, and in so doing researches only the formal sources surrounding the text and usually ends up reading it anachronistically, as if it had been uttered in his own time; and 2) "Whig history," in which the lawyer draws a trend line between old law and modern law and sees the past as an embryonic form of the present, or the present as a fulfillment of the past.' Reid is especially irritated by the attempts of the Warren Court and its supporters to adduce historical authority for the liberal civil rights decisions of the 1960s (51, 53, 70, 80-81, 85). It is not completely clear to me whether Reid believes that lawyers have invented bad history, where they could have used good history instead, to justify current decisions, or more sweepingly that good history can

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serve as current authority because faithful reconstruction will invariably yield an unusable product- will yield a view of the original text's meanings as multiple, complex, ambiguous, and dependent upon an alien and vanished context. According to this latter view the only fair instrumental use of history would be negative and critical: to explode any pretended historical justifications for current practices by showing how much times had changed and historical meanings had varied, to demonstrate in short the *irrelevance* of the past.

Your own early essays (1966, 1967) continue this vein of historicist critique, pointing out that modern lawyers often behave as if past legal texts were intended to address the same problems as their current forms, whereas in fact their framers were often asking different questions entirely (e.g., 121-24: if the First Amendment were only intended to restrict federal power to regulate speech, historical exegesis cannot inform us how far its framers favored libertarian or restrictionist views of free speech). By 1973-74, however, your own historicism has started to trouble you. Your worry seems to be that a "realist" commitment to studying law in social context entails the view that law is determined by that context, that its rules "merely reflect current policy preferences of politically dominant groups" (185), as opposed to the "formalist" or "idealist" view that law is the product of a profession rationally working out its principles through cases. If historians promote this sort of "realism," they will encourage judges to believe that "the law takes its content solely from the political and economic goals of society" (leading them slavishly to follow the dominant will as they did in the Japanese internment cases), whereas what judges really should do is to "incorporat[e] into our jurisprudence autonomous moral values that can serve as restraints upon legal decision-making" (194). How can historians help locate these values? Not by discovering them in the "original understandings" of legal texts- you continue to think that is a naive and fruitless venture. But: "Historians may . . . be able to help by identifying those legal traditions which are an essential part of our legal culture. For if those traditions can be identified, judges and other decisionmakers . . . will feel constrained to follow them in order to avoid initiating revolutionary changes in that culture" (197). One such tradition that you suggest is likely to be revealed by historical study is that of the "hegemony of the individual" (200) over nature, government, and the community.

Despite many problems[3] I might want to raise with your way of formulating it, I sympathize in principle with your program. What you seem to be proposing is a sort of method not so much for history as for historical jurisprudence: What uses should lawyers and judges (and

legislators and administrators too- for some reason we keep forgetting them) make of history? Just appreciating its historicity, its inability to speak directly and unambiguously to present problems, while very important, isn't enough. Policymakers live in history whether they want to or not; and they can't help appealing to history for inspiration or justification in a society such as ours in which certain mythic moments (The Migrations, The Founding) and teleologies (The Democratic Mission) have been endowed with significant cultural authority. Decision-makers are constantly remaking the past, synthesizing traditions that provide normative standpoints, sources of public values, for justifying or criticizing current policies. As the Progressive paradigm that so long dominated official-legal discourse has begun to fade out, scholars of various views have begun to propose alternative interpretations of our historical "traditions." Among the most interesting of these are: 1) The Chicago School's resurrection of a (considerably mythified) pre-Progressive common-law laissez-faire Era as a Golden Age of Liberty and Efficiency, from whence all regulatory activity since represents an unfortunate Fall;[4] 2) Bruce Ackerman's attempt to mediate between the poles of a pure universalism (our constitutional values have always remained the same) on the one hand and pure contingency (they are always in flux, so history teaches nothing) on the other, through the notion that the U.S. has had three different Constitutions, each produced by a separate crisis of revolutionary upheaval (the Founding; Civil War and Reconstruction; the New Deal);[5] 3) arid the efforts of Frank Michelman, Richard Parker, Cass Sunstein, and Mark Tushnet to build an alternative jurisprudence upon America's "republican" traditions, which stress the values of civic commitment, a rough equality of property, and participatory politics in counterpoint to some "liberal" conceptions of law as primarily an instrument for the promotion of individual self-interest.

A fourth novel source of perspectives upon the American legal past, developed in the service of current political and jurisprudential aims, is the historical work of scholars affiliated with the critical legal studies movement. And it's this work that I'm primarily concerned to write you about, because it's this work (nominally, anyway) that suddenly becomes central to your book (chapter 16: Report for 1981-84) as the object of a fierce, forty-two page polemic of denunciation, comparing "traditional" and "critical" legal historiography to the severe discredit of the latter brand. When I saw myself appointed as an "eloquent spokesman" of critical legal studies (CLS) on your very first page, I was naturally eager to see what you, by common consent one of our pre-eminent legal historians, had to say about all of "us" (if I may continue

to speak for such a ragtag army of misfits as CLSers are). Since I finished the chapter, amusement and irritation, both intense, have been competing for dominance of my reaction to it. My first (and possibly wisest) instinct was not to respond at all, but then I thought, "My God, suppose people read this and accept it as a serious account of what CLS is all about? What if they start quoting it as authority on the subject"? So I thought I'd better write something.

The core thesis of your piece is that "critical" legal historians work from values, premises, and methods that are to some extent fundamentally incompatible with those of "traditional" legal historians; so that a historian must make a choice between the two modes of traditional and critical historiography, and he or she should choose the traditional mode, because it's better. In the context of the rest of your book, especially the 1973-74 Report where you announce your program for recovering the essential traditions, notably those of "individualism," embedded in our law, it's clear that you identify traditional history with your own program, and critical history with an exaggerated form of the "realism" that denies any autonomous content to law.

Your conclusion is certainly disturbing, but less disturbing than the methods used to arrive at it.

To begin with a rather basic complaint, there's an elementary and entirely "traditional" convention governing critical reviews such as yours that when you attack a body of work, you are supposed to pick on examples that are fairly representative of it. In the piece of mine you cite on "Critical Legal Histories"[6] I pointed out that there were *many* modes of "critical" historiography, but identified as what I thought the most distinctive and novel of such modes the history-of-doctrinal-contradictions-and-their-mediation school founded by Duncan Kennedy's seminal "Structure of Blackstone's Commentaries."[7] You seemed to concur when you listed some of the products of this school in your footnote 6 (262). One might therefore have expected your article to take on Kennedy's article or others in his school, some of the other "critical" work I cited, or perhaps some of the entries in the *Yale Law Journal* bibliography of CLS.[8] Yet in fact, in your entire article you discuss neither these works *nor any others by a CLS affiliated person,* except Mark Tushnet's book on slavery (266),[9] which you imply is distorted history without even briefly indicating how, and Jim Kainen's piece on vested rights,[10] which you mention in passing (290 n. 154) as an example of "traditional" legal history. Instead your leading examples of CLS work tum out to be books by Jerry Auerbach,[11] William Chase,[12] and Judith Baer,[13] none of whom has ever identified himself or herself with CLS and whose intellectual and political commitments are related

only vaguely to those of most CLS people in that they are left-of-center (Auerbach and Baer) or adopt negative views (such as Chase's hostility to modern administrative law theory and the Harvard Law School) toward some twentieth-century legal institutions [14] (a criterion that would make Posner and Epstin into CLSers!). I think you picked these books, even though they don't have any connection to CLS, because some things about them summoned up in your mind images of what you *think* CLS is all about, and that you don't like.

So let's go on to those images, and the contrasting good images of "traditional" (Trad.) historiography. Your descriptions of *both* modes strike me as highly confusing, especially that of the traditional mode, which seems contradictory as well. Anyway, here are some of the contrasts, as you present them:

1. *Trad. history is neutral, objective, and factual; CLS history is partisan, political, and distorted because of its commitment to Marxism.* "I wonder whether the [high school] students who read [Mark Tushnet's book on slavery] appreciate that they are assimilating not the objective facts . . . but a Marxist interpretation of those facts" (266). I would expect better of you, especially since elsewhere in the book you fervently proclaim a set of your own political commitments out of which you think history *should* be written (commitments to American constitutionalism, individualism, etc.). In your concluding chapter on "Standards of Criticism," in fact, you argue that hostile reviewers of other historians' work ought to be sensitive to the fact that they may hate the work because of fundamental disagreements with its political or jurisprudential presuppositions; arid you imply, very sensibly, that critics ought to understand and evaluate such work on its own terms, or try to find criteria of historical worth that bridge the political gulf. So what is the point of this dig of yours at Tushnet? You can't mean, "History should be a recitation of uninterpreted brute data," since that would be idiotic; you must simply mean, "Marxists (or at least "self-proclaimed" ones- 266, n.30) can't write reliable history; only liberals can." This is positively libellous. You must be aware that you're taking on here not just (or even primarily) CLS historians (most of whom are extremely critical of orthodox Marxit historiography- more on this in a moment) but a long arid extremely distinguished tradition of historical work: that of Marx himself (on "The Civil War in France"), R. H. Tawney, Christopher Hill, Albert Soboul, M. I. Finley, Eric Hobsbawm, E. P. Thompson, David Montgomery, and Gareth Stedman Jones, not to mention Tushnet's own teacher, Eugene Genovese, a Gramscian Marxist commonly acknowledged by bourgeois as well as radical scholars to be among the great historians of American slavery. If you really

want to take on Marxist historiography, I think you have at least to specify what you think it is, there being so many varieties of Marxism around in the modem world. One might have hoped that the time had long since passed in American letters when a scholar could use the word *Marxist* in the confident expectation that the mere adjective was enough to dismiss a piece of work as an absurd distortion.

2. *Trad. historians are cautious and restrained in tone; CLS historians are "strident."* The authority cited on stridency is Schlegel, but no examples are quoted in the text,[15] and I rather doubt that you could find many. The Kennedy school of doctrinal history is on the whole rather abstract and dry in tone. There is a tradition of radical -especially labor-historiography represented by some members of CLS (Konefsky and Klare come especially to mind) deriving from Engels, Tawney, and Thompson, which is suffused with sympathy for the poor and laboring classes and admiration of their heroic qualities, and with indignation at propertied or governing classes who exploit their misery or are indifferent to it. I would call this "moral passion" rather than stridency, and find it hard to think of as a *defining* characteristic of the genre.

3. The following seems to be your more substantial complaint: *CLS historians have an "instrumental" view of law, meaning that they think that law and legal change are best explained as deliberately manufactured for their own ends by social, economic, or political interests: doctrine is only "rationalization" or "ideological superstructure." Trad. historians believe that law has an autonomous content, that is, one not reducible to the pressure of interests, but at least to some extent to be appreciated as an integral system standing above or apart from the immediate pressures of politics and social struggle.*

If this is what you mean, it seems to me to rest on a most peculiar and partial view of what traditional legal history is all about, and a staggering misconception of the aims of CLS historians. Let me try to sort this out:

(a) There is of course one tradition in legal historiography- we could call it classical legal history- that treats solely of the evolution of legal doctrine as an almost wholly self-contained process, unconnected to social context. This still attracts some very able historians, especially in England; but I assume this is *not* the tradition you are concerned to defend, because you cite with approval so many studies connecting legal to political, social, and economic change and have written such studies yourself.

(b) Among historians of law who *are* interested in its social context, surely the dominant approach has for some decades now been a thoroughly instrumentalist one. Willard Hurst explains nineteenth-century

law primarily as responsive to the demands of entrepreneurs pressuring for a legal framework facilitating rapid growth. Lawrence Friedman's work takes as its premise that the legal system is not autonomous but serves the dominant interest groups of society. Instrumentalism cuts across political affiliations. Orthodox Marxists see law as the repressive weapon of the ruling class. Populists and Progressives see it alternatively as the product of political initiatives by plutocratic elites or of reform movements of the masses; liberal pluralists as the vector sum of interest group pressures. Right-wing legal economists see common law as responsive to (wealth or utility-maximizing) interests in efficient cost-reduction, legislation to politically dominant interest groups.

(c) By contrast, most of the recent CLS history has been concerned to *reject* the instrumentalist and functionalist premises of this dominant tradition. Kennedy has said in as many ways as he can think of saying it that law has to be understood as embedded in relatively autonomous structures; and. that is why he and his school have for the most part felt able to confine themselves to writing doctrinal history (and been severely criticized by instrumentalist-Marxist historians for their "idealism" in doing so). Your paraphrase of the quotation from my article (you write [262): "Since law is indeterminate and thus incapable of autonomous development, critical legal studies historians striving to understand the law focus on its political roots") has things exactly backward: in fact it's *because* many CLS historians think legal principles are "indeterminate" that they think law *can't* adequately be explained as the product of interest-group or ruling-class pressures, or the "functional needs" of capitalism, economic growth, etc. For example, a fault-based standard ofliability is so mushy and manipulable that in principle it could serve anyone's interest or any set of social needs. And that is why many CLS historians have instead tried to understand the fault principle as an expression of a complex legal consciousness rather than as an instrument of economic growth or of the railroad bosses.

I must say I feel a real sense of grievance here, having devoted by far the largest part of the article you cite to trying to show how critics had undermined instrumentalist accounts of law and had insisted upon respecting its autonomy as an object of study. Kennedy's work on "classical legal thought,"[16] or for that matter my own on late-nineteenth-century lawyers,[11] have made it as clear as we possibly can that we reject the standard, *traditional* Progressive interpretation of elite jurists of that time as nothing more than tools of large corporate interests. At 287 you attribute to CLS writers the comic-book legal-realist view that judicial decisions are grounded "only in the self-interest or political values of judges." This again. is absurd (save in the sense in which it's

self-evidently true that the "political values" of judges will inform their practices) to anyone who knows CLS work. Kennedy's writing in particular has been devoted to elaborating the structures of the legal consciousness underlying decisional law; he shows, for example, how *Lochner v. New York* is not just an outbreak of piggishness among a few reactionary judges, but fits into the logic of the "classical" categorical schemes and modes of reasoning.[18] CLS work emphasizes- most of its knowledgeable critics claim overemphasizes- the imbrication of everyday social practices in such belief-systems. This is precisely the *opposite* of the view that doctrinal systems are merely rationalizations or masks of naked interests;[19] it is the view that the formation of "interests" themselves is saturated in some of the basic categories and assumptions of law.

What is fascinating to me about this basic misapprehension of yours with respect to CLS work is that you are hardly alone in it, but share it with many other critics of CLS.[20] The reasoning process seems to be something like this: CLS people identify themselves as on the Left; Left means Marxism; Marxism means a vulgar-instrumentalist view of law. Quite aside from the fact that Western Marxists have for decades been moving away from instrumentalism –so far away, in fact, that in current academic debate you can often identify the Marxist in the room as the person insisting upon the importance of ideology, culture, political language, or autonomous concerns of bureaucracies as independent variables- most CLS writing routinely rejects vulgar-instrumentalist explanations, whether they take orthodox Marxist, liberal pluralist, or Chicago-economistic forms. Why is it so hard for outside readers to see that? The usual answer is, "The Jargon. That awful Jargon." (See your p. 269, where to your credit you call this a "trivial objection.") This I think simply a *canard:* I challenge anyone to find more than the normal academic quota of jargon in my work or that of Kennedy, Horwitz, Klare, Konefsky, Feinman, Mensch, Tony Chase, Stone, Singer, or Tushnet, for example. Every year I see many quite ordinary second- and third-year law students, not nearly as learned or sophisticated as you, reading CLS stuff, writing papers using it, and having no great difficulty understanding it and none whatever telling it apart from vulgar-Marxist or Populist "law-is-a-ruling-class conspiracy" history. The problem is clearly not the intrinsic difficulty of the material, but what one might call some readers' educated resistance to it.

4. *CLS history is repetitive, narrow, and unimaginative because of its "commi(ment to polemical dissection of the indeterminacy and contradictions of liberal legalism. . . ." This was a new theme when Roberto Unger wrote* Knowledge and Politics *(1975). "But now the dissection*

has been completed, and application of Unger's insight to the American legal past requires little imagination or insight." Traditional historians do not simply dissect: they aspire to "identify the dominant principles of our law or to analyze how and why they changed" (274).

This assertion is worth some discussion because it is the only one in your essay that touches: although still without giving *any* authentic examples of the work it criticizes- on ideas CLS people have actually held. And you are quite right to perceive some of the CLS histories[21] as explorations of the "antinomies" of liberalism discussed by Unger (although quite wrong to suppose they merely reiterate Unger's insights, since it is one thing to expound a contradiction abstractly, and another entirely to write the history of its appearances in the nineteenth-century law of, for example, mortgages or running covenants). The impression you convey here is of writers who, having identified two aims in tension with each other that a body of law was trying to serve at once (e.g. nineteenth-century family law was concerned to promote both family cohesion and the equality/individuality of all family members), [22] immediately start shrieking that this tension shows how rotten and vacuous liberal legalism must be. You say that such tensions inhere in all social life or in "human nature" (274); exposing them is not news.

Here as so often in your essay one must pause to wonder whether you can possibly have read any of the work you are attacking. The CLS historians would probably agree that in one form or another such "fundamental contradictions" as that between the self and others (we need others to realize common projects and a social identity, but fear that they will enslave or engulf us) may be permanent aspects of the social life of human beings. The subject of these CLS histories is a successive set of modern Western claims to have *mediated* these contradictions- to have made them go away, or at least to have made them less painful and terrifying- through law. These mediating devices are inherently unstable: over time they tend to collapse and to be replaced with new ones. One way of writing the story of the "dominant principles of our law [and] how or why they have changed" is therefore as the rise and fall of successive mediating devices.

Let me do what you should have done, and mention some examples. 1) Elizabeth Mensch has applied CLS methods to the study of property disputes in colonial New York.[23] She reveals eighteenth-century conceptions of property rights to be rooted in contradictory models of voluntarism (e.g., use and occupancy; local community distribution) and hierarchy (e.g., deriving from Crown right; security of accumulation). She shows how these conflicts were played out in lawsuits between claimants to property; how the legal system could not embrace either

model fully without jeopardizing the legitimacy of the entire structure of property ownership in the colony; how lawyers struggled to find mediating positions such as *selective* assertion of (hierarchical) Crown right and of (voluntarist) Crown policy that would resolve the tension and how these mediators eventually broke down in the Revolution. 2) At about the same time, Joseph Singer published an article about how lawyers in the nineteenth and early twentieth centuries tried to develop a workable scheme for separating the boundaries of one individual's rights from another's on a different, more abstract plane, that of analytical jurisprudence.[24] He shows how legal thinkers hoped to mediate social conflict through rights by establishing that rights generally entailed correlative duties in others to respect the rights. This project required the jurists to push aside the troublesome area of *damnum absque injuria*- activities causing real but legally unrecognized injury-to marginal status. Singer patiently traces through dozens of treatises the growing recognition that *damnum absque injuria* actually encompassed vast and important areas of legally regulated social life (competition, uncompensated spillovers, most family relations, much labor capital conflict, etc.); and that the legal system, so far from generally establishing duties to respect property rights, frequently legislated regimes of privileges in which people were encouraged to demolish one another's property. Holmes developed, and Hohfeld ultimately formalized this insight, which at least at the level of theory put an end to the long supposition that to have a property right necessarily meant to have something whose value the legal system could and would protect from exercises of social and economic power. 3) Gregory Alexander recently wrote a long article[25] in the CLS mode on how nineteenth-century trust lawyers dealt with the contradiction inherent in "dead hand" transfers of property: that the law cannot protect the freedom of donors to tie up uses without restricting the freedom of donees, and vice versa. It was important for lawyers to avoid any sense of contradiction because a large part of the meaning of freedom for them consisted in the emancipation of free disposition of property from feudal restraints on alienation. Alexander shows how contradiction was mediated through such devices as "repugnancy" (the concept that some restrictions were incompatible with the "nature" of the estate granted) and the separation between law and equity. With the growing effort to rationalize trust law on scientific principles, however, the devices were discredited, and the contradiction starkly revealed in debates over the legality of late-nineteenth-century spendthrift trusts. Finally, twentieth-century lawyers invented new mediating devices (balancing tests, economic efficiency, and other social welfare criteria) that do not promise to be much more successful.

If one actually reads these articles and many others like them, your caricature becomes simply incredible.. These are not mindless polemics against legalism from a position of rigid ideological dogmatism, but rather careful, thorough, almost lovingly detailed, histories of the development of legal ideas and practices. All of them are based on original research. If their arguments are as stale and familiar as your assert, I wish you'd say where you have heard them before. You may not have learned anything new from the CLS historians, but others have. It is particularly reassuring to find so many of the CLS insights into legal history being confirmed and expanded by non-CLS-affi.liated historians.[26] Nobody in CLS has ever claimed that theirs is the only way to write history, or that they are producing more than a tiny fraction of the good history that's coming out. But to take the opposite position, that there's nothing interesting to be learned from CLS work, as you have, seems ungenerous in the extreme, especially considering that you don't even *try* to document it.

4. *Trad. historians stand tall for America, law, and capitalism; CLS historians have a bad attitude toward all these things.* Ultimately, this seems to be what your review comes down to. It's not really a critique of CLS at all (which would explain why you don't deal with any CLS work) but of a bunch of negative attitudes that CLS only vaguely symbolizes for you and that are actually exemplified in a heterogeneous group of writers whose only common fault is that they don't reaffirm basic American values, in particular the value of complacency about our legal and economic institutions and their historical role. This concern seems to be much higher on your agenda than the other concerns for "objective" historiography or "autonomous" law. It turns out in the end that you actually have no objection to overtly partisan history as long as it registers politically correct attitudes, or to instrumentalist explanations as long as they conclude that in the long run law has served *benign* social purposes and interests. The choice between Critics (meaning here simply scholars with bad attitudes) and the Trads. is between "whether one wants to preserve the existing American political order designed to enhance individual autonomy and freedom or to participate in imposing some new collective vision of the good on the polity" (302).[27]

Both your complaints about what you casually label CLS perspectives[28] and your notions about what the correct attitudes are for historians are so incredibly miscellaneous that it's hard to get a grip on them. The heart of the matter seems to be at 287, which tells us flat out that we just can't write any kind of constitutional history, good or bad, unless we're committed to the liberal premises 1) that there can be such a

thing as a body of fixed, objective, neutral, determinate legal principles, beyond the reach of political forces, protecting individual rights, *and* 2) that historical study can help to identify what at least some if not all (296) of these principles are, presumably because they have been realized in the historical practices of our institutions and will thus reveal themselves to objective researchers of those practices. Some comments on this set of premises:

(a) I must say that I would be reluctant to equip a young legal historian just setting out on his or her travels with this methodological and ideological baggage, which seems bound to land him or her in unnecessary mischief. Your prescription, unless I misread it, is one for a very "traditional" form of history indeed: a Whig legal history in which the fundamental principles of Anglo-Saxon liberty realize themselves progressively- albeit with regrettable lapses, distortions,and deviations- through time, peaking more or less optimally in our own time. To modern readers- such as the Reid and Nelson who wrote most of the essays in this volume- the besetting weakness of such history is its tendency to anachronism, its insensitivity to the contingency of legal and political language, to the realization that law, politics, equality, property, rights, were embedded in, for example, Marshall's time in a network of interpretive conventions quite different from our own, so that finding functional equivalents in our own time to Marshall's constitutional principles is necessarily a highly problematic and delicate task and one hardly likely to be performable "objectively," beyond the possibility of reasonable dispute: these are, in W. B. Gallie's phrase, "essentially contested concepts." On the whole I think CLS writers have made pretty good historians of legal concepts precisely because they work out of a theory of the social and cultural contingency of legal practices (that apparently identical practices, transposed to different social or ideological contexts, can acquire radically divergent meanings), which leads them to a proper respect for the historicity, the "local meaning," of their materials. I don't mean that there haven't been good histories by Whiggish-minded historians and bad histories by CLS-types: talent or the lack of it can always transcend theory. But I would think it rather more helpful to advise someone just starting to look into past legal practices to expect to find discourses somewhat *alien* to our own, and to see as a first job trying to understand them on their own terms, than to urge that person to search for the genetic ancestors to our legal principles as we understand them: as an initial matter, at least, he or she should be looking for differences, not identities. (This was Maitland's advice, and it still sounds good.)

(b) Your prescription seems also, completely arbitrarily, to rule out

certain kinds of conclusions that even a committed liberal might want to advance: the conclusion, for example, that American practices have *not* lived up to our fundamental, recoverable-through-history principles, and would require radical reformation to do so (the kind of conclusion that radical antislavery agitators extracted from the Declaration, in the teeth of the Constitutional entrenchment of slavery). Poor Judith Baer, whose *Equality under the Constitution* would have seemed exactly to fit your specifications for liberal-principles-extracting historiography, is denied "traditional" status and tossed onto the garbage heap with the rest of us CLS bums (264) because she thinks America *hasn't* kept faith with its egalitarian promises. (Also possibly because you don't care for her *Grundnorm,* equality, as much as you do for individual autonomy?) Many historians have lamented the sinking of America's communitarian republican ideology, with its stress on participatory politics, public virtue, and an equal distribution of property as preconditions to freedom-understood-as-self-realization-through-membership-in-a-polis, into the more atomistic ideology of liberalism. You used to be one of the historians yourself *(Americanization of the Common Law),* but now darkly perceive their work as "part of the critical legal studies effort to undermine the individualistic tenor of the American legal order."[29] Have we gone completely back to the 1950s, when anyone who tried to state the claims for democracy, community, and equality risked being labelled a subversive? Radical legalism, as well as radical anti-legalism, is an apple-pie *American* tradition. The individualism that now seems to lie at the center of your commitments was once itself a radical creed: until quite late in the nineteenth century, many highly respectable lawyers and judges reared in the Jacksonian anti-charter ideology continued to believe that the existence of large business corporations was absolutely incompatible with individual autonomy and freedom. I think I would have more respect for your ringing affirmation of individualist values if you were also to adopt their radical, history-approved, corollaries. The radicalism of our legal past, it seems, is acceptable only if it remains safely *in* the past.

(c) Your methodological instructions finally seem to me to rest on a confusion between the self-understandings of the members of a legal community (their motives, their conceptions of their work, etc.) and how an outside observer (a historian, a sociologist) might regard them. You repeatedly answer what you believe to be CLS charges of a legal conspiracy (lawyers and judges deliberately manipulating legal form to the disadvantage of poor, excluded, disfavored, or deviant groups) by pointing to studies affirming the integrity and internal consistency of bodies oflaw and the high-minded intentions of those who administered

that law to do so fairly, apolitically, neutrally. As I said under #3, above, CLS people have no quarrel with that (although they also think it useful occasionally to remind readers of the myriad ways in which the powerful do deploy law instrumentally against the powerless): they have written a lot of that kind of rehabilitative history themselves, especially on the late-nineteenth-century judges who have been saddled (not by CLS but by traditional Progressive historians) with a bum rap as lackeys of the robber barons. That's what a political ideology is all about: people who hold it sincerely believe that it is natural and neutral and based on science or common-sense and best for everybody in the society. But their belief doesn't make it so, or deprive historians of occasions for critical judgment.

Take the classical legal regulation of labor relations. By post-NLRA liberal standards, of course, that legal regime looks piggy beyond belief (except to very right-wing libertarian individualists such as Richard Epstein). But once you enter with provisional sympathy into that judicial mind-set (as a CLS historian would),[30] you can understand what makes it tick (i) a principle of mutuality: employers are free to hire or not to hire, employees to work at employers' terms or not to work; employees are free to join unions, employers to make nonmembership a condition of employment; neither employers nor employees may conspire to combine with others to. restrain trade; neither may cause or threaten harm to the property of others; (ii) a principle of correlative rights-and-duties: a property right gives rise to correlative duties in others. to respect the right; (iii) a principle of interpretation: the Constitution is designed to protect property and liberty as those terms have been historically understood at common law (a very Nelsonian proposition). The whole scheme hangs together, and it's wonderfully general, neutral, and apolitical in its formulation. To be sure, in practice it always seemed to result in any potentially effective labor action's being immediately subjected to an injunction, but that was just the break of the cards. You don't have to suppose the judges were consciously biased to explain that result; it flows, in some sense, directly from the premises. But you surely can "deconstruct" the premises, as Holmes[31] and Walter Wheeler Cook[32] did, for example, to show that their apparent neutrality is illusory, and that they can't be applied to concrete cases without "inarticulate" judgments of policy regarding such issues as whether an employer's inchoate property in expected future profits is to be treated as a Hohfeldian privilege defeasible by competition or a labor boycott, or as like a contract right, infringeable if damages are paid, or (the way the U.S. Supreme Court treated it) as. a property right protectible by injunction; or whether labor's rights to organize shouldn't also be protectible by

injunction; or whether violence at the plant site should be considered criminally unlawful or a privileged defense of (either management's or labor's) property.

This kind of demonstration, the stock-in-trade of both legal realism and CLS, seems to me very valuable. Surely one of the things that historians ought to do is to try to discover the sunken codes of shared inarticulate assumptions that underlie apparently neutral decision systems. Wouldn't that be a lot more interesting project than simply celebrating the system's neutrality and the noble motives of the judges? The only objection seriously put forward is that such deconstructive work, finding the subtext, will "undermine respect for the rule of law," because if people don't believe that general propositions *can* always decide concrete cases, individual liberties will be finished, washed up. I think this is nuts. A commitment to general, neutral legal principles has never of itself precluded political tyranny (has been in fact an instrument of political tyrannies), and can, notoriously, be an extremely serviceable handmaiden to the tyranny of wealth. On the other hand, a commitment to the legal-realist belief in the historical contingency and contextual variability of legal rules does not mean that one doesn't support legal rules and institutions attempting to restrain repressive coercion: a strong commitment, especially on the part of influential elites, to certain ways of interpreting such rules over others that are plausibly advanced, can do a lot to avoid or mitigate political persecution. All the legal-realist or CLS perspective says is that you need the cultural-social commitment to the rule-interpretation and the willingness to engage in politics . to back it up, in order to give the rule meaningful content; without that back-up, the legal rule is an empty shell, "reified rights-rhetoric," as the jargon expresses it.

The reason your essay is upsetting, and perhaps worth writing against at this length, is that it shows an intelligent and usually conscientious scholar falling victim to an unhappily common syndrome of reactions to intellectual work originating on the Left: a combination of paranoia and carelessness. The paranoia shows up in the remarkable attribution of every critical sentiment of post-1960s historical scholarship relating to law to this tiny band of CLS scholars, and the still more remarkable conclusion, in the Age of Reagan, that this band- most of whose members are in fact struggling to find and hold on to teaching jobs in environments growing ever more hostile to them -poses a potent current threat to civil liberties. The carelessness is exhibited in your confidence-which is unfortunately probably well founded- that in reviewing work from the Left you don't have to read it, quote it, or engage with any of its arguments in order to trash it. You can just assume you

know what it's about, and assume most readers will share your disdain for it. One sees, these days, signs of the syndrome everywhere. The head of the appointments committee of a major law school said recently that his committee would not even interview graduates of law schools with significant numbers of CLS faculty because of the risk that those graduates might have been contaminated by CLS ideas, and that hiring one might cause his school to be taken over by Them. Such a person would presumably think it an absurd imposition on his time and patience to be expected before passing this judgment to learn anything about Their ideas. What really gets to me is that these are often exactly the same people who uphold as against CLS the virtues of "civility" and "the liberal value of respect for the rights of others" (296 n. 186). We really are back to the 1950s, without even the consolations of early rock-and-roll.

NOTES

1. William Nelson and John Phillip Reid, *The Literature of American Legal History* (1985).

2. Chapter 16 (Report for 1981-84).

3. To summarize some of these briefly: 1) Your account seems to blur together several propositions that should be kept distinct. (a) Commitment to the study of law in its political-economic-social context does not have to entail the belief that law is determined by that context. (b) The beliefs, however sincerely held, of judges or lawyers that their practices are autonomous does not make them so, or preclude historians from concluding otherwise. It does not even follow *pace* your Japanese-internment example that, as an empirical matter, judges committed to a formalist-idealist conception of professional autonomy are more likely to resist the pressures of the power politics of their time than judges who think law is mostly the product of social forces. On the contrary, as the Legal Realists were fond of pointing out, legal formalisms certain of their autonomous, neutral, apolitical character are peculiarly prone to permeation with unconscious bias; only a jurisprudence capable of recognizing, rather than committed to denying, the political pressures imprinted on legal doctrines, is likely to be able to transcend such pressures. It was skeptical judges like Holmes, Brandeis, and Hand, not their formalist colleagues, who expanded free speech protections in this century. (c) The opposition seems too stark (as indeed you recognize at 200) between legally maintained "traditions" and the "preferences of politically dominant groups," since the traditions could not become "essential" or even "traditions" to begin with unless the "dominant groups" had adopted and promoted them. 2) Even if a historical method is capable of identifyi.ng the "essential traditions" (such as "individualism") of our society, I can't share your confidence that once identified they could or should have the constraining force you want them to have over our legal decisions. (a) The traditions of our culture are plural, not unitary: there is "republicanism" as well as "liberalism," the Puritan commonwealth as well as the rugged individual, the artisanal fraternity as well as the free enterpriser, Eugene Debs and W. E. B. Du Bois (as Mark Tushnet has recently pointed out) as well

as Thomas Jefferson and Andrew Carnegie. (b) Even within liberalism, as critical legal studies historians are fond of pointing out, the traditions point toward opposite goals: an abstract commitment to the traditions of "private property" or "freedom of contract" can perfectly consistently generate completely contradictory regimes of concrete legal rules. (More on this theme later.) At different points in our history, for instance, tradition-minded conservatives have supposed that "individualism" logically *required* prohibiting all corporations, allowing everyone to form corporations, precluding state regulation of corporations, permitting virtually unrestricted corporate combination, and breaking up all large corporations into small ones. It is hard to believe on such evidence that "tradition" is able to inform our policy options in the constraining manner you hope from it. (c) Some of our deeply embedded traditions-racism, nativist xenophobia, repression of dissidence, glorification of the more violent and dominating forms of male sexuality, ecological carelessness, obsession with money making, etc.-are ones we should be rediscovering in order to try to grow out of, not to endow with renewed normative authority.

4. See, e.g., Richard A. Posner, "A Theory of Negligence," 1 J. Legal Studies (1972); Richard Epstein *Takings* (1985).

5. See, e.g., Bruce Ackerman, "Discovering the Constitution;' 93 Yale L. J. 1013 (1984).

6. Robert W. Gordon, "Critical Legal Histories," 36 Stanford L. Rev. 57 (1984).

7. Duncan Kennedy, "The Structure of Blackstone's Commentaries," 28 Buffalo L. Rev. 205 (1979).

8. "A Bibliography of Critical Legal Studies," 94 Yale L. J. 464 (1984).

9. Mark Tushnet, *The American Law of Slavery, 1810-1860* (1981).

10. James L. Kainen, "Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights against the State," 31 Buffalo L. Rev. 381 (1983).

11. Jerold S. Auerbach, *Justice without Law?* (1983).

12. William C. Chase, *The American Law School and the Rise of Administrative Government* (1982).

13. Judith Baer, *Equality under the Constitution: Reclaiming the Fourteenth Amendment* (1983).

14. You link Auerbach to CLS thus: "Since Auerbach makes clear his own dissatisfaction with the legal system, it seems clear that Auerbach's work should be perceived as part of the critical legal studies effort to undermine the individualistic tenor of the American legal order."

15. And only two in the footnote (262 n. 7), one of which is co-authored by Schlegel himself.

16. Duncan Kennedy, "Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940," in 3 Research in Law and Sociology 3 (ed. Spitzer 1980).

17. Robert W. Gordon, "Law and Lawyers in the Age of Enterprise," in *Professions and Professional ideologies in America* 70 (Geison ed., 1984).

18. See Kennedy, supra note 16.

19. A most peculiar aspect of your article is that one of the few works of a CLS-affiliated historian that actually does set forth instrumentalist (among other) interpretations is a work you don't mention at all, though you seem secretly to be using it as proxy for CLS work generally: Morton Horwitz's *Transformation of American Law*. And while in its instrumentalist mode, as I pointed out in my article, Horwitz's book is entirely within the *mainstream* of social-legal historiography, as politically it is within

the mainstream of Progressive historiography. It is a wonderful book in many ways, but it is not in *those respects* (though it is in others) typical of recent CLS history.

20. See Philip Johnson, "Do You Sincerely Want to Be Radical?", 36 Stan. L. Rev. 247 (1984); Louis B. Schwartz, "With Gun and Camera through Darkest CLS-Land," id. at 413; Paul Carrington, "Of Law and the River," 34 J. Legal Education 222 (1984).

21. Especially those in the "Kennedy School": see supra at note 16.

22. The example is yours (274), suggested by Stanley N. Katz, "Legal History and Family History: The Child, the Family, and the State," 21 Boston College L. Rev. I025 (1980).

23. Elizabeth Mensch, "The Colonial Origins of Liberal Property Rights," 31 Buffalo L. Rev. 635 (1983).

24. Joseph Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld," Wisconsin L. Rev. 975 (1982).

25. Gregory Alexander, "The Dead Hand and the Law of Trusts in the Nineteenth Century," 37 Stanford L. Rev. 1189 (1985).

26. Hendrik Hartog's book (which you praise) on New York City fits beautifully into the CLS account of the history of the public-private distinction (prefigured by Louis Hartz's great book on Pennsylvania, years ago), as do Scheiber's work on the history of public rights and Steven Diamond's on taxation; Charles McCurdy's articles on Justice Field and on corporation law, Patrick Atiyah's history of contract law, Thomas Grey's article on Langdell (which you also praise, and which is heavily indebted to Kennedy) all dovetail neatly with Kennedy's, Horwitz's, and my material on late-nineteenth-century law; Charles Donahue's and Tom Grey's synthetic histories of property confirm Vandevelde's CLS article on property, and so forth.

27. Observe the rhetorical oppostions in this sentence: You gently and consensually "preserve"; we forcefully and conflictually "impose." Your order promotes "individual autonomy and freedom," ours a "collective" vision of the good. Yours is sanctioned by tradition; ours is "new."

28. Some of your views of CLS are totally wacky- like the identification of CLS with Austinian positivism (290); where did *that* come from, I wonder? Or the notion that CLSers think "Americans are a violent people" (268), especially since later Edward Ayers is praised for his "nondogmatic" explanation of southern crime as the outcome of the "cultural glorification of violence" (275 76). Or that. CLS "ignores . . . the persistence of basic social. values and social structures even in the face of just demands for reform" (279 n. 99). All these seem to be the purest invention.

29. You say this of Jerold Auerbach's *Justice without Law,* which you proceed to summarize so as to make it sound uncannily like your (apparently now disowned) early work.

30. See, e.g., Ellen Kelman, "American Labor Law and Legal Formalism," 58 St. Johns. Univ. L. Rev. I (1983); Kenneth Casebeer, "Coppage v. Kansas and At-Will Employment Revisited," 6 Cardozo L. Rev 765 (1985).

31. Oliver Wendell Holmes, Jr., "Privilege, Malice and Intent," in *Collected Legal Papers* 117 (1920).

32. Walter Wheeler Cook, "Privileges of Labor Unions in the Struggle for Life," 27 Yale L.J. 779 (1918).

William Nelson Replies to Robert Gordon

I did not write chapter 16 of *The Literature of American Legal History* out of hostility to critical legal studies, nor am I now replying to Bob Gordon's review of the chapter for that reason. I have learned a great deal from members of the movement in the past, and I hope to learn more from them in the future. But recently I have grown puzzled about what the message of the movement is, and my puzzlement has led to concern that critical legal studies, having accomplished many of its early objectives and spawned a second generation of scholars, may be at a crossroads. When I read Bob Gordon's invitation to join in a debate about CLS,[1] I concluded that it might be useful to explain why I and perhaps others were finding CLS puzzling, and that my explanation, viewed as a piece of data in the world, might help CLS members decide what they wanted their scholarly message to be.

At bottom, the issue that Gordon's review of my chapter raises is whether I correctly understand the CLS message. Because that message is nowhere stated clearly and concisely, I may well misunderstand. There is no other option, however, but to restate my understanding, in the hope that if it is wrong, Gordon will also restate the CLS position clearly and concisely enough for me to comprehend it.

I shall proceed in the following fashion. First, I shall offer two interpretations of what CLS may be that would, however, trivialize and therefore misinterpret the movement. Even though I therefore reject both of them, I find it necessary to explicate them so that they can serve as guideposts revealing where not to search for the essence of CLS. Second, I shall identify briefly what I understand to be the objects of traditional historical writing and traditional legal analysis. I assume that scholars in the critical legal studies movement are doing something other than or in addition to what traditional scholars do, and accordingly section 3 will try to identify what the difference is. Finally, in part 4, I shall restate my puzzlement with CLS.

I. Preliminary Interpretations of Critical Legal Studies

Let me begin by identifying two possible interpretations of what critical legal studies might be, neither of which I accept as accurate.

The first possibility is that CLS scholars may be, as Gordon says, "a ragtag army" for whom no one person can speak because all its members share no minimal set of coherent ideas. But to treat the critical scholars

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simply as a group of friends who like to attend conferences together without sharing common ideas or common attitudes is to trivialize the CLS movement and to dismiss it too lightly. A movement without an intellectual content at its core is not an academic movement at all and would not deserve the serious treatment that other academics have rightly given it. Accordingly, I shall continue my efforts to ascertain the movement's core intellectual content.

A second interpretation of CLS would identify its core content as negative and critical rather than affirmative and constructive. As I understand the history of CLS's origins, those who first coalesced as founders of the movement were brought together largely by their shared sense that traditional legal scholarship was narrow and stultifying. CLS's founders hoped to expose the narrowness of existing scholarly ways and thereby open the legal academy to new forms of scholarship. But the founders did not agree, and indeed, they never thought it worthwhile to try to agree, about the directions future legal scholarship should take.

This second interpretation sees critical legal studies as an intellectual movement of potentially revolutionary dimension dedicated to dismembering established hegemonic structures without any clear idea about how to replace them. There are two difficulties, however, in understanding CLS as a typical revolutionary movement with only a critical and not a constructive program.

For the first difficulty, I rely on a point made by Thomas Kuhn: old, traditional paradigms typically are not abandoned simply because they fail to serve adequately the ends they are designed to serve; old paradigms fail because newer ones appear to serve the same ends better.[2] Kuhn's argument leads me to infer that, insofar as CLS has successfully carried off its revolutionary effort against traditional scholarship, its victory should be attributed largely to the power of its alternative vision and not simply to its critical force. Even a brief glance at the pages of law journals confirms this inference. Traditional scholarship has not collapsed under the weight of some critical onslaught, but is, if anything, more vibrant than ever. All that has come to an end is its old hegemony, as it now coexists with newer scholarly forms- a coexistence that suggests not that traditional scholarship has been shown by its critics to have no worth, but that newer, alternative scholarly forms such as CLS also have significant constructive value.

But there is also a second, more serious obstacle to interpreting CLS as a purely critical movement with no constructive goals. Such an interpretation would place the critical legal studies movement past its prime. As I survey the product of legal scholarship today, it appears that critical legal studies has accomplished its goal of destroying the

hegemony of old-fashioned legal scholarship and thereby enabling others who pursue different scholarly techniques to enter what CLS has helped to make an increasingly pluralistic academic mainstream. Of course, the critical scholars have not been alone in devising new scholarly forms. Only a few other names need be mentioned -Bruce Ackerman, Ronald Dworkin, George Fletcher, Lawrence Friedman, Richard Lempert, Frank Michelman, John Noonan, and Cass Sunstein -to make the point that many other scholars, who fit under neither the CLS nor the law and economics rubric, have contributed to the growing freshness of the law reviews, which now publish a wide variety of work. To mention these names is not to deny the significance of CLS, but only to note that it is part of a larger movement that has brought much needed diversity to the legal academy.

If destroying the hegemony of traditional scholarship is understood as the only objective of CLS, however, then nothing differentiates CLS writers from the liberal scholars whose names are mentioned above. Moreover, nothing else remains for CLS thinkers to do but rest on their accomplishments and tum to other work. But two facts are plain. The first is that an intellectual gulf separates the work of Ackerman, Dworkin et al. from that of Gordon, Kennedy et al. The second is that the critical legal studies movement shows no sign of disappearing. These two facts suggest that members of the CLS movement do have a constructive, affirmative program beyond simply broadening the forms oflegal scholarship. However, before outlining my interpretation of what that program appears to be, I wish to note both that I may be wrong about its existence and that, if I am wrong, my error will explain much of what may be a simple misunderstanding between Bob Gordon and myself.

Let me return to Mark Tushnet's book on the law of slavery, toward which I did not mean to take any "dig." As chapter 16 observed, Tushnet offers a striking hypothesis that the law of slavery reflected "a self-contradictory world" grounded, on the one hand, in "bourgeois social relations" and, on the other, in "the total relationships of slave society."[3] If the only point of Tushnet's book were to undercut the scholarly monopoly of traditional historians like A. E. Keir Nash, whose concern was to determine whether southern judges treated. blacks fairly in antebellum criminal cases,[4] I have only one minor quibble with it. Tushnet is quite right that slave law can be understood from what he labels a Marxist as well as from a traditional liberal perspective; my only quibble is whether he needs the full documentation of a book rather than simply his stimulating first chapter plus a few illustrations to make such an obvious point.

The fact that Tushnet wrote a book rather than an article, together

with his failure to limit himself explicitly to the narrow goal of merely establishing the plausibility of a Marxist interpretation, inevitably will lead readers to suspect that Tushnet wanted to do something more. Readers will suspect that the purpose of his fulsome documentation is to establish the superiority of the Marxist interpretation. If Tushnet's readers possess the attitudes of the reference librarian in my local library system who put Tushnet's book on reserve, they will assume that Tushnet has documented his book in full so as to establish that, in some neutral and objective sense, it is true. Readers like Bob Gordon and I, who doubt the existence of a final neutral and objective truth, will, of course, find this assumption absurd; we will conclude that Tushnet means to establish the political superiority of his interpretation.

This brings me again to a point in the analysis that bears repetition. If CLS historians mean only to discredit hegemonic claims of traditional historians and legal scholars to be the only neutral and objective writers in their fields, they are clearly right.Those who are not part of the movement should thank early CLS scholars for making the useful point that many scholarly approaches exist. But continued reiteration of this message, if nothing else is added to it, becomes tedious. I am convinced, however, that the critical legal studies movement has a more powerful message: that its historians claim not that their syntheses are as good as liberal syntheses but that their syntheses are better.

II. The Goals of Traditional Historical and Legal Scholarship

In order to identify the distinctive message of CLS, it is necessary first to set out briefly what more traditional scholars in history and law do. Regrettably lack of space makes it impossible to justify why traditional scholars ought to do what they are doing.

There are, of course, many views about what historians do. Nonetheless, nearly all traditional historical scholarship, as I understand it, is characterized by sensitivity to the unique character of something in the past. Historians, at a minimum, try to show that the past was different from the present. They may also try to do more. They may, for example, portray relationships between two or more characteristics of a past society. Or they may describe how the characteristics of a society changed over time. In whatever fashion they approach their subject, however, the foundation on which traditional history rests is the identification of some previously unknown way in which the past differed from the present.

Traditional legal scholars, in contrast, are concerned about the future.

Whether they are arguing about cases or statutes, their underlying object is to persuade a decision maker that one out of two or more possible rules of law is the best rule for future governance of the issues at hand. Legal scholars, of course, make many sorts of arguments: some argue, for example, that one rule is superior to others because it more efficiently promotes an important social goal; others may argue that one rule fits best with a particular conception of justice; still others may urge the adoption of one rule over another on the ground it is more consistent with cases decided by courts in the past. All of these forms of argument are perfectly appropriate ones for legal scholars to make.

The hybrid discipline denominated legal history can take the form of either historical or legal scholarship. A historian, that is, can undertake to show the unique characteristics of law at some point in time in the past; indeed, a historian can undertake to study past law in any of the ways he or she can undertake to study anything else in the past. Alternatively, a legal scholar can attempt to use data from the past to make a legal argument that a decision maker should choose one rule in preference to alternatives because of the superior rule's greater consistency with past decisions. Both sorts of scholarship tend to carry the label of legal history, and scholarship of the latter sort can, incidentally to its main purpose, contribute to our knowledge of the law's past. But it is important to remember that only the first sort of scholarship is truly scholarship in the history of law; the latter is a form of legal argument. At the same time, it is also important to remember that both history and legal scholarship are appropriate forms of academic endeavor. The two scholarly forms are quite different, but neither is intrinsically superior.

III. The Goal of Critical Legal Studies Scholarship

I assume that critical legal studies historians are trying to do something other than or in addition to what traditional historians or traditional legal scholars do. Their goal, I think, it not merely to portray the uniqueness of the past or to make a legal argument, but to teach a lesson in political theory. The lesson is that law is politics: that legal institutions adopt rules which serve the dominant interest groups in society.

This, of course, is what I wrote in my original chapter .16. At least one member of the CLS conference, writing what he called an "affectionate" history of the movement, so stated the CLS position,[5] and the other CLS writings that I had examined appeared to support his state-

ment. Even Bob Gordon seems to agree with the statement in his review, when he writes that "surely one of the things that historians ought to do is to try to discover the sunken codes of shared inarticulate assumptions that underlie apparently-neutral decisions systems"-codes that, if Gordon's example from labor law is typical, will reveal how dominant interest groups use law to promote their ends.

But, the main argument in Gordon's review, which frankly puzzles me, is that CLS historians have rejected this familiar instrumentalist/realist approach. Unlike the realists, CLS historians, according to Gordon, study doctrine seriously in an effort to address "a successive set of modern Western claims to have *mediated* . . . contradictions [such as the "fundamental contradiction" between the self and others][6] -to have made them go away, or at least to have made them less painful and terrifying- through law."[7] Gordon is correct about the CLS study of doctrine as a device for mediating contradiction, and I ought to have taken note of this doctrinal character of most CLS history in my original chapter 16. But, as I shall try to show below, once the purpose of CLS doctrinal analysis is appreciated, CLS scholars again emerge as realist/instrumentalists, though with a special twist: whereas at least some realists believed that policy entered the judicial process on an ad hoc basis, as judges responded to policy considerations in individual cases, CLS contends that policy enters the law in a more systematic fashion, as entire bodies of doctrine are pulled and tugged in inconsistent directions by conflicting interest groups. But the ultimate conclusion for both groups is that the outcomes produced by the legal process result from the impact of political and social forces on law, not from any neutral content in the law.

Duncan Kennedy's essay on Blackstone's *Commentaries,* together with the three articles that Gordon cites as examples of good CLS history, are illuminating. Kennedy differentiates his scholarship from traditional liberal writing. He says that the traditional "approach practiced in most law school classrooms" consists "of analyzing the rationale of a decision to see if it 'makes sense.' " He agrees that this traditional method is comparative, for he notes that if the rationale does not make sense, then the law teacher has two choices: either "to formulate an alternative rationale that satisfies us of the rationality and justice of the outcome" or to "propose a different outcome, and explain why it would be better."[8] Kennedy notes that his CLS method is similar, "in that it requires the analysis of the coherence of judicial explanations of outcomes" -that is, it focuses on doctrine. But Kennedy's method is also different, since his "goal is neither an alternative rationale nor a criticism of the outcome." His goal "is to discover not what should have been done,

but . . . the apologetic motive that the formal rationale was designed to disguise."[9]

Kennedy is thereby striving to show not how the doctrinal enterprise can be carried on more justly or effectively, but rather that all efforts at doctrinal coherence are "charades" [10] and apologies that "judges could not admit and still retain their legitimacy."[11] His aim is not what I believe the ultimate aim of legal scholarship must be: to show lawyers how to achieve just results or, at least, how to achieve the best results they can in the necessarily imperfect world we inhabit. Nor does he pursue the historian's goal of showing how Blackstone or other people in the past were special and different from people of today. Instead, CLS work such as Kennedy's analyzes doctrine to show that, at least in recent centuries, Anglo-American lawyers have struggled ultimately without success to mediate the contradictions of liberal legalism.

The three articles to which Bob Gordon points in his review as good examples of critical legal history are not significantly different from Kennedy's essay on Blackstone. Because Gordon made special reference to them, each will be examined in some depth.

Because she draws on primary source materials, especially the legal papers of an eighteenth-century New York lawyer that previous historians have not examined in detail, and because those sources reveal a body of legal doctrine vastly different from property law as we know it today, Elizabeth Mensch's article on "The Colonial Origins of Liberal Property Rights" [12] does accomplish the historian's familiar goal of portraying the distinctive character of past doctrine. But that is not her stated objective. Mensch sees eighteenth-century doctrine not as a unique body of law whose uniqueness requires explanation, but as *"representative* of a conceptual dilemma well recognized by the most sophisticated of early liberal theorists," who devoted their efforts "to the creation of mediating concepts which served to mask the inevitable irreconcilability of hierarchy and voluntarism."[13] Her main aim is to show that provincial New York lawyers created their mediating concepts, according to Mensch, by incorporating "elements of both conceptual models [hierarchy and voluntarism] into a vaguely conceived combination, never fully articulated, . . . [that] was inherently unstable, however, and seemed always on the verge of unravelling into its two contradictory elements."[14]

As Gordon promises, Joseph Singer's article, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld,"[15] is a detailed exegesis on the jurisprudential writings of Mill, Bentham, Austin, Holmes, Salmond, Hohfeld, and other lesser figures. It appears that the point of Singer's 80-page-long exercise is not to explicate his quite

familiar material but to critique it.[16] Singer's own conclusion speaks best for itself. He urges that his analysis, especially of Hohfeld's writing,

> demonstrates that legal rights are justified by a fundamentally contra- dictory political and legal theory. Legal decisions are not determined, . compelled, or rationally justified by the inherent logic of rights, since rights encompass the contradictory principles of freedom of action and security. Since every legal decision reverts to the fundamental contradiction, we have no alternative but to decide each case in the light of competing goals and interests. To make these decisions, nothing can aid us except the same moral and political arguments we use in other areas of ethical discourse. *It is an illusion to think that legal reasoning is any less political and subjective than the reasoning used by legislators, voters and other political actors.*[11]

Gregory Alexander's article on nineteenth-century trust doctrine likewise "discusses a basic paradox at the core of liberal property law."[18] He explains how, when "the mediating features of pre-Classical legal analysis" failed to resolve the paradox effectively, "legal writers of the late nineteenth century attempted . . . to replace its fragmentary approach to dead hand issues with an integrated conceptual scheme. . . ." But, Alexander notes, their "grand design failed even as it was being articulated by such well-known writers as John Chipman Gray."[19] The ultimate point of this "historical account" is not the traditional historical goal of portraying nineteenth-century trust law for its own sake or the traditional legal goal of arguing about the form that twentieth-century trust law should assume; Alexander's object is to suggest "that within the individualistic regime of consolidated property there is no objective basis for choosing between the autonomy of the donor and that of the donee, the dead hand dilemma; any resolution of that problem is a 'naked preference.' "[20]

The message I take from these four studies of the incoherence and contradiction in legal doctrine and from their refusal to suggest how lawyers could have engaged in better doctrinal analysis is as follows: There are no good or bad, better or worse, approaches to legal analysis. All legal analysis is suspect, and every legal outcome results not from the excellence of lawyers' analysis but from the realities of political power. The point of studying doctrine is not to show that good doctrine leads to better and bad doctrine to worse results, but that all doctrine will be manipulated to attain results favored by those who possess power. Thus the CLS study of doctrine seems merely to point me back to the classic realist/instrumentalist insight that power, not law, determines the outcomes that legal institutions will produce.

lV. The Trouble with Critical Legal Studies

I have two objections to scholarship that reiterates this realist/instrumentalist theme. First, I find it dull and familiar. Although I agree with Gordon that we must never forget how sunken codes of inarticulate assumptions control the application of doctrine to cases, we do not need to read lengthy new books and articles to remember. Nothing teaches this lesson better than some of Holmes's classic, and brief, essays and opinions.[21]

It bears emphasis that my objection is not that political values have no place in scholarship. I agree with CLS writers that a scholar's political views should find a place in his or her writing and that, consciously or unconsciously, they probably will. What I find tedious about CLS is its continual repetition and excessive documentation of this obvious point.

I also have a second objection to CLS work reiterating that law is politics- an objection that goes, I believe, to the heart of my dispute with Gordon. Let me note preliminarily that our division is a political and not an intellectual one, which means that I make no claim that CLS scholarship is bad history or incoherent law or is in any way intellectually inferior to traditional scholarship. My claim is that CLS writers are using their substantial mental capabilities to point American legal scholarship in the wrong direction politically. Let me also note that our division is not a typical Left-Right split, and, indeed, I resent Gordon's imputation of some reactionary bias that allegedly produces "a combination of paranoia and carelessness" on my part to "work originating on the Left."[22] Gordon and I both stand well within the American Left, although we have different visions of the causes the left should support. Mine is the left of John Kennedy's New Frontier, Lyndon Johnson's Great Society, and Jimmy Carter's Justice Department, which all stood for racial and religious equality and individual autonomy. Critical legal studies, in contrast, seems part of the New Left and presents a puzzling program which is said to be non-Marxist but which, to the best of my understanding, regards minority rights as an issue of secondary importance and individual rights possibly with hostility.

I can state my objection to the political direction of CLS most effectively by imagining a simple, two-person society in which one person, A, possesses extensive but not unlimited power over a second person, B. Should A govern B through naked power, or should A and B agree to a government under law, even though they both appreciate the realist/instrumentalist insight that their law will be manipulated largely to serve the interests of A rather than B? As I have observed the efforts of the

United States to coerce the people of Vietnam, of the Soviet Union to coerce the people of Afghanistan, of Protestant Irish to rule Ulster Catholics, of American whites to govern American blacks, etc., I remain convinced of the efficacy of law. Both the governors and the governed seem to be better off if the governors rule not through naked power but through power restrained by law. Put differently, it appears that both the strong and the weak are better off if the weak accede to government by the strong and the strong adopt rules permitting the weak to participate in society- while simultaneously retaining rights under law to be different in respect to matters fundamental to their identity.

Law can have efficacy and serve as a restraint on power, however, only if lawyers strive to give it determinate meaning that will point toward specific results in at least some cases. Aware as I am of the strength of the realist/instrumentalist insight, I do not expect that law can ever attain perfect objectivity and neutrality. Nevertheless lawyers must continue trying to make doctrine as consistent as possible with a collective sense of right and justice that transcends the narrow concerns of competing interest groups. Legal scholars must, furthermore, heed an elemental truth- that some legal doctrines, no matter how imperfect they may be, fit better with that collective sense of right and justice than others. Racial equality, even in its half-hearted American style, is better than *apartheid.*

This, in turn, sets an agenda for legal scholars. The aim of legal scholarship must be to analyze the preferability of competing doctrinal formulations: to debate whether one particular doctrinal configuration is better or worse than the alternatives. The debate can range in many directions. Some scholars can usefully argue that doctrine is best when it is internally consistent; others can urge that sound doctrine conforms to some abstract conception of justice; still others can contend that good doctrine is that which historically has served some societal need. And, of course, the debate will never end. But through hard work, effective thought, and an intuitive appreciation of society's values, some scholars will enjoy temporary and partial victory in the debate, and occasionally their victories will become law and thereby constrain the powerwielders.

What is most troubling about CLS scholarship is the failure of its adherents to engage in the debate and thus to assist in the process of making law that can serve as a limitation on power. If CLS scholars were advocating programs to use law affirmatively to redistribute wealth and power to the poor and underprivileged, I and many other liberals would support their program. But CLS does not advocate any such

program of affirmative legal reform. On the contrary, it appears that CLS scholars are seeking to undermine law rather than use it to better society. My surmise is that they hope, through revealing the false consciousness underlying liberal legalism, to cause the American people to rise up, to marshall their collective power, to overthrow the current system, and to replace it with some utopian alternative. I do not believe, in contrast, that either American lawyers or the American people suffer from any false consciousness. I think the government we have now is precisely the government that the majority of Americans want and the government that best promotes the majority's interests and well-being. The communities of Middle America that periodically coalesce into a majority are the ultimate source of political power in the nation as we know it, and I fear government in accordance with the naked political preferences of this majority. I can think of no way to restrain this majority other than by appeals to law.

None of what I have said is intended to indicate disagreement with the root CLS claim: that deep injustices remain in American life and that one way the injustices might be eliminated is through a fundamental restructuring of law and society. I agree, but for me a trip to utopia is not worth the price. I am not prepared to throw away one of the more just legal systems the world knows, simply because the system is imperfect and a better system *might* be obtained. What I believe separates me from the scholars of CLS is their willingness to take the risk rather than try to improve the law through less thoroughgoing, meliorative approaches.

Perhaps I misunderstand CLS, and perhaps my disagreement with Bob Gordon is little more than a matter of attitude and emphasis. After all, I agree with Gordon about the need for awareness of "the sunken codes of shared inarticulate assumptions that underlie apparently-neutral decision systems," and Gordon agrees with me that "a strong commitment, especially on the part of influential elites, to certain ways of interpreting . . . rules over others that are plausibly advanced, can do a lot to avoid or mitigate political persecution:'23 But I find the unarticulated assumptions and passions of most Americans obvious and rather easy to unearth, and the liberal and humane legalisms that restrain those passions rather fragile. Thus, I find the CLS program ofuncovering the assumptions and unmasking the rules trivial and its challenge to law potentially subversive.

Iuse this strong language not out of hostility to CLS but with a purpose. ·My purpose is not to keep CLS members from joining law faculties or from writing whatever they wish; my commitment to liberal and humane legalism and my appreciation for what I have learned from

CLS in the past preclude that. My purpose is to induce CLS scholars, in the long run if not in response to this essay, to elaborate and articulate a constructive program of scholarship that will help make our shared law, however imperfect it is, "the best it can be."[24]

NOTES

1. Robert W. Gordon, "Critical Legal Histories," 36 Stan. L. Rev. 57, 116 (1984).
2. See Thomas S. Kuhn, *The Structure of Scientific Revolutions* 77-91 (2d ed. 1970).
3. Mark V. Tushnet, *The American Law of Slavery, 1810-1860,* at 32-33, 36 (1981).
4. See A. E. Keir Nash, "A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negro," 48 N. C. L. Rev. 197 (1970); A. E. Keir Nash, "Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South," 56 Va. L. Rev. 64 (1970).
5. See John Henry Schlegel, "Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies," 36 Stan. L. Rev. 391, 411 (1984).
6. The quote is from Duncan Kennedy, "The Structure of Blackstone's Commentaries," 28 Buffalo L. Rev. 209, 211-13 (1979).
7. Gordon letter at 147.
8. Duncan Kennedy, (supra) note 6. 11. Id. at 219.
9. Ibid.
10. Id. at 372.
11. Id. at 219.
12. 31 (Buffalo L. Rev.) 635 (1982).
13. Id. at 636 (emphasis added).
14. Id. at 660.
15. Joseph William Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld," (1982) Wisconsin L. Rev. 975.
16. *See e.g.*. id. at 997, where, after quoting an argument of Mill, Singer observes that the argument "begs the question." Frequent comments of this nature suggest that criticism rather than explication is Singer's goal.
17. Id. at 1058-59 (emphasis added).
18. Gregory S. Alexander, "The Dead Hand and the Law of Trusts in the Nineteenth Century," 37 Stanford L. Rev. 1189 (1985).
19. Id. at 1228.
20. Id. at 1193.
21. *See, e.g.*. *Lochner v. New York,* 198 U.S. 45, 74-76 (1905) (dissenting opinion of Justice Holmes); Oliver Wendell Holmes, "The Path of the Law," 10 (Harv. L. Rev.) *457* (1897).
22. Gordon letter at 153.
23. Id.
24. The quoted language from my colleague Ronald Dworkin, *Law's Empire* 229 (1986), strikes me as particularly apt here.

Gordon's Response to Nelson

Let me respond to what seem to me to be the its essential points of your letter.

I. Your Characterizations of CLS Historical Work

Specific writers. 1) Tushnet on slavery. I don't at all understand your response here. In the book you say that uninformed readers will be misled to think that Tushnet's history is "objective," since it's actually "Marxist." Now you say you don't believe there's such a thing as objective history. It must follow that uninformed readers of any history will be misled if they suppose it to be objective. So why single out Tushnet's? Of course Tushnet thought his interpretation was a better one than rival ones, or he wouldn't have written it. He drew on Marxist (and even more on structuralist) traditions of explanation because, like his teacher Genovese, he believes with good reason that, judiciously used, these help powerfully to illuminate the historical problem. 2) Kennedy on Blackstone: You say (Nelson's letter, text accompanying note 10) that Kennedy's piece is neither history nor legal argument because it neither locates Blackstone's thought uniquely in the past nor helps lawyers argue for just results in the present. The first charge is just wrong: the entire essay is devoted to situating Blackstone's thought at a historical moment between mediaeval-feudal and modern-liberal, in order to clarify our own categories and assumptions by showing how Blackstone's formulations anticipate, but also differ from our own. The second's validity depends on how one assesses the present utility to lawyers of perspectives- such as (real) legal history, anthropology, or sociology-that study the legal order from the outside, rather than directly engaging in its ongoing arguments and activities, and treat as problematic all the premises (the "common-sense" of the system) that ordinary legal arguments take for granted. How but through such distancing can lawyers achieve reflective self-knowledge about their premises, and change them if they are misguided? Finally, even if CLS histories happened to fall into neither genre you mention (though in fact I think they contribute to both), but into a third genre such as, let us say, historically supported political theory, what would be wrong with that? Legal theory needs jusification in political theory, so why shouldn't we work on the basics?

lnstrumentalism. You are "baffled" (see Nelson's letter, text accom-

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panying note 7) by my claim that CLS historians have rejected instrumentalist accounts of law, and respond with a counterclaim of your own that on close inspection the CLS historians "again emerge as rather standard realist/instrumentalists," your evidence for this being the conclusions of Kennedy and others that they have revealed the "apologetic motives" underlying legal structures. [Incidentally, you can't maintain both that CLS departs radically from traditional legal history, much of whose best work (e.g., Hurst and Friedman) is far more overtly instrumentalist that CLS's, and that CLS merely iterates old themes.] Now an "instrumentalist" view of law, as I was using the term, is t.he view that you attributed to CLS in your book: that the rules, doctrines, arguments, processes of the legal system are best explained as deliberately manufactured in their own interests by (dominant) interest groups or classes. A historian who took this view seriously wouldn't waste much time on the content of law or of legal reasoning or rhetoric or argument, because by his hypothesis these would be nothing but whipped cream, "superstructure," rationalization of naked interest or preference. The historian would be looking for the real dirt, the ruling-class or entrepreneurial interest behind the scenes. But this is clearly neither the method nor the goal of the CLS historians we're discussing because they evidently take the content of law very seriously indeed. "Traditional" historians with good reason usually criticize them for neglecting contexts.

I think the problem you're having grasping what CLS historians are up to ultimately derives from your implicit acceptance of one of the basic dualisms of liberal legalism itself: If law is not objective and determinate, then it must be the product of unconstrained desire or power or arbitrary whim. So if someone undertakes to show that a body of legal doctrine is contradictory or otherwise indeterminate, she must, in your view, believe that it's totally open to manipulation by power-holders or just the whim of the decider. Your response constantly reverts to what Unger in *Knowledge and Politics* has called the "antinomy of reason and desire" in liberal thought: Throughout you keep opposing Reason, represented by law, traditional values, "liberal and humane legalism," to Desire (or Will or Interest), conceived of as the "passions of most Americans," the interests of the middle class majority or of the powerful, and even as "the government" (except the courts).

CLS work has very largely been directed to assaulting this very dualism and to trying to excavate, in one doctrinal field after another, the "deep structures" of legal consciousness that constrain the way legal actors (and often extra-legal actors too) talk and think and act respecting law. Law may not constrain decisions in the way that legal formalism claims:

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the lessons of Realism are pretty clearly that it doesn't. But this doesn't mean that legal decisions are unconstrained.[1] On the contrary, decision makers are, usually without being aware of it, prisoners of their conventional categories of discourse. The categories organize and make sense of reality for them; make them see some things as similar and others as different or unrelated; highlight some forms of coercion as intolerable and completely fail to notice (or dismiss as resulting from natural necessity) others; incorporate basic assumptions about nature, history, morality, efficiency, obligation, representation, legitimacy. Almost the entire body of the CLS historical work we've been discussing has been devoted to elaborating such frameworks of constraint on legal thought, or "sunken codes of inarticulate assumptions," as I've been calling them. Law is neither pure power or pure reason, in this view: it's what some writers call "ideology," or a "cultural code," or "social text," or "political language," or "set of discursive practices." And the discourses of law connect with other social discourses to form complex overlapping systems of ideology that help to constitute and shape the desires and powers of interest groups themselves. Interest groups partly are what they are because of legal definitions; they claim from one another and the state (among other goods) things they believe they are legally entitled to (people will die to preserve a "right" to things they would never miss if they hadn't come to think themselves entitled); and they possess power or authority in part because the law confers legitimacy on its exercise. If you start looking at the world this way, the dichotomous model of desire constrained by reason disappears: both "interests" and "law" are seen as social practices that flow in the channels cut for them by complexly structured frameworks of consciousness.

This much CLS scholars have simply borrowed from the many other disciplines-including of course history itself-that have challenged the liberal-positivist tradition in social science with the "interpretive turn." In writing the history of legal doctrine, CLSers have added the insight that the understanding of these doctrinal clusters is illuminated by considering them as successive attempts to mediate-to find rational and stable solutions to-the dilemma of the self's simultaneous need for and fear of others. Now the lawyers who have built these doctrinal systems have usually been powerful people with some stake in the status quo, so that they have generally tried to argue that some (considerably idealized) version of the current legal arrangements provides near-optimal solutions to the dilemma. They are in this sense apologetic (as are your own affirmations of faith in the current legal system as representing for all its flaws about the best we can hope for, with perhaps some room for gradual improvement). CLS historians are indeed con-

cerned to show up the apologetic nature of legal ideology. But they also frequently point out that apology for the status quo is not at all a necessary feature of legal thought; and that because of its contradictions legal thought always contains liberating and emancipatory possibilities as well as conservative ones. Unmasking apology is thus a byproduct of the central purpose of these histories, which is simply to begin to describe-a sufficiently difficult task in itself-the structures, the sunken codes, underlying our commonplace modes of thought.

The task is "obvious" and "trivial." At this point you interject your judgment that the sunken codes are "obvious" and that trying to describe them is therefore "trivial." "I find," you say with breathtaking insouciance, "the unarticulated assumptions and passions of most Americans obvious and rather uneasy to unearth" (Nelson's letter, text accompanying note 23). This certainly simplifies things: We can dispense with social-legal history, the sociology and anthropology of law, the political economy of regulation -forget about literature, psychoanalysis, and every other exploration of the mysteries of the human heart. Struggling hard here to rescue some sense out of this, the best I can do is to guess that your view that CLS's project is obvious derives from your confusing it with that of standard instrumentalist histories.

Your point is perhaps that if all historians do is to uncover the selfish motives of interest groups behind legal enactments, to prove over and over again that law is just a mask for power and self-interest, this will become a boring truth indeed. Even this would be a slander on the instrumentalist histories. It's always valuable to do research exposing the line-ups of interest behind some legal decision or enactment, always interesting and useful to learn such things as that railroad executives were among the lobbyists for railroad regulation and worker's compensation -things that weren't at all obvious and familiar when first written about. In fact I think you'd get rather more insight for your own project of trying to preserve the benefits such as free speech you see in the rule of law from the historical sociology of political action — from the study of how repressive movements arise, and resistance to them succeeds or fails-than from the nuances of First Amendment doctrine. The doctrine is nothing if political will is lacking to back it up: the conditions for nurturing dissident speech have to be pursued through politics. Plenty of respectable legal arguments were available to protect "subversives" from persecution in the 1950s; but on the whole these didn't operate to restrain the persecutors. Yet if this is what you mean, shouldn't you be polemicizing against the Chicago economists who are the prime specialists these days in reductionist economistic accounts of law?

CLS has not been primarily interested in uncovering motives of wealth and interest and power, but in describing latent structures of consciousness. And there's nothing in the least obvious about these: Kennedy does not try to show that classical legal thought was devised to protect capitalists, but that its categories were organized around the master principle of "powers absolute within their spheres," which structured decision making in such disparate areas as federalism, separation of power, the boundaries between public power and private right, and contract and tort. As one who has been working in the period, I find Kennedy's classical legal thought article to be a major advance in the historiography of late nineteenth-century legal thought. If you think it wrongheaded, I think you should engage with it on its own terms. You've also said that Joseph Singer's history of *damnum absue injuria* in analytic jurisprudence was "quite familiar." I don't know of other work that mines the sources as he does, or even looks at many of those sources, or anticipates his interpretations.

II. Your Claim that CLS Histories Are Bad Politically Because They Undermine the Rule of Law

Before addressing this contention, could I ask querulously why it seems such a struggle to get critics of CLS to address the substance of the work? Most of these critics complain about how CLS goes around politicizing everything and undermining scholarly objectivity and all the rest of it, and yet most of their critiques of CLS are pure political polemics, accusations of nihilism or totalitarianism, or that "this perspective is bad because if people came to believe it they would undeflline the rule of law." One is reminded of the right-wing lawyers who keep asserting that there just has to be a correct reading of the Constitutional text or the intentions of the Founders because if there isn't we will have nothing fixed to steer by. But the assertion doesn't do a thing to show the skeptical anti-originalists are wrong, or to produce a plausible conservative interpretation of the original understanding.

I can't help contrasting CLS's own trashing projects, such as those directed against law-and-economics, which take the body of work being criticized on its own terms, however alien the terms and the world view behind them may seem to the trasher. There are significant and honorable exceptions, of course; for example, Kornhauser's critique of CLS's legal economics[2] which really tried to get inside the mind set of the work.

But to discuss the politics:

A. *CLS suppresses the Individual.* You don't like our history chiefly because of our politics, and yet your notions about our politics are if possible even more obscure than your notions about our history: CLS "seems part of the new left and presents a puzzling program which is said to be non-Marxist but which, to the best of my understanding, regards minority rights as an issue of secondary importance [secondary to what, one wonders?] and individual rights possibly with hostility" (Nelson's letter, text accompanying note 22). In your book and response you hammer on this theme of CLS's hostility to "the individual," darkly implying some plot to submerge the poor creature in some horrid new collective, perhaps the State. But where do these impressions come from? Certainly not from CLS political writings, which are acutely sensitive to the terrors and constraints of group life. CLS people (and hardly they alone-the basic critiques are as old as liberalism itself and still vital) do criticize many of the conventional liberal ways of thinking about individuals such as the common liberal opposition of the individual *to* the collective, which neglects all the ways in which personality, desires, interests are formed and influenced through collectives; or the classical-liberal claim to have satisfactorily mediated the conflicts between individual and group life by means of such notions as that individuals' consent to workplace hierarchies or domestic violence or political regimes can be presumed to express their desires so long as they don't leave. (Folks have what they want and want what they've got.) People committed to those emaciated forms of liberalism concerned only to protect very abstractly defined negative-liberty rights-to-be-let-alone against formal infringement have not only permitted but also justified as realizations of individual freedom the most appalling social constrictions of personality- in local communities, in small businesses, in big bureaucratic hierarchies, in families.

There are of course varieties of liberalism that fully recognize the indebtedness of the self and its projects to social inheritance and environment; that realize how often "consent" can result from submission to domination; and that see the job for law and politics as one of improving the communal conditions for the fuller and richer development of both individual and social personality. Feminist studies have been perhaps the most copious recent sources of insight into how formal-legal rights can operate both to expand and constrict practical freedom. CLSers identify completely with these varieties of liberalism in seeking to expand the range of individual freedom **-by** which is meant practical freedom and phenomenological freedom, that is, freedom experienced as freedom **-in** social life. The politics of liberal rights has undeniably helped expand real freedom in the past and sometimes still does; but

sometimes it just produces fancy apologies for unfreedom. It's important to cultivate the ability to discriminate.

B. *CLS histories, by exposing indeterminacies and injustices of legal rule systems, help to undermine the current system of the rule of law and all the good things it protects without proposing anything concrete to replace it.* This is your major complaint.

First just a couple of preliminary points. I'm tired of hearing that CLS never comes up with any constructive ideas, because anyone who takes the trouble to read the work, including even some of the history, can find in it plenty of concrete strategies for trying to change legal doctrines and institution. Anyway, it's a very odd complaint to bring against historians, especially critical ones, that they don't have concrete programmatic suggestions for the reformation of society: they might reasonably think that supplying such proposals wasn't their function; that simply helping us to understand our situation might be a useful foundation for an intelligent politics; and that this might be especially true if-as CLS people believe- some of our ordinary modes of understanding our situation so badly misconceive it that it is difficult even to imagine, much less sensibly discuss, radical reform proposals within the prevailing terms of everyday political discourse. The demand for "practical proposals" is often just a demand that the critic stay inside the boundaries of the very liberal discourse she or he is trying to transcend.

At the core of your response lies the assumption that the currently prevailing liberal notions of the rule of law constitute a system, something that has to be taken (subject to minor adjustments) as a whole, or rejected as a whole and another system installed in its place. The system has faults, even grave faults, but has proved itself superior to rival systems in its ability to protect individual autonomy. Radical criticism (trashing) of the system erodes its legitimacy, throws out the baby with the bathwater, and is thus irresponsible unless it has previously prepared blueprints for a replacement system (and even then, the costs of abandoning the proven present for an untried future might seem unacceptably high). The position thus articulated even by a committed left-liberal such as yourself arrives at a tragically conservative conclusion: "Deep injustices remain in American life . . . [One] way the injustices might be eliminated is through a fundamental restructuring of law and society. I agree, but for me a trip to utopia is just not worth the price" (Nelson's letter, text accompanying note 22.) One of the concrete political benefits of critical historiography- some of the CLS type, and some not- is that it quite directly addresses the presuppositions of this tragic frame of mind in the hope of persuading its possessors to think

that fundamental change might be possible without sacrificing every accomplishment of civilized legalism. Here are some quick suggestions about how history might help to do that:

1. *History can help expose the reifications of categories that often underlie claims that babies and bathwater, the good things and the evils resulting from the rule of law, are indissolubly linked together in a system so that the evils are all necessary evils.* For example, "If you let the OSHA inspectors on the factory premises without a warrant, then you'll have to let the police batter down your door at 3 in the morning. There are costs (to workers) to foregoing surprise inspections, but these are surely justified by the benefits we all enjoy from the law's protection against the state's invasion of individual privacy and property." Legal and political argument are of course full of conflations of this kind: histories describing past ones that we now all feel to be absurd and showing how their plausibility depended upon (now exploded) reifications sharpen the ability to recognize such categorizations in our own time. My example is one that is fairly easy for most 1980s liberals to shoot down (although it was not easy for 1880s liberals and is still difficult for their libertarian descendants). One point of history, not just CLS history but any history, is to show how although we can't help thinking through the categories we know, by becoming self-conscious about them we may escape victimization through false ideas of the necessary relations of things included within them.

2. *History can induce skepticism about the corrosive force of skepticism.* As a liberal who has tasted the bitter fruit of legal realism, you find it difficult to pin too much of your faith on the formalist position that liberty depends upon the reality of determinate, nonmanipulable, legal doctrine-predictable neutral rule-applications- and so adopt the common fallback position that liberty depends on at least the appearance of rules beyond politics: "OK, OK, we all know that legal doctrine is indeterminate and full of apologetic nonsense, but if you go around saying so the fascists (or the mob) will take over and minorities and dissidents will be left with no shelter from the furious blast." One hears this all the time, yet can't help but feel suspicious of the claim that juristic skepticism about rule formalism leads to Caesarism or mob rule- or that the appearance of doctrinal consistency does much of anything to prevent them -and would like for once to see the point argued carefully as a historian should argue it. It was fashionable once to argue that Weimar Germany proved the point; but if anything the example tends to show the opposite- even those members of the legal elite who despised the Nazis were so determined to think purely "legally" and not "politically" about what was going on that they allowed them-

selves to be neutralized by the party's perfunctory compliance with legal forms. I might add that the current crop of conservative judges in this country is committed to removing protections for minorities and dissidents in the name not of "indeterminacy" but of legal literalism and fixed constitutional meanings.

3. *History teaches that both the rulers and the ruled are given to identifying and defending as the essential elements of the rule of law what is really only the social-contract-in-force at the time.* This is the usual point of attack of instrumentalist rather than of CLS critical-historians and is charmingly illustrated through your own very instrumentalist parable of the weak persona and the strong person. In the parable- which is in fact the standard liberal parable about the origins of law and the state-the version I like best is Adam Smith's: "Laws and government may be considered . . . in every case as a combination of the rich to oppress the poor . . ."[3]-the strong propose to the weak that if the weak will confirm their domination and rulership the strong will protect the weak in their smallholdings and in some "rights" essential to their identity. This deal continues, not without friction, for a few centuries, when suddenly the weak people (or perhaps some of the more sensitive and guilt-tripped souls among the strong) say: "Hey, it isn't fair that your strong guys should be dominating us like this. We propose that we acede to an equal share in your wealth and power." The strong hire a lawyer, who says indignantly: "What about the sacred tradition of the rule of law?" -(i.e., the original deal)- meaning: "If you folks keep pushing for a revision of the deal, we'll see to it that you risk losing everything. We'll stop protecting the rights you have and stop contributing to the production of wealth for you share in." Now this is a scary threat: it has been made, frequently, against labor and women, for example. It's an effective display of power. It certainly invokes traditions. **But** I can't say it strikes me very forcibly as a claim of justice, or for that matter as a claim of social necessity (i.e., that the rule-of-law system, the deal *as it stands,* is essential to the well-being of both weak and strong). The strong always argue that the deal in force is optimally- or at least so in this second best world- free and efficient. The weak often grudgingly believe them, although not always; sometimes push for revisions of the deal; and sometimes actually win, if not an equal share of power, then some more extensive "rights." Then lawyers and jurists (who have often played no role in bringing about the resulting compromise except to resist it) tum to justifying the new deal as the essence of sacred legality. It is possible to appreciate such practical protections as established "rights" afford without mystifying

them, that is, without supposing that the fact of having been encoded in law makes of any going deal the best-attainable deal.

4. *History liberates the political imagination by revealing suppressed alternatives.* This needs little elaboration; it's a familiar agenda of social history and has been adopted by some CLS historians, notably those of labor law. For example, it is exceedingly useful to be reminded that the present consensus, if it is one, that fundamental decisions about investment, production technologies, and the organization of work are for management to make is a very recent artifact of the post-World War II period, that it can hardly be explained simply as what American workers "want," because it was disputed for most of our history and has only (unstably) come to prevail after long and violent struggle.

5. *History helps to teach that the rule of law "system" isfundamentally misdescribed, that inspected at close range it's not really a system at all, but a complex mass of competing and contradictory systems.* This is the main point that I want to urge here about the utility of critical history.

Take as a starting point the account you give of the rule of law: as a body of more-or-less definite rules, more-or-less regularly enforced, protecting individual autonomy against infringement, particularly infringement by the actions of state officials. Take-because so much interesting historical work has been done on this aspect of the subject-the most traditional form of the account, which stresses the centrality of the legal protection of private property rights in promoting individual autonomy. What can be learned from history?

A first cut at the account points out simply that property only protects one's autonomy to the extent that one has any. Many people have nothing but a property in their own labor, which practical necessity requires them to contract away immediately and some people (slaves, to some extent married women, often native Americans, etc.) have not even that. So for most of our history we're talking about the "individual autonomy" of propertied white adult males, a fairly small minority of the population. "The rights of property!" is therefore an ideological slogan in the narrow sense of ideology as a partial, interested view of the world that parades as a universal, disinterested vision. By our time all this really is obvious and familiar (although it wasn't so at all, to respectable opinion, until recently), so there's no need to labor the point.

Second: even within this minority, there. have been from the first settlements fundamental, irreconcilable disputes about what kinds of uses-and-acquisitions, what sort of "autonomy," the law of property ought to protect. Over and over different groups (tenants versus land-

lords, squatters versus speculators, craft laborers versus entrepreneurs, open-field grazers versus enclosers, etc.) assert conflicting rights to property founded in opposing visions of how property rights originate and what they are for- labor-theory visions, "republican" visions, "craft-communitarian" visions, as well as classic liberal (Hume-Bentham) visions, etc. The content of the law of property has thus been inescapably shaped by these intense political-ideological struggles to establish the constantly contested and thus unstable and shifting core meanings of the concept itself. (CLS scholars or affiliates- Mensch, Forbath, Hartog, Alexander, Bone, come specially to mind- have added to the growing pile of historical elaborations of this point, but of course this tradition of work has long been established in social history.) And this hasn't simply been a struggle among groups, but within groups and even within individuals, most of whom on close inspection will be found to subscribe to several competing and irreconcilable views of property rights all at once.

Third: When you look closely even at the way that the minority-within-the-minority of Americans who subscribed to the classical-liberal theory of property (and it's doubtful that more than a handful can be found in any period who ever took the theory neat, unadulterated with conflicting theories) actually pursued that theory through the legal system, you still don't find some definite, determinate, agreed-upon notion of property rights. Once more you turn up a nest of multiple, various, contradictory, controversial legal forms.

Your response to my letter, for instance, lays stress on that aspect of the "rule oflaw" that protects "individual autonomy" through restraints on official power. In the case of liberal property law, this translates into "negative liberty" -the set of rules protecting owners against the interference of others, particularly the state, with the owner's freedom to dispose of (enjoy, exploit, alienate) his or her property. But this is a very partial, one-sided, and ultimately very misleading description of liberal property rights.

(a) Your account stresses the ways in which law restrains power and coercion, but not the ways in which it confers power- in the case of property, the power to exclude or expel from the property people who are not behaving as the owner wishes, or to condition access to the property on obedience to the owner's will- and indeed power backed up by the coercive force of the state.

(b) Likewise, it stresses the benefits law confers on the right-holder but not the burdens it imposes on everybody else, which may be of several kinds: duties not to infringe on the right, obligations to pay damages if one does infringe and most important of all, vulnerability

to the arbitrary and uncontrolled discretion of the right-holder within his or her sphere of right. Protecting the freedom and security of some through property rights therefore inevitably means limiting the freedom and increasing the insecurity of others. (Alexander's article on the history of the law of spendthrift trusts elegantly illustrates the point: the law cannot promote the freedom of disposition of both the donor who wants to restrict the freedom of donees and of the donees: it must choose between the two.) As historians like Hurst, Scheiber, Friedman, Horwitz, and a fellow named Nelson have been pointing out for some time, the nineteenth-century American legal system devoted a good deal of effort to destabilizing and destroying traditional rights of some people's property in order to create predictable legal expectations in others. I would love to see you explaining to the thousands of renters who every day are thrown out of their homes so that the owners can abandon the buildings or convert them to condos how the "rule of law" protects their "individual autonomy."

(c) Your account (like the two points just made) stresses one peculiar form of liberal rights, by no means the most prevalent form at that, out of the great variety of historical and possible forms. Your form is of course that of the rights-bundle agglomerated in the hands of an individual owner, and such a bundle as entails duties in others not to interfere with the right. But of course many, perhaps most, actual property rights in our society haven't at all been designed to protect the right-holders from interference. Many property rights are rights in common -riparian rights to "reasonable use," "profits a prendre" in fishing grounds, etc.-whose exercise can leave any individual right holder high and dry with nothing. Or they are "privileges," subject to diminution or total destruction by others exercising like privileges- as for example the rights of competitors to the profits of their businesses, or intra-family immunities. (The Singer article we've discussed relates the gradual dawning of the importance of these distinctions in analytical jurisprudence.)

(d) Finally, you stress such aspects of the rule-of-law as involve rights against the state to the neglect of the rights of the state,·"public rights" as the nineteenth-century lawyers liked to call them, and before which, they were wont to insist, individual rights must give way. For lawyers operating in this mode, the core meaning of the "rule of law" was that the community must be legally empowered to override private interest for the common good.

The point is that the legal history of this society hardly reveals anything as simple as a tradition that the law has been designed to protect individual autonomy against the coercive and arbitrary interference of

officials. That has been a purpose of the law, of course, but it is no less (although also no more) accurate to say that the purpose of law has been to endow both individuals and collectives (governments, corporations, in more recent times labor unions) with the capacity to exercise arbitrary power over the lives and fortunes of others, backed up by official coercion. Property is a set of limits on sovereignty, but it also *is* sovereignty, a means of facilitating as well as of containing domination. Legal rights in action are experienced by some as confirming their freedom and security; by others as enhancing their vulnerability to being bossed around or to accidents of fortune, or simply as random violence. It's vital to emphasize that these negative effects, the vulnerability and violence, don't happen because of some failure of legality, some imperfection or shortfall in the realization ofthe rule of law: They are consequences of a particular version of the rule of law. How you evaluate such negative effects on individual autonomy as people invoking the rule of law have helped to bring about is a totally separate project. Some people on the right adopt a Darwinian-utilitarian point of view that, at least until excessive regulation came along and fouled everything up, legal rights gravitated to their most efficient exploiters, the losers all deserved to lose, and even the losers profited in the long run. Others, to put it mildly, suppose that view is excessively complacent or simply contentless because of the incoherence of the efficiency concept. But whatever one's politics as a legal historian, one should be not blind to the realities of how rights work, and why people are always fighting over their content.

The relevance of all this to your position is pretty obvious: It makes hash out of the question constantly posed to critics of legal liberalism: "If you tear down the existing order-the system founded on the tradition of the rule of law-what will you replace it with?" The point of the critique is that there isn't, and has never been, an existing order or system of the type supposed, one that has to be swallowed whole (or almost whole with a few changes) or else replaced wholesale by "utopia." The existing order, like past orders, is a teeming jungle of plural, contradictory, orders struggling for recognition and dominance. Radical reformation of this vast miscellany of contingent practices isn't likely to come about through drawing blueprints to replace one fictitiously described abstract order with another (liberal fantasies about the existing order are often just as vague and utopian as any projection of postrevolutionary communism), but by pressing against thousands of local situations of constraint for the fuller realization of the liberating possibilities that are already immanent in this jungle of orders. The role of history in this politics is the extremely modest but perhaps still useful

one of trying to describe as concretely as possible how constraints upon freedom get socially manufactured and how people acting collectively through politics sometimes succeed and sometimes fail in breaking through the constraints. It is a little struggle all in itself to strive to be realistic about how we construct our images of our situation, the current system.

A Postscript on Hegemony

Your response at one point makes striking use of one of the terms of the critical vocabulary: CLS and other new forms of legal thought have "destroy[ed] the hegemony" of "traditional" legal scholarship. As it turns out, you mean traditional scholarship no longer occupies the pages of the law reviews alone, but has to share them with law-and-economics, neo-Kantian moral philosophy, law-and-society empiricism, and a bunch of other approaches. Your usage is a curious one-a Hegemon doesn't live alone in the world, but among others whom he or she dominates- but revealing. Hegemony in critical theory describes the power of a world view so dominant that it has passed into the marrow even of those who could benefit most from overcoming it: even the dominated accept its terms as those of practical realism and common sense. In fact your response provides dramatic proof (if more proof were needed) of the continued hegemony of the liberal-legalist paradigm. For I assume that as a knowledgeable legal intellectual, you are already basically familiar with the main elements of the CLS critique of the paradigm, apparently to the point of conceding that much of it may be true, even trivially true and obvious; more: that you have absorbed and processed the main insights of legal realism, structuralism and poststructuralism, phenomenology, hermeneutics, the "new" social history, and history of political languages, and all the other currents that have fed the work of CLS. Yet-I don't think I'm deceived to infer from your book and response- none of this exposure to the work and its sources has affected even slightly your ordinary way of thinking about law. Your defense of the "rule of law" relies for its force upon virtually every structural feature of liberal-legal thought that CLS has been concerned to assault: the oppositions of law to politics, reason to desire, public to private power, practical reform within the system to utopian revolution outside the system, rational-internal coherence of doctrine to total vulnerability to external manipulation by power or whim, etc. Nor is there any sign of your having grappled with the critiques and found them, at the last, all wanting. The critiques have

simply left no traces at all. That's hegemony: the embedding of an ideology so deeply that even one of its sophisticated historians treats it as unproblematic common sense or else (your alternative move) as a political faith beyond alteration altogether by critical examination — "Here I stand, I cannot do otherwise."

The fact that Jaw reviews now carry some critiques as well as endless exemplifications of liberal legalism, that there's some real diversity of political views, a broadening of the ideological spectrum, is evidently progress of a kind, certainly a lot better than the old genteel consensus that- in the names of good sense and reason -supressed everything but the liberal center. But tolerance for diversity is hardly a sufficient condition for the advancement of understanding, which demands that at some point we all be willing to put our most basic premises at risk instead of batting away any challenges to them that threaten our comfort. "It's all obvious," "if s all familiar," "it's dangerous even if true," "it's your thing, not my thing," "it's baffling and obscure" -are the noises made by a system trying to repel disruption to its normal functioning. It's time to get beyond all that.

NOTES

I. Karl Klare argues this point eloquently and precisely in "Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Fink.in," 44 Md. L. Rev. 731, 748-52 (1985).

2. Lewis Kornhauser, "The Great Image of Authority," 36 Stan. L. Rev. 349 (1984).

3. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations,* ed. R. H. Campbell (Oxford, 1976) 11:715 n. 21.

Nelson's Second Reply to Gordon

I. Understanding Critical Legal Studies

Let me turn first to the historical value of CLS work, where I now think I can identify what divides me from Gordon. I agree with Gordon that CLS histories fit within the genre of "historically supported political theory." I also agree that "legal theory needs justification in political theory" and that some scholars should "work on the basics." Finally, I agree that scholars who turn to history to elaborate political premises will at times gain new insight into the past; much valuable work comes to mind.[1] Obviously, I am one of the last people who would doubt the utility to lawyers of perspectives "that study the legal order from outside."

But ultimately the value of the contributions that historically supported political theory makes to history and law depends upon the quality of the political theory. It is here that I have difficulties with CLS. At the time I wrote chapter 16, I had come to the conclusion that what CLS "historians do is to uncover the selfish motives of interest-groups behind legal enactments, tO prove over and over again that law is just a mask for power and self-interest," and I found this "a boring truth indeed."[2] Although Gordon has shown me subtleties and complexities in CLS theory to which I had not previously paid attention, I remain convinced that the main goal of CLS history is to show that "all doctrine will be manipulated to attain results favored by those who possess power." Perhaps I have misread the many CLS pieces I have examined; perhaps they emphasize what I take to be their subtleties rather than what I see as their main premise. Those who read the pieces I have discussed both in chapter 16 and in my initial response must make their own judgment.

II. The Error in CLS Politics

My other complaint, as Gordon rightly observes, was that *"CLS histories, by exposing indeterminancies and injustices of legal rule systems, help to undermine the current system of the rule of law and all the good things it protects, without proposing anything concrete to replace it."* This complaint, in turn, was related to my acceptance, in part, of "one of the basic dualisms of liberal legalism"- a recognition of a tension in law between "objective and determinate" principles, on the one hand, and policy values that are a "product of unconstrained desire

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or power," on the other. While I believe, as do the critical scholars, that law as a total system rests both on determinate principles and on arbitrary policy choices, I do not understand that the mixture between the two is fixed. On the contrary, I understand that, if jurists and scholars treat law as arbitrary, it will become more arbitrary, and that, if they emphasize its objectivity, it will move in the direction of becoming more determinate.[3] Thus, when I observe CLS historians urging that law is simply politics, I fear that they will point the legal system as a whole toward greater arbitrariness.

At this point, Gordon accuses me of making a polemical attack on the Left, and he asks why I do not do my "polemicizing" against the Right instead. My response is that it is precisely with the Right that I am concerned. My concern is not that leftist intellectuals will obtain political power and use it to tyrannize others. My fear is that the religious right may come to power in the United States and use its power to suppress what it finds sinful. If that should happen, I want to be able to appeal to law to protect the autonomy of people who have differing visions of good and evil.

To the extent that law has a determinate content directed toward the maintenance of the status quo, the appeal will have the desired effect. But what if critical legal scholars have demonstrated that law is simply political expediency both to the liberal lawyers who would advance the appeal and to the conservative judges who would decide it-judges such as Morris Arnold, Richard Posner, Kenneth Ripple, and Ralph Winter, who continue to proclaim their adherence to the rule of law? Will the appeal to law be as likely to restrain the religious tyrants?

In my judgment, legal scholars should be striving to strengthen the capacity of law to restrain tyranny by building as much objective and determinate content into it as possible. Gordon obviously disagrees. My guess is that three underlying reasons account for his disagreement. First, he finds the status quo more objectionable than I do, and hence he is less willing to see it translated into determinate legal rules.[4] Second, Gordon may be less fearful than I of tyranny by the religious right. Third, Gordon has accepted the CLS emphasis on law as a mask for power and self-interest and thus is less confident than I am of the capacity of legal scholars to give it a more objective content.

Gordon's position is neither incoherent, irrational, nor unworthy of respect. I claim equal coherence, respectability, and rationality for my own liberal legalist position, and, in addition, make one further claim on its behalf: that it is superior to CLS as an instrument for preserving the liberal constitutional structure under which we currently live.

NOTES

1. See, e.g., 1 Michel Foucault, *The History of Sexuality* (Robert Hurley trans. 1978); Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776-1860* (1948); Herbert Storing, *What the Anti Federalists Were For* (1981); E. P. Thompson, "The Moral Economy of the English Crowd in the Eighteenth Century," 50 Past and Present 76 (1971).

2. Unlike Gordon, I do not understand my conclusion to be an attack on instrumentalist legal history. Instrumentalist work does not argue that interest is the basis of law; it assumes the importance of interest and then goes on to illustrate how particular interests affected particular rules in particular ways. For example, when Lawrence Friedman, the leading instrumentalist legal historian, analyzes prosecutions for petty crime in the late nineteenth century, the point of his analysis is not to show that these crimes were prosecuted at the behest of interest groups, but to identify what the groups were and what they had to gain from prosecution. See Lawrence M. Friedman and Robert V. Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910,* 31 1-13 (1981). It is precisely this attention to contextual detail that makes the work of Friedman and other instrumentalist historians interesting and valuable. In contrast, as Gordon himself notes, "traditional" historians with good reason usually criticize' CLS historians "for *neglecting* context."

3. One of the subtleties I have picked up from Gordon is his thesis that intellectuals should be more skeptical about their ability to influence law so fundamentally as to make it either more objective or more arbitrary. This thesis is sufficiently interesting end important to warrant further research, but until that research shows that law professors lack all such. power, it would be irresponsible to act as if what we say has no practical significance.

4. I agree with Gordon that the current maldistribution of wealth in the United States is a troubling element of the status quo. I also agree with one of his main themes that law has often been used to defend this maldistribution. It is not necessary, however, to undermine the rule of law in order to rectify the maldistribution. All that is needed is the political will, which currently is completely lacking, to impose high taxes through progressive rate structures and to use tax revenues to fund social programs that would redistribute wealth to the poor.