Marxism and Critical Legal Theory: Why Groucho?

Craig Brownlie*
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Abstract

For too long, the relationship, so clear to so few, between Marx’s perception of the evolution of the law and the perception espoused by the proponents of Critical Legal Studies has remained hidden.
The fact that [defendant] dances to a different choreographer should not be a reason to deny him, and inferentially all of us, the basic constitutional right to express our feelings whether they are about the flag-dancing or Groucho Marx.  

I. INTRODUCTION OR "MR. MARX, THE READER. READER, MR. MARX."

For too long, the relationship, so clear to so few, between Marx’s perception of the evolution of the law and the perception espoused by the proponents of Critical Legal Studies has remained hidden. (A nihil cum id if you will.) The zenith of Critical Legal Studies was reached on the radio show Flywheel, Shyster, and Flywheel. It is easy to imagine the young Crits lying in front of their radio, paging through the comics section of their local newspaper and listening to Groucho Marx and his brother, Chico, bringing anarchy to the legal profession. As the future law school professors would drift in and out of sleep, Marx’s brand of wisdom would seep into their unconscious minds only to peer out from behind their eyeballs after they became members of the Bar.

This Note will examine the obvious influence of Groucho Marx on

* The author winters in Cleveland at Case Western Reserve University, while spending his summers on the rolling hills of Pittsburgh. He gratefully acknowledges the contributions of Ken “Harpo” Brownlie, Suzanne “the Red” Breton, Jeanne “Joanne” Brownlie, Professor Kathryn “Louise” Mercer and all the folks down at Pep’s Place for Plants, Pest, Plumbing, and All Your Plastic Needs for their assistance in the preparation of this Note.

2. In Black’s. Yes, you should have taken Latin.
3. NBC radio broadcast 1932-35.
Duncan Kennedy, Robert Gordon and their brethren as demonstrated by their explications of the extreme legal realism originally put forward by the greater Marx, Groucho.

II. PRECIOUS LITTLE CRITIC HISTORY

The Critic, as they came to call themselves, or the Critters, as they shall be called in this Note, developed a wholly unorthodox legal philosophy. The kernel of inspiration behind the Critters popped into existence in the 1960's at Yale Law School during a Marx Brothers Film Festival. The cinema was unable to provide the proper size screen. Consequently, the picture bled over onto the walls. Almost as one, students and faculty in attendance realized the narrowness with which they had been approaching the law. Apparently, most of them mulled about on the sidewalk outside the theater complaining about the projectionist, the Socratic method of teaching, the lack of projectors or Goebbers, and recent Supreme Court decisions, in that order. A few of the more vocal members of the audience proposed a series of gatherings where a solution could be found to these various woes.

At their first meeting in a secret and unknown location in New Haven (3093 Walnut Street # 5), this collection of great legal minds debated several proposals for a guru. After ruling out Plato, Jesus Christ, Clarence Darrow, Oliver Wendell Holmes, and Stan Laurel, the Critters agreed on Groucho Marx. Various subsequent gatherings were held at all sorts of people's homes as close to Kennedy's place as possible, since he had no car.


5. Although "buthism" is not politically correct, the term is in juxtaposition to Marx Brothers. The author will probably avoid "buthism," "guro," and "hoppy-lasted ween-woos" in future writings (at least, those which he wishes to see published).

6. Some have mistakenly edited Karl, who never once made a film. Moreover, Karl was known to collaborate with people who were not his brothers (ask Fred Englez). For a discussion of Karl's work, see Symposium, Marxism and the Law, 23 COLUM. J. TRANS. RAY'S L. 217 (1985).

7. The Critters have apparently relinquished Jesus Christ to those who expose law and economics. The Roman Catholic felt differently about Christ's sense of law and order. See Richard Delgado & John Kilgore, God and Gomedar: Politics and Conflict in the Heavenly Family, 6 CRIME. COMMENTARY 7 (1989). Delgado and Kilgore's article was a masterpiece. A history of their efforts. This is the sort of footnote the editor wanted.

8. If you doubt the validity of this version of the founding of the Critters, then see G. Edward White, From Realism to Critical Legal Studies: A Transcendental Intellectual History 46 SW. L. REV. 819 (1986) and Are Critics Really Necessary? Barrister Interview With Duncan Kennedy, MUNICH, FALL 1987, at 11.


10. Had in some sense of authors: See Old Pyleed, Carol's Lack of Honor or Fashion

11. Prefaced herewith in its present form.

12. See STAN. L. REV. 1 (1984). The Critters carefully avoided references to their brethren in full. They complained to the more common refrain, that Stanford Professor Mark G. Kelman slipped in a manner to the sky. In so doing, Professor Kelman quoted from 5049 sentences and 7500 footnotes, all beginning with a "we" as a way of striking the reader as being the most common references. Unfortunately, the editor did not act the same for you.
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7. The Critters have apparently relinquished Jesus Christ to those who espouse law and economics. The Romans doubtless felt differently about Christ's sense of law and order. See Richard Delgado & John Kidwell, God and Gadamer: Politics and Conflict in the Heavenly Family, 6 CONST. COMMENTARY 7 (1989). Delgado and Kidwell's article was a blasphemy. I hope it is a blast for you. This is just the sort of footnote the editor warned me about. Unfortunately, the editor did not do the same for you.


10. Had no sense of humor: See OZ Flywheel, Cardozo's Lack of Humor or Fashion Sense in the Garment Worker's Case (forthcoming manuscript).

11. Preferred burlesque in its purest form.

what result the publication had on Stanford's reputation. Of course, recognition meant the Critters were right all along and they proceeded to appear in every publication available to them. The response was swift and brutal. Marxists were banned from tenured faculty posts in numbers that made one long for the open-mindedness of the 1950's. Tons of "Groucho Marx" masks were burned in the street in front of the University of Chicago Law School which left a grotesque plastic mass that some 1Ls swore resembled Harpo's profile when the sun hit it just right. Splinter groups emerged, most notably the feminist off-shoot, called the Dumontians. The Dumontians claimed as their motto: "an association that bans women is not the kind women should want to join . . . ." Other groups included purists who felt that railing against the system was a pointless exercise and insisted on total silence.

Yes, the Critical Legal Theorists continued and prospered by developing ever-changing means of infiltrating the legal system. During the dry years, sly references to the "incomparable Groucho" found their way into Critter articles. In one article, a list of "noted legal authors" included "Holmes, Brandeis, Cardozo, Hand, Jackson, and Groucho Marx." The secret eyebrow wiggle and special walk allowed the Critters to acknowledge each other without creating problems for themselves. They would attend Marx Brothers revivals separately, but sit near each other, laughing softly. Now, the Critters have been reborn and are out in the open more than ever. Their ideas are taught and discussed in law schools across the country. Frequent showings of Marx Brothers films provide constant inspiration and an unending line of disciples. Currently, Critical Legal Studies is a full-blown movement. Once a slight drizzle, the Critters have become an acceptable part of legal weather just as Marx was accepted by Hollywood once he showed he could make a dollar.

14. See the cast list from almost any Marx Brothers film.
16. Harpists, but you know that. We won't discuss the extremists who wear funny hats and talk with an unidentifiable accent.
19. THE COCONUTS (Paramount 1929) ("Why-a no chicken?").
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III. MARX'S IDEOLOGICAL CONTENT: LEGAL RULES AND REASONING OR A PREPONDERANCE OF WISDOM

Just what do the Critters believe, you may be asking yourself. Of course you may be asking yourself how you read so far into this Note or why there ain't no sun up in the sky. Some have claimed that the Critters are primarily concerned with the false belief that things are the way they are because that is the way those particular things should be. For example, Groucho Marx walks into a room because he belongs there, not because any other factor led him to make a choice to be in that room. If you have seen the state room scene in A Night at the Opera, then you realize the injustice in all this and you can see why the Critters feel the way they do (cramped and a little seasick).

Others maintain that modern legal reasoning justifies rules of society which make oppressive outcomes appear inevitable, logical, and inherently fair. Basically, if you want to get the idea from here, society dictates you take the viaduct. You can't swim and you can't take a bridge and, most of all, you can't take a chicken. This has become known as the Why-a-duck syndrome.19

Section III will analyze the movement's debt to Marx by examining those of his contributions which are sine qua non. This will be brief.

Marx was a brilliant legal tactician. He dissected a witness with the care of a pathologist. Maybe you would like to consider Marx's approach to the examination of a witness in a case of high crimes against the state of Fredonia. On the other hand, maybe you would not, but you have read this far.

Groucho: Chicolini, give me a number from one to ten.
Witness: Eleven.
Groucho: Right.
Witness: Now I ask you one. What is it has a trunk, but no key, weighs 2,000 pounds, and lives in the circus?
Groucho: That's irrelevant.

Published by NSUWorks (Paramount 1929) ("Why-a no chicken").
Witness: An elephant! Hey, that's the answer! There's a whole lot of elephants in the circus.20

The clarity and tenaciousness of the questioning is enough to make a trial attorney's heart skip a beat. The Critters have pointed to this very transcription time and time again to show how a few non sequiturs can really tighten up the courtroom.

Marx did not limit himself to mere trial work. His work in contracts has remained a model for hundreds of attorneys.

Groucho: "The party of the first part shall be known in this contract as the party of the first part."

Chico: Well, it sounds a little better this time.

Groucho: Well, it grows on you. Would you like to hear it once more?

Chico: Just the first part.

Groucho: What do you mean, the . . . the party of the first part?

Chico: No, the first part of the party of the first part.

Groucho: All right, it says the, uh, "the first part of the party of the first part shall be known in this contract as the first part of the party of the party of the first part shall be known in this contract . . . . Look, why should we quarrel about a thing like this, we'll take it right out, eh?

Chico: Yeah, ha, it's-a too long, anyhow! Now, what do we got left?

Groucho: Well, I got about a foot and a half. Now it says, uh, "the party of the second part shall be known in this contract as the party of the second part."

Chico: Well, I don't know about that . . . .

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Groucho: Now what's the matter?

Chico: I no like-a the second party, either.

Groucho: Well, you shoulda come to the first party, we didn't get home till around four in the morning. I was blind for three days!21

Joe Adamson, who should be a Critter, has dissected this remarkable contractual analysis.

Groucho and Chico grow increasingly aware of the contract's inadequacies, until, finally, clause by clause, they reduce it to shreds and tatters like the logic that produced it and wipe it off the face of the earth. Chico insists on coming up with aesthetic critiques of the prosaic verbiage ("Hey, look, why can't-a the first part of the second party be the second part of the first party? Then you got something.") It's this idea that you can treat a formal agreement with any kind of individualized response that finally kills the whole deal. If there's one thing you're not supposed to concern yourself about in the reading of a contract, it's whether or not you enjoy the sound of the words. There wouldn't be any contracts left if people went around worrying about that.22

Critters may cherish Marx most for his commentaries on the practice of law itself. In a friendly exchange of letters with Attorney Joseph N. Welch, Marx inquired about the operation of Welch's legal office. Here we can see Marx predicting a wide variety of issues which would ultimately only be dealt with in the Model Rules of Professional Conduct.

I was a little frightened when I read the imposing list of lawyers on your letterhead. There are at least forty. Over the years I have been sued by groups of attorneys on most of the minor charges—rape, larceny, embezzlement and parking in front of a fireplug—but none of the legal documents received at my residence ever had more than four names on it.

22. JOE ADAMSON III, GROUCHO, HARPO, CHICO AND SOMETHING ZEPPO: A CELEBRATION OF THE MARX BROTHERS 288 (1973). That last sentence should keep corporate attorneys awake nights. If that doesn't work, maybe we could try phoning them around two in the morning.

https://nsuworks.nova.edu/nlr/vol17/iss2/33

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Chico: Well, I don’t know about that . . . .

20. DUCK SOUP (Paramount 1933).
How do you all get along at the office? Do you trust each other? Or does each one have a separate safe for his money? Isn't there some danger that you and one of your many partners could both be in a courtroom representing opposing clients, and not be aware of it until you faced each other before the judge? Do you have one community storage room for your briefcases—does each one sit on his own case?

Some day, if I ever get to Boston, I would like to come in and gaze upon this vast array of legal talent at work—or even at play.25

Most of all though, Critics remember the Marx who was concerned with the employment of still-wet-behind-the-ears lawyers as in-house counsel by motion picture studios.

It wouldn't surprise me at all to discover that the heads of your legal department are unaware of this absurd dispute, for I am acquainted with many of them and they are fine fellows with curly black hair, double-breasted suits and a love of their fellow man that out-Saroyan Saroyan.

I have a hunch that this attempt to prevent us from using the title ["Casablanca"] is the brainchild of some ferret-faced shyster, serving a brief apprenticeship in your legal department. I know the type well—hot out of law school, hungry for success and too ambitious to follow the natural laws of promotion. This bar sinister probably needed your attorneys, most of whom are nice fellows with curly black hair, double-breasted suits, etc., into attempting to enjoin us.26

This quote unerringly predicted Critter concern with hierarchies in law schools and law firms.

Above all, it was Marx's honesty which is the flame that flickers in the hearts of Critics. He clearly felt that the truth was a viable strategy for an attorney, when all else failed.

Groucho: Your honor, I demand a habeas corpus.

23. THE GROUCHO LETTERS: LETTERS FROM AND TO GROUCHO MARX 301-02 (1967).
24. Id. at 16. The dichotomy between those "with curly black hair, double-breasted suits and a love of their fellow man that out-Saroyan Saroyan" and those lawyers who are "ferret-faced shyster[s]" foretells the divisive fight over critical legal theory. (You decide whether the Critics or the other guys are Saroyan or look like ferrets.) This quote has been widely misinterpreted to explain the penchant for hair dye and hugging common among the Critics. These qualities may just be the result of excessive spare time.

26. Marx, himself, wound up in court on a few occasions. Normally, he allowed his attorneys to speak for him. For no reason, other than that I found the case, it is worth noting that Marx was once sued for libel. On his show, You Bet Your Life, Marx said, "I once managed a prize-fighter, Canvassack Cohen. I brought him out here, he got knocked out, and I made him walk back to Cleveland." Retired boxer Sam Cohen took offense. The Court held that Cohen was a public figure and Marx could say what he wanted about him, even if he wasn't talking about him. See Cohen v. Marx, 94 Cal. App. 2d 704 (Cal. Ct. App. 1949).
How do you all get along at the office? Do you trust each other? Or does each one have a separate safe for his money? Isn't there some danger that you and one of your many partners could both be in a courtroom representing opposing clients, and not be aware of it until you faced each other before the judge? Do you have one community storage room for your briefcases—or does each one sit on his own case? Some day, if I ever get to Boston, I would like to come in and gaze upon this vast array of legal talent at work—or even at play.23

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IV. CRITTERS' USE OF MARX OR I SPENT A WEEK ON LEXIS ONE NIGHT

Ultimately, Marx's greatness must be judged by the pervasiveness of his philosophy. The Three Stooges have failed to inspire legal brilliance outside of Oklahoma and they are doomed never to have a journal note of their own. ("Woo! Woo! Woo!" "Owwo!") However, Marx's renown has spread beyond mere Critter circles.

Marx has successfully infiltrated the legal profession as the Critters have been able to find gainful employment. Use of his wisdom has proliferated at a rate comparable only to the national debt. To the amazement of all concerned, Marx has found his way into innumerable opinions as can be observed by even the novice explorer of LEXIS.25 Obviously, the Critters have allowed his influence to show through in their work. For example, the Critter cheer clearly displays the Marx touch. "If we are not part of dissolution, we're part of the problem."26

Perhaps Marx's greatest contribution bearing appropriate credit is the Groucho Marx theory of language significance which proposes that if the law contains the secret words in the magic order, then it must mean one

23. THE GROUCHO LETTERS: LETTERS FROM AND TO GROUCHO MARX 301-02 (1967).
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particular thing.\textsuperscript{28} Basically, the law means what it means because those in the know have learned the code. This has proven invaluable to Critics who have contested parking tickets. For cases evaluating malpractice, Marx has been invaluable in establishing precedent (or at least dicta).

[When . . . the [State Medical] Board isolates and accepts a physician's testimony . . . the Board's reliance on the isolated bit of testimony is reminiscent of nothing so much as the old Groucho Marx program in which Groucho would say to the contestant: "Say the magic word and the duck will come down and you'll win a hundred dollars."\textsuperscript{29}]

In the arena of torts, Justice Sims offered his version of a Marx Brothers film which would result if plaintiff's argument that hosts should be responsible for their guests' smoking was upheld by his Court.

Groucho arranges with Mrs. Dillingham to have the brothers employed as smoker-watchers at her party. At a pre-party meeting where Groucho announces the job, Chico is incredulous that anyone would hire the brothers for this purpose but Groucho assures him the deal is "legit" because, 'Some judge ordered it.' At the party, each Marx brother, dressed in a tuxedo, is stationed by a large potted palm. The party dissolves into turmoil when Harpo insists upon touting his horn at guests who believes are smoking recklessly.\textsuperscript{30}

When privacy is an issue, the Court relies on Marx's classic rule. "This case arises because plaintiff, to paraphrase Groucho Marx, wouldn't belong to any video club that would have him as a member."\textsuperscript{31}


\textsuperscript{29} City of Santa Ana v. Workers' Compensation Appeals Bd., 128 Cal. App. 3d 212, 222 (Cal. Ct. App. 1982). This may, in fact, be a corollary of the Groucho Marx theory of language significance.

\textsuperscript{30} Biles v. Richter, 206 Cal. App. 3d 325, 332 (Cal. Ct. App. 1988). Needless to say, the film was never made. Apparently another fine screen-writer was lost to the judiciary. (S.D.N.Y. 1980) (using a Marx Brothers' routine to illustrate a point about national emergency legislation); see also In re Universal Money Order, 470 F. Supp. 869 n.5 (S.D.N.Y. 1977) (using the same routine written by the same judge to make a different point).


\textsuperscript{32} Webster v. Farmer, 514 N.Y.S.2d 185 (City Ct. 1987). Uniquely, the Court felt that the change of Small Claims Court into something similar to a television game show was a bad idea. Marx was ahead of his time, predicting the basis for many modern legal decisions (i.e., "magic words"). See almost any case trying to interpret the meaning of "rulemaking" (S.D.N.Y. 1988) (using a Marx Brothers' routine to illustrate a point about national emergency legislation); see also In re Universal Money Order, 470 F. Supp. 869 n.5 (S.D.N.Y. 1977) (using the same routine written by the same judge to make a different point).

\textsuperscript{33} Hines v. State, 646 S.W.2d 469, 471 (Tex. Ct. App. 1982). The Court does not indicate whether the guns, the diamonds, or the 'Groucho' mask is more incriminating. This could be interpreted as an insult to gun fanciers and jewelers.

\textsuperscript{34} Daniel H. Bemon, The You Bet Metaphorical Reconstructuralist School, 37 J. LEGAL EDUC. 210, 210 (1987).

\textsuperscript{35} You and I both wish I had a cite for support.
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Even civil procedure falls under Marx's broad lens. "Is Small Claims Court to become something akin to the old Groucho Marx show wherein the contestant must say the 'magic words', in order to reveal their reward?\textsuperscript{32}

A backlash has occurred. "[T]he testimony concerning possession of guns, diamonds, and a "Groucho Marx" face mask was introduced . . . indicating that the State desired to portray the appellant as a felon. Most of the backlash though has come from disenfranchised journal writers. "When I read truly hardcore CLS tracts . . . I usually conclude . . . that the author is only pulling my chain."\textsuperscript{33}

No definitive evidence exists that the Czien's brand of Marxism has swept the chambers of the U.S. Supreme Court. However, it is believed that Justice Scalia does a wonderful version of Whatever It Is, I'm Against It from HORSEFEATHERS.\textsuperscript{34}

\textbf{V. In Summary}

\textbf{You take great legal thought where you can find it.}


\textsuperscript{29} City of Santa Ana v. Westmore's Compensation Appeals Bd., 128 Cal. App. 3d 212, 227 (Cal. Ct. App. 1982). This may, in fact, be a corollary to the Groucho Marx theory of language significance.

\textsuperscript{30} Allen v. Righter, 206 Cal. App. 3d 255, 332 (Cal. Ct. App. 1988). Needless to say, the film was never made. Apparently another fine-screenwriter was lost to the judiciary. S.D.N.Y., (1969) (using a Marx Brothers' routine to illustrate a point about national emergency legislation); see also In re Universal Money Order, 470 F. Supp. 849 (S.D.N.Y. 1977) (using the same routine written by the same judge to make a different point).


\textsuperscript{32} Webster v. Farmer, 514 N.Y.S.2d 165 (City Ct. 1987). Uniquely, the Court felt that the change of Small Claims Court into something similar to a television game show was a "novel legal decision" (i.e., "magic words"). See also supra note 31. See also S. 2 § 1, 5 U.S.C. § 501 and "adjudication" under Administrative Procedures Act, ch. 5, § 1, 5 U.S.C. § 501 (1966).

\textsuperscript{33} Harris v. State, 866 S.W.2d 469, 471 (Tex. App. 1993). The Court does not indicate whether the guns, the diamonds, or the "Groucho" mask is more incriminating. This could be interpreted as an issue to gun fanciers and jewelers.

\textsuperscript{34} Published at the request of H. Brownson, The You See Metaphysical Reconstructionist School, 37 J. Litigation, 3245, 3257 (1987).

\textsuperscript{35} U.S. 103 S. Ct. 2588 (1983).