What Should a Law Teacher Believe?

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"In legal writing, of course, it is always said that ambiguity is to be avoided, since people's rights and duties so often arise out of language and depend upon its meanings. But every natural language is to some extent ambiguous. Unlike languages of mathematical logic, which are designed for almost no purpose but to avoid ambiguity, ordinary languages have other jobs to do. . . ."—Arthur Allen Leff*

I.

Who can forget the sequence in Ingmar Bergman's Winter Light1 (Bergman's own favorite among his films) where the distraught parishioner, played by Ingrid Thulin, seeks immediate intervention by the local priest (Gunnar Bjornstrand) to aid her husband whom she fears may commit suicide. In a stunning admission, the priest reveals to Ingrid that he does not himself feel certain of God's love or even existence and can provide her husband no assurance. The husband (Max von Sydow), whose existential panic has been touched off by reading in a newspaper that the Chinese would soon have nuclear weapons and thus it was "only a matter of time," drives a short distance out of town and kills himself with a shotgun as the frigid winter afternoon turns into night.

Is this, basically, what is happening to American legal education today, thanks to the spread of Critical Legal Studies (CLS)2 activists

2. The best discussion of the genesis and early development of Critical Legal

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throughout the few remaining tenure-track teaching posts in America's law schools? Like Bergman's priest without religion, are the CLS professors essentially "law teachers without law" who are precipitating the same, potentially suicidal, crisis of faith within the secular world of legal professionalism and systematic training in the law? Is the Harvard Law School the first victim of such self-laceration? According to a growing number of law professors on American campuses, the threat posed by CLS is not an imaginary one.

Professor Paul Carrington, Dean of the School of Law at Duke, has been one of those most concerned about CLS. In his now widely-read manifesto of the anti-CLS movement, initially delivered at the San Francisco AALS meeting in December, 1983, Carrington argues that the relation between law and politics has led some professors to lose their faith in the law. Citing the use of law against the socially powerless as one example, Carrington suggests that:

Faced with such impediments to belief in law, who can fail to have doubts about the validity of their professionalism as lawyers? Such disbelief threatens competence. More than a few lawyers lack competence because they have lost, or never acquired, the needed confidence that law matters... Moreover, there is dread in disbelief. A lawyer who succumbs to legal nihilism faces a far greater danger than mere professional incompetence. He must contemplate the dreadful reality of government by cunning and a society in which the only right is might. Such a fright can sustain belief in many that law is at least possible and must matter.  


5. Carrington, supra note 4 at 227. For an assessment of the direction in which Carrington's views were leading him prior to the publication of his critique of nihilist...
This is a dramatic analysis which can be approached from several different, equally intriguing, angles. First, from the historical perspective (to which we shall return at greater length in Part III of this article), Carrington’s comments can be usefully compared with the critique which orthodox legal scholars directed against American Legal Realism in the period at the end of the 1930’s. It is odd that the remarkable similarity between Carrington’s critique of CLS and the orthodox hostility to Legal Realism fifty years ago has gone almost entirely without comment from any quarter in the current debate.

Second, in spite of Carrington’s obvious concern over the implications (as he sees them) of the CLS critique (which he seems to designate as simply “nihilist”) he does not actually engage in a historical or empirical discussion of whether or not the critique is true. He focuses, rather, upon the intellectual and psychological effects of our thinking it is an accurate description of law and politics. Carrington is thus more concerned with the implications of our “contemplating” the spectre of “government by cunning” than with the implications of actually having to live in a society so governed.

Nor is there any evidence for the proposition that Carrington dismisses the possibility that ours is a “government of cunning.” Indeed, how could he? Many of America’s finest journalists, international legal scholars, novelists, and critical intellectuals spend much of their

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7. Carrington, supra note 4 at 227, citing Roberto Unger, one of the most controversial figures within CLS, as well as authors of some recent work published in the HARVARD LAW REVIEW. See Carrington, Paul D. Carrington to Robert W. Gordon 35 J. Legal Educ. 9, 10 (1985):

I am certainly aware that my concern is not appropriate with respect to all the persons having some sympathy or connection with CLS; it is for that reason that I tried to avoid referring to CLS as a corporate body, and chose to comment instead on Legal Nihilism, a phrase which I thought likely to claim [sic] for their banner, but which may nevertheless apply to some. [Emphasis added.]


lives systematically documenting the way that the American government operates through "cunning" or deceit. The U.S. government often relies on the rationale that within the "hardball" politics of late twentieth-century internecine competition between the Free World and the Soviet Imperium, "might" often has to take precedence over legalistic conceptions of "right" unless we genuinely wish to see the Russians ruling the Rockies.\footnote{Americas Watch Spokesperson Aryeh Neier, who} Americas Watch Spokesperson Aryeh Neier, who

...
is surely as committed as Paul Carrington to holding legal rights superior to political conflicts and is widely respected for his devotion to the "rule of law" values defended by the American Civil Liberties Union,\(^5\) is compelled to report that in today's world:

The Reagan Administration holds law, and particularly international law, in low regard, as it has demonstrated on a number of occasions, from its objection to U.S. ratification of the 1977 Protocols to the Geneva Convention to its effort to sabotage the World Court. Nowhere has this been more evident than in the way the White House has dealt with terrorism.\(^4\)

Obviously, "sabotaging the World Court" when international law might obstruct our military and economic foreign policy\(^16\) is precisely what Carrington must mean by governmental cunning and subordination of law to politics. Thus the world which frightens him, the one whose very "contemplation" Carrington warns law teachers against, is already upon us. The sort of contemplation which understandably fills the Dean of Duke's School of Law with "dread" forms part of what most Americans have to face each morning on their "toasters with pictures"\(^16\) (televisions) when they get up and make breakfast. That Carr-
rington is able to lament the critique of law's subordination to politics while avoiding acknowledgment of the critique's sad application to the way the world has rapidly become, remains one of the great mysteries of his article.

Third, there is an uncanny similarity between Carrington's plea for courage in the face of dreaded unbelief and the crisis of religious faith represented by the priest's apostasy in Bergman's *Winter Light*. It is almost as if Carrington regarded belief in law as a kind of residue of the spirit which once provided such a warm glow to the candle of religious faith — almost as if, for Carrington, the values of the rule of law are propped up (like those of religion) by nothing more substantial than a tissue-paper-thin leap into the dark and that our fragile faith in the law itself could be swept away as one cynic after another rapidly succumbs to a seemingly irresistible heresy: belief that law is a hoax. Can totalitarianism of one form or another be far behind such a collapse? "Teaching cynicism may," at any rate, argues Carrington, "and perhaps probably does, result in the learning of the skills of corruption: bribery and intimidation." What, according to Carrington, is the appropriate remedy? "[T]he nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy."

It apparently did not occur to Carrington that his suggestion some CLS professors should not be in legal education would strike a few professors at national law schools as a potential threat to academic freedom and the intellectual independence of American law teachers.

Even after the development of sharp criticism of Carrington's commentary regarding limits to what a law teacher should be allowed to believe, the Dean wrote to readers of the *Duke Law Magazine*: "I hope

18. *Id.*

The committee received an inquiry from Professor Paul Brest of the School of Law, Stanford University, concerning an article by Dean Paul Carrington of the Duke Law School dealing with the 'critical legal studies' movement in legal education. Professor Brest inquired as to the Association's position on issues of academic freedom raised by a seeming predisposition against the appointment of law professors who espouse what Dean Carrington termed 'nihilistic' views . . . We hope to produce a statement
you will agree that my words did no harm save that perhaps of uttering an unwelcome truth." Carrington's placement of the consequences of his conduct in the past (i.e., "did no harm") is not the only aspect of the Dean's judgment that is now being questioned.

II.

Before returning to a historical perspective on the relation between anti-CLS critique in the 1980's and anti-Legal Realism prior to the Second World War, it may be helpful to take a brief look at what CLS, the object of Carrington's concern, is all about.

Though the fact is not often enough acknowledged, there are at least four approaches to or versions of CLS. First, CLS has been holding national meetings for about seven years in cities such as Boston, Madison, Minneapolis, Camden, San Francisco, and Washington, D.C. In a sense, the best description of CLS is simply the values and views of all the lawyers, law students, law professors, social scientists, and other interested parties, who have come together for these national meetings and everything which has come out of that mutual association and activity. Virtually no one ever tries to talk about CLS in these terms and that is a pity.

A second version of "what CLS stands for" can be based upon the material included in "A Bibliography of Critical Legal Studies" published by the Yale Law Journal in 1984. Such a reading (and it be-

that will at least explain the difficulties in the question and will not be entirely platitudinous.


22. See, e.g., Gordon, Robert W. Gordon to Paul D. Carrington 35 J. LEGAL EDUC. 13 (1985); Finman, Critical Legal Studies, Professionalism, and Academic Freedom: Exploring the Tributaries of Carrington's River, 35 J. LEGAL EDUC. 180 (1985); and Gary Minda's article, herein at 705.
23. There is no history or even summary of these meetings in existence, to my knowledge, yet (again) Schlegel's comments are illuminating. See Schlegel, supra note 2.
comes in this approach just that, a reading of CLS) eliminates the values and perspectives of those who do not publish books or articles yet have participated in the experience (or “happening” in Edward Thompson’s reference) of CLS as a form of social praxis. Even this truncated version of CLS, however, is virtually never what writers have in mind when they refer to “what CLS says” about this or that.

Next, there are third and fourth versions of CLS which involve a paring down of the massive CLS bibliography (as of 1984) into just forty or fifty “key works” and then cataloging those between one of two categories to which I refer as CLS3 and CLS4.

CLS3 represents, more or less, legal education’s (belated) version of American left academia. Although the Accuracy in Academia estimate that there are 10,000 Marxist college and university professors in America is, I imagine, outrageously high, there are Marxist, socialist, anarchist, radical feminist or otherwise left-wing teachers and scholars in most university disciplines in the United States today. The “work” of CLS3 stands in direct relation to the scholarship produced by other American left-wing professors, particularly those in such fields as sociology, history, and political science. Premier examples of CLS3 scholars include Richard Abel at UCLA, Morton Horwitz at Harvard, and David Trubek at Wisconsin. CLS3 writing also has an important and interesting relation to the work of legal historians and sociologists not involved with CLS, such as Lawrence Friedman at Stanford, Willard Hurst at Wisconsin, and Stanley Katz at Princeton.


27. See Benjamin, supra note 20.


29. Although Abel and Trubek, for example, can be regarded as empirical sociologists, the split between “empirical” and “theoretical” work is not at all what I have in mind when distinguishing CLS3 from CLS4. The sort of work characterized here as CLS3 shares with the work of other left academicians both an empirical and a theoretical capacity.

30. For brief but representative recent examples of each author’s general approach to legal history or sociology, see Friedman, AMERICAN LEGAL HISTORY: PAST AND PRESENT, 34 J. LEGAL EDUC. 563 (1984); Hurst, Response, 1985 AM.BAR FOUND. RES. J. 138 (1985); Katz, “An Historical Perspective on Crises in Civil Liberties” OUR EN- DANGERED RIGHTS: THE ACLU REPORT ON CIVIL LIBERTIES TODAY 311 (N. Dorsen, 1986).
simplest possible way, CLS3 is engaged in the analysis of historical, political, and socio-economic causes and consequences of the operation of the American legal system, broadly understood. It is rarely, however, CLS3 research perspectives which are referred to when people (both in and out of CLS generally) talk about "the CLS argument."

CLS4, however, from closed meetings of tenured faculty to the pages of Time magazine, is precisely at the heart of things whenever CLS as a whole is supposed to be under discussion. Rejecting "evolutionary functionalist" explanations (whether of Marxian or liberal origin), CLS4 asserts that the primary (or even exclusive) importance of law derives from its "superstructural" role in society. Or if one rejects the "base/superstructure" nomenclature itself — which seems inevitably to end up artificially separating "ideas" from "forces of production" — it can be argued that what is unique about CLS4 is its emphasis upon the significance of law as a form of "ideology," as a means of providing "legitimation" for the way things already are. The law-as-ideology approach sees the mental structure of legal reasoning as a framework within which individuals come to know and understand themselves and their world.31

This conclusion by CLS4 is derived from two essential analyses, to which I refer as the critique of indeterminacy and the critique of pervasiveness. First, the critique of indeterminacy is what we normally conceive to be the cutting edge or "avant-garde moment" of American Legal Realism:32 the assertion that law is not, like the mountain, there...
but — on the contrary — law is an open-textured and infinitely "manipulable" system (at least at the level of language and the understood meanings of words) whereby virtually any judicial result can be "logically justified" on any given set of facts. Thus law cannot be explained simply in terms of reasoning from precedent or *stare decisis* or logical analysis of statutory or common law rules. Rather than constituting some sort of revolutionary philosophy, however, this critique (in and of itself) frequently amounts to little more than the argument for inclusion of "and materials" in the titles of West or Foundation casebooks published since the Second World War.

At some prestige law schools (though not, apparently, Dean Carrington's) Legal Realist skepticism has become the dominant emphasis within parts of the first-year curriculum. The degree to which a law school relies upon such an assiduous approach to teaching first-year subjects (or upon the class assignment of such supplementary texts in the first-year as Grant Gilmore's "nihilist" works) is probably one of the best indexes of where a particular school ranks in the national law school "pecking order." One way of interpreting Paul Carrington's critique of "nihilism" in law teaching would, in fact, suggest that he is mounting a challenge to the current "top ten" law schools in the United States (according to contemporary orthodoxy) and proposing alternative criteria (e.g. the absence of CLS teachers) for determining exactly which schools should be ranked at the apex of national hierarchy.

It is the second aspect of CLS4, however, referred to here as the critique of pervasiveness, which carries this version of CLS beyond Legal Realism. On the one hand, the critique of indeterminacy unlocks *how* the mechanics of liberal legalism work: results which are, in fact, politically contingent — inevitably dependent upon circumstances (and not just 'economic' ones, of course) *outside* of legal reasoning — are made to seem *above* politics (the identities of the contending parties or interests, the relative power of particular lawyers, judges, legislative lobbies, the 'larger' social tensions and conflicts of the day) and thus appear reasonably neutral. On the other hand, the critique of pervasive-

35. *Compare*, address by Duncan Kennedy to the 29th National Conference of Law Reviews (March 24, 1983).
ness unlocks why liberal legalism is important, why it is significant that
the process works the way it does: "By inducing us to believe that ex-
isting institutions and patterns of social thought are natural, rational,
or necessary, legal discourse inhibits our ability to perceive the contin-
gency of present arrangements — the extent to which they are created
and sustained by human choice." 36

Thus the how of liberal legalism's self-effacement added to its why
— its naturalization of social institutions throughout a society which
identifies itself (at least within CLS4 theory) as legitimated through
the rule of law — equals the target of CLS4 critique: the ideology of
liberal legalism and of the American legal system. As Bill Nichols sug-
gests in a different but parallel context:

All human activity that involves communication and exchange,
whether it is the economic production of an automobile or the artist-
ic production of a painting, produces meaning. The elements of
this production that represent the needs of the dominant class order
are ideological elements. We need to be able to identify these ideo-
logical elements, to discover the aspects of representation that em-
body them, to understand the place set out for us within such
processes. One crucial aspect of this place is that it proposes a way
of seeing invested with meanings that naturalize themselves as
timeless, objective, obvious. What remains hidden is the process of
representation itself, the investment of meanings as a material so-
cial process. Ideology appears to produce not itself, but the world.
It proposes obviousness, a sense of 'the way things are,' within
which our sense of place and self emerges as an equally self-evident
proposition. 37

I have quoted Nichols here at some length since his observations
seem to explicate the CLS4 critique: in the determinate or Classical38
game plan (serving the dominant order), liberal legalism presents a
world where law produces not itself but, rather, appears to produce the
world. That is what ideology, according to CLS4 (and much recent
Marxist theory, incidently) 39 is all about.

36. Note, Subjects of Bargaining Under the NLRA and the Limits of Liberal
38. See Mench, "The History of Mainstream Legal Thought" THE POLITICS
OF LAW 18 (D. Kairys, ed. 1982).
39. See, e.g., L. Althusser, "Ideology and Ideological State Apparatuses" LENIN
AND PHILOSOPHY AND OTHER ESSAYS 127 (1970). For a general discussion of legal or
I find it hard to disagree with the first component of CLS4 — the critique of indeterminacy; neither would many of the original Legal Realists in their best, most iconoclastic, moments. But I question the second component or prong of the CLS4 analysis: the critique of pervasiveness. In his essay herein, Harvard Professor Duncan Kennedy argues persuasively (it seems to me) in defense of one conception of pervasiveness. He suggests that for radical law teachers there is a severe price to pay for abandoning the “real system” or “the basic, the hard curriculum” to those who would teach these courses from a Classical or “Willistonian” perspective while “left-liberal types” gravitate toward the seemingly more “value oriented” courses such as Constitutional Law, Civil Rights and Liberties, or Poverty Law (is this course still taught?). The latter variety of “soft” course (in terms of student perception) remains important, asserts Kennedy, but it is more significant for CLS4 professors to meet the challenge of the “hard/soft model” by demonstrating systematically the parallel “indeterminacy” of “hard or ‘black letter’” courses, such as Property, Contracts, Torts, substantive Criminal Law, Corporations and Tax.

Indeed, I cannot imagine a “critique of indeterminacy” worth its salt which could not demonstrate the inherent, “across the board” ambiguity of legal language, irrespective of the particular field of law which happens to be covered by a specific case or statute. Indeterminacy is built into the law as a structure just as the unconscious is built into human mental life as a structure; these are not introduced from the “outside” (by the “Realist” law professor in the first instance, by the psychoanalyst, for example, in the second) but rather are con-


40. For extended discussion of this point of disagreement, see Chase, Toward a Legal Theory of Popular Culture, 1985 Wis. L. REV. ___ (1985).
42. Id. at 611.
stitutive of the structures in question themselves. Kennedy is right to argue that it is precisely in the universe of the apparently iron-clad, common sense/common law first-year curriculum where the Legal Realist critique must be refought, year in and year out, if it is to succeed.

But there is all the difference in the world between successfully demonstrating that indeterminacy is pervasive throughout the law school curriculum (as Kennedy does) and demonstrating that the ideological consequences of the gambit which the critique of indeterminacy seeks to reveal are pervasive throughout American social life. One cannot even try to argue, in fact, that the ideology of "liberal legalism" or of the American law school has managed to permeate the consciousness of different social classes or groups in the United States and thus has changed American politics and history, without abandoning the American law school library altogether and engaging in the kind of sociological, historical, or anthropological research which is sometimes attempted within CLS3 and is commonly the center of American left academic scholarship.

Rather than questioning the centrality of legal ideology in social history, however, CLS's conservative critics have confined themselves to an attack on the first prong or component of CLS4 analysis: the critique of indeterminacy which directly relates CLS4, as even its champions usually acknowledge, to the American Legal Realist movement. Here, then, it is useful to return to our promised sketch of the relation between anti-Legal Realism and contemporary hostility to CLS.

"What should a law-teacher believe?"

44. See Singer, supra note 33.
Current opponents of CLS often profess an at least "arm's length" appreciation of or respect for the critical analysis of law generated by American Legal Realists during the period between the two great world wars. But the comparison I wish to draw is between the current hostility to CLS and the specific opposition with which Legal Realism was confronted during the rise of totalitarian governments in the 1930's. Like so many other iconoclastic or modernist movements of this century, Legal Realism has become a great deal more acceptable to the orthodox after its initial challenge has been absorbed and/or deflected.45

Paul Carrington, in his critique of CLS, indicates that "[t]he professionalism and intellectual courage of lawyers does not require rejection of Legal Realism and its lesson that who decides also matters. What it cannot abide is the embrace of nihilism and its lesson that who decides is everything, and principle nothing but cosmetic." The distinction deployed here by Carrington to "save" Legal Realism from being subject to his critique of nihilism — the effort to distinguish between who decides matters/who decides is everything — turns out, in my view, to be a hopeless contrivance when actually applied to specific Legal Realist and CLS doctrinal analyses. Not only is it impossible to determine whether some sliding scale of percentage cosmetic reveals Jerome Frank or Karl Llewellyn or Thurman Arnold to be 96% skeptical of a particular appellate judicial rationale for a legal decision (as opposed to the presumed CLS score of full "tens" from all three judges!) but, further, simple common sense tells us that if the opinion for the court had been written by one of the dissenters instead of one of the majority (indicating the balance had shifted the other way in a particular judicial appeal) then who decided was (in a sense) "everything". To provide another example, consider the opinion of Realist-fellow traveller, Benjamin N. Cardozo, in the famous case of MacPherson v. Buick Motor Co.47 In justifying the result which he reached in MacPherson (defendant motor company liable for negligent failure to inspect for safety prior to sale), was Cardozo’s dramatic extension of

45. Of course Legal Realism has never been accepted as the general organizing theory for either mainstream legal education or legal scholarship in the United States. For a much fuller discussion, see Chase, American Legal Education Since 1885: The Case of the Missing Modern, 30 N.Y.L. SCH. L. REV. 519 (1985).
46. Carrington, supra note 4 at 227.
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"the principle of Thomas v. Winchester" nothing but cosmetic (as Carrington would have it), thus moving him into Carrington's "nihilist" category? Or was Cardozo's manipulation of the earlier legal principle only 9/10's cosmetic? Is that even a distinction worth trying to make? Is my attempt here to, perhaps, obscure the distinction between two different meanings of the word "principle" (the way Carrington meant it and the way Cardozo used it in MacPherson) itself a form of "cosmetics"? Am I therefore a "nihilist"? What, precisely, is the difference between Carrington's "nihilism" and Francis Wellman's "art of advocacy"?48 If there is no significant difference between the central argument of Legal Realism, the first prong of CLS4 critique, and the essential dynamic of an adversary judicial system, then are not all legal professionals likely to end up branded as "nihilists" within Carrington's system of thought?49

I have suggested, however, that there seems to me to be an even more fundamental argument which can be made with regard to contemporary anti-CLS posture, an argument which links it to the anti-Legal Realist critique advanced during the latter part of the 1930's. Historian Edward Purcell has written of the increasingly bitter reception Realism received as the Second World War loomed:

In the context of the late thirties the logical implications of realism, morally and politically, seemed too apparaent and too frightening. Much of its work had slighted the importance of ethical theory. Its philosophical assumptions had undermined the concept of a rationally knowable moral standard. Its apparent ethical relativism seemed to mean that no Nazi barbarity could be justly branded as an evil, while its identification of law with the actions of government officials gave even the most offensive Nazi edict the sanction of true law. Juxtaposing that logic to the actions of the totalitarian states, the critics painted realism in the most ominous and shocking colors.50

49. There is an interesting parallel between the hostility to CLS within the academy and hostility to zealous advocacy by the defense bar in criminal cases. In both instances, the targets of criticism are assailed for having gone as far as possible (within the rules) toward revealing the "open texture" of legal language and legal process. See, e.g., M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975). And in both instances, it is almost a regime of proper etiquette or inarticulate but consensual norms of decency which are allegedly transgressed.
50. Purcell, supra note 6 at 172; cf., J.P. DIGGINS, MUSSOLINI AND FASCISM: THE VIEW FROM AMERICA (1972) (a far superior historical account but which does not
Purcell’s deft presentation of the anti-Legal Realist mood which developed as the War approached is equalled only by his curious unwillingness or inability to respond to the kind of critique which was launched against the fatal vulnerability to totalitarian misuse to which Realism, according to its critics, had lent itself. Moreover, this attack upon Legal Realism is one to which I have found many contemporary law professors unable to respond other than in terms such as, “any system of ideas can be used by the wrong people,” etcetera.

Thus, to the extent that a distrust of the political implications of contemporary CLS inconclasm can be seen as analogous to the fear of Legal Realist “moral relativism” of the 1930’s, the current critics of CLS as a potentially dangerous intellectual force seem to me to have a strategic argument against CLS which may appeal to both liberal and conservative law professors.

It is also an argument which I think can be readily smashed. First, we might ask if there are any direct links between the work of the American Legal Realists and right-wing or authoritarian political developments subsequent to Realism’s impact on American law and jurisprudence. No one, to my knowledge, has argued that specific fascist or Nazi leaders during the 1930’s or 1940’s were familiar with or utilized in their political theories the work of American Legal Realists. Nor, to my knowledge, has anyone argued that, within the American political context, leaders such as President Richard Nixon or Henry Kissinger have relied upon the Realist critique of indeterminacy in law to justify their conduct in violation of law, whether we are referring to domestic espionage and neglect of civil rights and liberties, the Watergate conspiracy, the overthrow of democratically-elected leaders of foreign consider the reaction to American Legal Realism).

51. It is relatively easy to juxtapose quotations from Paul Carrington’s critique of CLS, for example, with references from 1930’s critique of Legal Realism. See, e.g., Purcell, supra note 6 at 159-160:

The forerunners — scholars such as Holmes, Pound, and John Chipman Gray — had always had their critics, but they had seemed to represent an ever-strengthening force in an old and slowly changing discipline. . . . [.] By the late thirties criticism turned into a direct frontal assault on realism as a form of skepticism, nihilism, and moral relativism that was helping to destroy American civilization.

In a sense, the transformation of CLS’s institutional reception has duplicated that of Legal Realism but in less than half the time. See A Discussion on Critical Legal Studies, supra note 3; A Symposium on Legal Culture: Legal Education and the Spirit of Contemporary American Law, 8 HARV. J. LAW & PUBLIC POLICY 225-358 (1985); Critical Legal Studies Symposium, 36 STAN. L. REV. 1-674 (1984).
countries, or the illegal bombing of Cambodia which cost thousands of human lives. Just as President Nixon probably had little familiarity with the work of Karl Llewellyn and presumably was not persuaded to authorize payment of funds to silence Watergate conspirators by certain passages in the Uniform Commercial Code (one of Realism's greatest "achievements"), President Ronald Reagan probably did not have recourse to the works of Roberto Unger or Duncan Kennedy in deciding to invade Grenada, back Central American anti-communist "contras", pull out of World Court jurisdiction, or approve Central Intelligence Agency terrorist activity.

Thus, there would appear to be, in retrospect, little direct evidence for the 1930's contention that promotion of an "indeterminacy critique" of judicial reasoning somehow led to the rise of Nazi and fascist, right-wing or neoconservative political regimes.

Second, Purcell observes that Realism's "apparent ethical relativism seemed to mean that no Nazi barbarity could be justly branded as an evil. . . ."52 Again, this seems to me an argument which can easily be defeated. Significantly, it was responded to at the time and from the left. In his great work on the rise of the Nazi social, economic, and legal system, Franz Neumann53 observed that "[i]f we agree with a recent American work that holds [wiping out the boundary between ethics and law] to be progress, then we can refute the National Socialists in political or ethical terms, not in terms of law."54

For Neumann, a socialist, the idea that one's moral, ethical, and political stance in the world could be collapsed into any sort of exclusive reliance upon legal philosophy was absurd. One could oppose fascism from the left not because it violated some particular canon of legalism but, rather, because it was fascist.55 To be sure, this

52. See supra note 55.


54. F. Neumann, supra note 53 at 153 [emphasis added]. It is amazing that this point of view seems invisible to Purcell, supra note 6, and that Purcell thus fails to frame his book in terms of why so many American law professors appear to have ridiculously overestimated the capacity of law, standing alone, to prevent the rise of fascism or anything else.

55. For arguments why one should oppose fascism, irrespective of one's personal jurisprudential preference, see, e.g., F. Neumann, supra note 53; R. Palme Dutt, Fascism and Social Revolution (1934); D. Guerin, Fascism and Big Business (1936);
circumstance may present a certain perplexity for those not on the left who, stripped of their jurisprudential position, may be without any clear answer why a capitalist should oppose fascism.56

I realize that many CLS supporters today have responded, like some Legal Realists of the past, to assertions that they are "moral relativists" or "nihilists" by arguing that, on the contrary, they have strong moral values which are not undercut in their view by recognition of the "indeterminacy critique" (prong one, it will be recalled, of CLS analysis)57 and that they hardly perceive their work as somehow making the American legal system increasingly vulnerable to right-wing or neoconservative demagogic appeals. I am sure that, in many cases, this reflects the most appropriate and honest response to the growing hostility directed toward CLS.

Yet there seems to me to be great value in following the approach of Nation magazine journalist Alex Cockburn: that is, contest the op-


56. See, e.g., J. BORKIN, supra note 55 at 139-140:

By the time the prosecution of the I.G. officials began in 1947, a new element had been added to the objections of war crimes trials. The cold war had begun. Germany, the wartime enemy, had become a sought after ally; the U.S.S.R., the former ally, was now regarded as the enemy. Congressman John E. Rankin of Mississippi declared on the floor of the House of Representatives: "What is taking place in Nuremberg, Germany, is a disgrace to the United States. Every other country now has washed its hands and withdrawn from the saturnalia of persecution. But a racial minority, two and a half years after the war closed, are in Nuremberg not only hanging German soldiers but trying German businessmen in the name of the United States."

See also L. GOLDMANN, THE PHILOSOPHY OF THE ENLIGHTENMENT 28-29 (1973):

It must be constantly stressed that the fundamental moral neutrality of the individualist approach refers only to values of content, to relations of love, hate or indifference to others. In contrast to these are the formal values already listed — freedom, equality, toleration — and the concept of justice, which, as will be seen, is closely linked with them. In history these are intimately bound up with individualism, and, so long as they can be realized without difficulty, still retain their dominant position in western capitalist society. But, just because individualism in the last resort is morally neutral, there is always the danger that in a serious crisis they may be displaced by the opposite values. National Socialism in Germany was the greatest and most frightening instance of this, but unfortunately not the only one.

57. See supra notes 31-44 and accompanying text.
position in terms of their most basic conceptions of the terrain of debate. In other words, what **exactly** is wrong with a person (including a law professor) being a **nihilist** if he or she wishes to be? Where, for example, is the evidence that even naked nihilist values lead to the rise of fascist social movements?

One way of briefly approaching this issue is to observe the way the "David Abraham affair"¹⁸ has helped sort out two basic views or positions with respect to the origins of German Nazism and, to a lesser degree, other European varieties of fascism. On the one hand, we can identify those theorists who characterize Nazi Germany as a specific form of and moment within the development of European capitalism during the first half of the twentieth-century. Summarizing Abraham's thesis itself, Richard Evans writes that:

> [T]he bourgeoisie, weakened and divided by the Weimar Republic and confronted by a strongly organized working class, was plunged into a deep crisis by the Depression. Fascism, as a result, came to power not just because of the struggle between labour and capital, nor because of any kind of equilibrium between the two, but also because of 'the inability of fragmented dominant groups to organize and unify their interests' . . . The only way for industrialists and landed estate owners to protect their social dominance in these circumstances was to join forces to bring an end to the Weimar Republic. In this way, the political system could be reshaped to remove the political impediments to class unity and destroy the obstacle that organized labour posed to the accumulation of capital.⁵⁹

On the other hand, we can identify those theorists who reject such "Marxist" or "materialist" emphasis and whose "revision" of the initial, post-War scholarly view produced a new generation (including David Abraham) of "counter-revisionist" scholars on the left. Prior to the recent outbreak of this intellectual "civil war" between revisionists (eclectic) and counter-revisionists (neo-Marxist), one of the most widely respected historians of fascism, Stanley Payne of the University of Wisconsin, seemed to come down on the side of one of David Abraham's current adversaries — at least on the issue of the role played by

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¹⁸. See, e.g., The David Abraham Case: Ten Comments From Historians, 32 RADICAL HISTORY REV. 75-96 (1985).

finance capital in the rise of Nazism: "[Henry] Turner is evidently cor-
rect that the right authoritarians, not the Nazis, were the main party of
big business, and the counter-revisionists have failed to prove that big
business 'bought' Hitler. . . ."60 Given Payne's apparent location on
the "right" or "anti-vulgar Marxist" side of this fault line running
through contemporary fascist historiography, and with specific relation
to the current hostility to the "indeterminacy critique" in legal studies
and its "nihilist" overtones, it is fascinating to record this observation
by Payne:

The Hitler regime was so bewildering in its methods and goals
that interpretation has frequently given up altogether and fallen
back on sheer negatives for understanding — the 'revolution of ni-
hilism' or the overriding motiviation of 'antimodernism'. Hitler and
his crew, however repellent, were not nihilists but held tenaciously
to firm and evil values. Nihilism is more nearly what came after
Hitler, unless sheer hedonism is considered a value rather than
the absence of values.61

One wonders if those current guardians of the integrity of Ameri-
can legal education who feel so strongly about "nihilists" on law school
faculties need to be told precisely what Payne means by nihilism, what
he means by the phrase, "what came after Hitler". What came after
Hitler, of course, was the world of Adenauer's capitalist, "hedonist",
American-sponsored "economic miracle", the desultory consumer soci-

60. S. PAYNE, FASCISM: COMPARISON AND DEFINITION 58 (1980).
61. Id. at 96 [emphasis added]. For the Italian case, see id. at 183.

[.A.] James Gregor in his The Ideology of Fascism . . . argues that
Italian Fascism developed a coherent ideology that was not the product of
nihilistic collapse but rather the consequence of specific new cultural, politi-
cal, and sociological ideas developed in western and central Europe during
the late nineteenth and early twentieth centuries.

Payne adds that:

Eugene Weber suggested that fascism was a unique and specific revo-
lutionary project in its own right, while George Mosse, the leading histo-
rian of Nazi and pre-Nazi culture, interprets fascism as a revolution of the
right with transcendental goals of its own and specific, not merely reactive
or opportunistic, cultural and ideological content.

Id. at 183-184.

How many law professors, including those who have waded into the debate over
"nihilism" in legal education, have even heard of Payne, Weber, Mosse, the wonderful
scholar Richard Hamilton, or any of the other premier American historians and soci-
ologists of Nazi or Fascist culture and society?
Anthony Chase

ety of glass shopping malls and Autobahn pictured in boring instructional films I viewed in German language classes in the 1960's (complete with grotesque muzak sound-track apparently designed to encourage us to mark down Berlin on our world shopping list). It is precisely the directionlessness of this post-War German culture which has been savaged by artists like Heinrich Böll, Peter Handke, and Rainer Werner Fassbinder, whose film, *The Marriage of Maria Braun*, like Reagan's homage to Bitburg, reveals with great clarity the true implications of Paul Carrington's misreading of the socio-economic conditions of nihilist culture.

IV.

On the first of June, 1927, as part of an exchange which included discussion of the relative merits of socialism, Mr. Justice Holmes wrote his friend and correspondent, Fabian socialist Harold J. Laski, the following:

> You put well a philosophic rather than economic difference between us. I do accept 'a rough equation between isness and oughtness,' or rather I don't know anything about oughtness except Cromwell's — a few poor gentlemen have put their lives upon it. You respect the rights of man — I don't, except those things a given crowd will fight for — which vary from religion to the price of a glass of beer. I also would fight for some things — but instead of saying that they ought to be I merely say they are part of the kind of world that I like — or should like. You put your ideals or prophecies with the slight superior smile of the man who is sure

62. See Observations on 'The Spiritual Situation of the Age' (J. Habermas, ed. 1984); and Special Issue on Heimat, 36 New German Critique (Fall 1985).

> The point of Reagan's impending trip to West Germany is to drive home a single message to the network audience: in World War II the peoples of the free world, mostly Americans, British and Germans, fought shoulder-to-shoulder against Soviet totalitarianism. Since there is no internationally recognized border in the President's mind between fantasy and fact, this is the history in which he now believes and thus it is perfectly natural for him to stand in silent appreciation over the bones of an S.S. man, foe of Bolshevism and, like the Nicaraguan contras, the moral equivalent of the Founding Fathers.
that he has the future — (I have seen it before in the past from the abolitionists to Christian Science) and it may be so. I can only say that the reasoning seems to me inadequate and if it comes to force I should put my [illegible] on the other side.65

This seems to me a classic example of modern, anti-socialist argument, directed here against the left-wing philosophy of Harold Laski, revealing a long list of powerfully skeptical notions which can be utilized in debate against a broad range of utopian political views.

What is amusing, of course, is the way that Holmes used an orthodox variety of liberal “nihilism” or “moral skepticism” against the left, whereas today, the ultimate inheritors of much of Holmes’ skepticism, the CLS teachers and scholars on the left, are criticized precisely for being what Laski was not: more skeptical about value assumptions; i.e., more “nihilistic” like the healthy, analytical liberal. In other words, as far as left-wing approaches to law and legal education in America are concerned, it seems to be a case of “heads you lose, tails I win” where the left is constantly cast as marginal, unprofessional, even unethical, for being either nihilistic or not nihilistic enough, depending upon the mood of orthodox intellectual bureaucrats, those to whom Paul Nizan referred, only a few years after Holmes’ letter to Laski, as “les Chiens de garde”.66