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CLS Stands for Critical Legal Studies, If Anyone Remembers

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CLS STANDS FOR CRITICAL LEGAL STUDIES, IF ANYONE REMEMBERS

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INTRODUCTION

Critical Legal Studies ("CLS"),[1] which started as a Left movement within legal academia,[2] has undergone so many

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[1] For a guide to CLS see generally MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); David L. Gregory, *A Guide to Critical Legal Studies, by Mark Kelman*, 1987 DUKE L.J. 1138 (1987) (book review). *See also* Jonathan Turley, *Roberto Unger's Politics: A Work in Constructive Social Theory: Introduction: The Hitchhiker's Guide to CLS, Unger, and Deep Thought*, 81 NW. U. L. REV. 593, 594 (1987) ("At its most basic level, the CLS movement challenges society to consider some ultimate questions about the validity of its own institutions and to reconsider some past 'ultimate answers' upon which those institutions are based."); Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987). For a comprehensive bibliography of CLS's works, see Duncan Kennedy and Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984). *See also* ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE (1990); J.M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133 (1991) (reviewing ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE (1990).

[2] *See* Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 561 n.1, 564 (1983) (describing the two main tendencies in the CLS movement, defining Kennedy as belonging to the first non-Marxist one and placing CLS "within the tradition of leftist tendencies in modern legal thought

changes, that one may liken it to products of pop culture, such as the television cartoon show, *South Park*.[3] *South Park* features a character named Kenny, totally unlike any other cartoon hero, tragic or otherwise. Like Kenny, who is an outsider and who speaks a language unintelligible to all except, astonishingly, his classmates, CLS no longer seems to possess a voice comprehensible to anyone outside its own small circle. Kenny, unlike all other cartoon figures, dies in every episode.[4] Significantly, often Kenny's death has been self-inflicted—though not necessarily intentional—when, for instance, he ignores warnings of imminent danger. Like Kenny, CLS has suffered many often self-inflicted injuries. Like *South Park*, generally, CLS is certainly colorful, but often little more than that and, as in the cartoon, except for the certainty of Kenny's death and later resurrection, there seems more flash than substance in its existence. We are left to guess whether CLS will prove to be as resilient after apparent death, as Kenny.

It is this author's hope, however, that just as Kenny found his post-mortem voice and purpose in *South Park: Bigger, Longer, & Uncut*,[5] CLS also might rediscover its own. To do so may well

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and practice"). There are commentators who prefer "political location" instead of "intellectual movement." *See* Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1528 n.53 (1991) (also describing CLS as postmodernist rather than leftist). *See also* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION {FIN DE SIECLE} 9 (1997) [hereinafter, A CRITIQUE OF ADJUDICATION] ("CLS has existed . . . in four quite distinct modes. First, there was once a 'movement' called cls; there still exists a cls 'school' and a 'theory of law' called cls; and there is from time to time a media 'factoid' called cls").

[3] *South Park* is a half-hour television cartoon show that airs on the Comedy Central network, channel 45 in New York City. In 1999, the cartoon was turned into a movie. SOUTH PARK: BIGGER, LONGER, & UNCUT (Paramount Pictures 1999). *See* Stuart Klawans, *Bewitched. Summer Celluloid Meltdown*, NATION, Sept. 6, 1999, at 36 (providing a short and comprehensive review of the movie).

[4] Kenny's many deaths is the show's running gag. The climax of every episode, in fact, arrives when one of his friends cries out, "The Bastards! They killed Kenny!" with more certain though strangely comic predictability than the Road Runner going over the inevitable cliff.

[5] In the *South Park* movie version, Kenny found his ultimately comprehensible voice under the extremely difficult circumstances of his death (of course, in the milieu of the *South Park* story line, this was as certain—and undisturbing—as the sunset following the sunrise).

require some new—actually, of course, old—critical theories of law, such as those that view legal systems as a product of the societies they purport to govern,[6] and that those theories will not be rejected *ab initio* as before. Duncan Kennedy's[7] work shows, though it eventually rejected the notion of law as pure superstructure, that CLS had understood early on the relation, in general, between economic base and legal systems and, in particular, that between social structures and distribution of rights.[8] In many ways, Duncan Kennedy's infamous 1983 "little red book," *Legal Education and the Reproduction of Hierarchy: A Polemic Against*

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[6] Karl Marx, *Preface to a Contribution to the Critique of Political Economy*, *in* THE MARX-ENGELS READER 1, 4 (Robert C. Tucker ed., 2d ed. 1978).

[7] Professor of law at Harvard Law School, Kennedy was one of the founders of the Conference on Critical Legal Studies. Kennedy's, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71 (1970) may have marked the pre-beginning of the movement. *See* Gordon A. Christenson, *Special Event: Celebrating a Centennial: A Proud Past, A Promising Future: Looking Back "In Pursuit of the Art of Law,"* 45 AM. U. L. REV. 1015, 1920 n.16 (1996).

[8] *Compare* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (asserting that "the 'freedom' of individualism is negative, alienated, and arbitrary. . . . We can achieve real freedom only collectively, through group self-determination," which "implies the use of force against the individual.") *with* DUNCAN KENNEDY, SEXY DRESSING, ETC. (1993) [hereinafter SEXY DRESSING] (continuing to discuss the economics of human relations, e.g., those implied in erotic heterosexual abuse) *or with* KENNEDY, A CRITIQUE OF ADJUDICATION, *supra* note 2 (strictly focusing on a postmodernist critique of judicial decision making). *See also* J. Paul Oetken, Note, *Form and Substance in Critical Legal Studies*, 100 YALE L.J. 2209, 2209-10 (1991) (discussing Kennedy's influence on CLS). *See also* Donald Galloway, *Nothing if Not Critical: A Review of* A Critique of Adjudication {fin de siecle} *by Duncan Kennedy*, 35 ALBERTA L. REV. 273, 273 (1997) (book review):

> In many respects, Duncan Kennedy is the Holden Caulfield of the legal academy. . . . Like J.D. Salinger's protagonist, Kennedy reveals a deep alienation and loss of faith in social institutions which translates into an antipathy towards 'phonies,' [and] expresses disdain, if not contempt, for the denials, duplicity and bad faith that he finds when he examines the rhetoric and actions of those who have assumed traditional roles in the social institutions with which he is most familiar—in particular, appellate judges, legal educators, lawyers and legal philosophers.

the System,[9] captured the essence of CLS and appears to have contained the seeds of its future. This is why it, and its inspiring author, serve as a reference point for much of this Article. The *Polemic* encouraged the legal community to "[r]esist!" and to avoid or at least to postpone becoming innocent ideological instruments[10] employed and exploited for the illegitimate reproduction of hierarchy.[11] At more or less the same time, Kennedy offered this work in a considerably altered shape, smaller size, and under a different title, *Legal Education as Training for Hierarchy*,[12] being but a chapter in a larger work and whose polemical content and theory of distribution of rights is startling for its complete absence. It is importantly, however, the version still in print. If the 1983 pamphlet version contained Marxist observations, only to reject its methods,[13] the shortened[14] Chapter Edition eschews any reference to its Marxist counterpart,[15] thus capturing in its own evolution the development of the larger CLS movement of which it is a signal part.[16] Nevertheless, no doubt due to the stylistic

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[9] DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (1983) [hereinafter POLEMIC].

[10] KENNEDY, POLEMIC, *supra* note 9, at ii.

[11] KENNEDY, POLEMIC, *supra* note 9, at 36.

[12] *Legal Education as Training for Hierarchy*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 54, (David Kairys ed. 3d ed. 1998) [hereinafter *Legal Education as Training for Hierarchy* or "Chapter Edition"].

[13] *See generally* JEAN-PAUL SARTRE, SEARCH FOR A METHOD (1963) (Hazel E. Barnes trans.) (analyzing such a method); Jason E. Whitehead, *From Criticism to Critique: Preserving the Radical Potential of Critical Legal Studies through a Reexamination of Frankfurt School of Critical Theory*, 26 FLA. ST. U. L. REV. 701, 721-31 (1999).

[14] Kennedy implies that the two works, except for their different sizes, are the same, noting at the end of the Chapter Edition that the pamphlet rendition is simply its "enlarged" counterpart. *Kennedy, Legal Education as Training for Hierarchy*, *supra* note 12, at 75.

[15] Kennedy, *Legal Education as Training for Hierarchy*, *supra* note 12, at 54.

[16] The peak of CLS scholarship seems to be 1982-83. *See, e.g.*, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 1st ed. 1982) (perceived at that time as CLS's "manifesto," the book opened with Kairys' virulent attack on law as a tool for maintaining the social status quo and contained writings by the most prominent CLS proponents, such as Elizabeth

force and charm of the author's personality and background, even the Chapter Edition still seems radical and purposeful while inflated with what is now, at the turn of the century, an all-too-familiar quasi-generalized leftist emptiness.

As what appears to be the prime example of the crits'[17] struggle with their Marxist roots, this Article focuses on Duncan Kennedy's infamous *Polemic*, which manifests both the climax and the downfall of CLS. Kennedy has an extraordinary sense of social injustice which, unfortunately, he does not employ to seek solutions. His refusal, for example, to adopt a clear and unique position as observed by Peter Gabel[18] may have sent a message of weakness to followers who decided, in response, to separate and focus on concrete action, rather than on a definably indeterminate indeterminism.

Thus, this Article is an excursion through CLS from its start as an exhilarating legal movement, a product of the post-Vietnam War era, and the counterpart of the European leftist renaissance that sprang Venus-like from DeGaulle's resignation, through the

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Mensch, Duncan Kennedy, and Morton Horwitz). As the introduction to the third edition states, "[t]his book, in all three editions, is an attempt to develop a progressive, critical analysis of current trends, decisions, and legal reasoning and of the operation and social role of the law in contemporary American society." DAVID KAIRYS, *Introduction*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 16 (David Kairys ed., 3d ed. 1998). *See also* William E. Forbath, *Taking Lefts Seriously*, 92 YALE L.J. 1041 (1983) (reviewing THE POLITICS OF LAW, 1st ed., *supra*); Sanford Levinson, *Escaping Liberalism: Easier Said than Done*, 96 HARV. L. REV. 1466 (1983) (reviewing THE POLITICS OF LAW, 1st ed., *supra*); Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 561-63 (1983), *reprinted in* ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986) (summarizing the movement's mission of undermining "the central ideas of modern legal thought," objectivism and formalism and stating that law is "the expression of a particular vision of society"). *See also* Joseph Isenbergh, *Why Law?*, 54 U. Chi. L. Rev. 1117 (1987) (reviewing ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986)).

[17] The label "crits" is applied commonly to CLS scholars. *See* Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 615 (1989).

[18] *See generally* Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984).

deplorable splintering of CLS which caused fem-crits and race crits[19] to more or less renounce the movement, to its present center-Left stance from which it simultaneously embraces and distances itself from Marxism. The salvation for CLS can only be achieved by abandoning its almost cartoon-like popular hype in favor of an authentic leftism. Karl Marx, whether "vulgar"[20] in his explicit economic concepts or not, was, as Herbert Marcuse noted,[21] a brilliant scholar. Despite the crits' constant efforts to distance themselves from Marxism and its social criticism, the extent to which CLS remains a legitimate legal movement is because it embraced an essentially Marxist criticism of illegitimate social power.[22]

This Article suggests first, that because CLS was so obsessed with rejecting liberalism's claim to objective analysis, it lamentably

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[19] Gary Minda, *Neil Gotanda and the Critical Legal Studies Movement*, 4 ASIAN L.J. 7, 15 (1997) ("Subgroups splintering off from CLS emerged, the most important being the Fem-Crits and the Critical Race Scholars.").

> [While the Fem-Crits keep] reminding us about the central importance of gender in framing our analysis of law[,] African-Americans, in turn, brought to the surface the importance of race consciousness in framing how the law dealt with race issues. The affinity between CLS and the legal feminist and critical race theory movements arose from the fact that these movements shared an 'outsider status' defined by the personal observation on what it was like to be 'outsider.'

Id. at 9.

[20] *See* Duncan Kennedy, *Antonio Gramsci and the Legal System*, ALSA F., Winter 1982 (1982) [hereinafter *Gramsci and the Legal System*] (applying Gramsci's theory to legal studies and embracing with apparent relief a "Marxist" Gramsci who rejected the "vulgar" dichotomy of base and superstructure). Briefly, the base or basis describes the mode of production in a certain type of society, e.g, feudalism, and, as such, determines the superstructure, which functions as the legitimizing ideology that, of course, includes religion, institutions, the State, law, and art. *See* Marx, *supra* note 6, at 5.

[21] HERBERT MARCUSE, ONE DIMENSIONAL MAN (1966).

[22] *See* Tushnet, *supra* note 2, at 1518 n.16 (assessing that CLS, as a political place, offers a "common opposition to a system of illegitimate hierarchy"). For a summary of Marxist criticism of illegitimate social power, see KARL MARX, THE COMMUNIST MANIFESTO (1848). *See also* Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* 150 (William Rehg trans., MIT Press 1996) (addressing the illegitimate interventions of social power).

minimized and even trivialized conservative theories and their perpetuation of the status quo. Second, this misplaced preoccupation caused CLS to lose its adherents, strength and legacy. Ultimately, this Article argues that acknowledging the missed opportunities and openly embracing its Marxist roots may be CLS' only chance to overcome its present crisis.

I. CLS: FROM FOUNDATION TO CURRENT CRISIS

A. CLS at the Beginning

Despite the enormous social transformations of the 1960s, the dominant theory of law remained unchanged, and, with what must have been increasing difficulty, continued to present law as neutral and above, or at least autonomous of, politics.[23] CLS was born out of frustration with, and in an effort to expose, the contradictions and incoherence of both liberal and conservative legal theories.[24] According to what is surely CLS's original claim, the

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[23] *See* Richard Davies Parker, *The Past of Constitutional Theory—and Its Future*, 42 OHIO ST. L.J. 223, 257 (1981) (criticizing the legal theories of the 1950s for de-emphasizing the politicization of law); Gary Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J.L. REFORM 561, 569 (1988) (criticizing modern legal theories for picturing law as neutral and for their insistence that institutions could settle matters about the inconsistencies of law and politics); Tushnet, *supra* note 2, at 1529-30.

[24] Some commentators stated that "critical legal studies is grounded in part in legal realism," explaining the spring of "well defined pro-active jurisprudence in critical legal studies, feminist jurisprudence, and critical race theory" as caused in part by Rawls' theory of justice, and his invention of the "veil of ignorance," which shows the law as a product of power. Gerald P. Moran, *A Radical Theory of Jurisprudence: The "Decisionmaker" as the Source of Law—The Ohio Supreme Court's Adoption of the Spendthrift Trust Doctrine as a Model*, 30 AKRON L. REV. 393, 412 & n.69 (1997) (citing JOHN RAWLS, A THEORY OF JUSTICE (1971)). Other commentators stated that CLS "arose, at least in part, as an attack" on the Chicago school of law and economics. *See, e.g.*, Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner*, 36 AM. BUS. L.J. 193, 194 (1998). *See also* MARK KELMAN, *supra* note 1, at 114 (1987) ("Since a fair number of CLS writers attacked Law and Economics writing, either in detail or in passing, CLS was often viewed by outsiders unfamiliar with the range of CLS as predominantly an

discourses of both conservative and liberal theories concealed and legitimized unacceptable hierarchies of "social power."[25] Thus, originally, CLS offered a philosophical structure to those who sought a critical position of the social (legal) system in order to rectify social injustice.[26] The critical thrust of CLS was that "legal scholarship can be a kind of transformative political action,"[27] and thus CLS, its literature, and its conferences, initially focused on action and social change.[28] To its merit, then, CLS's critical position has never been an end in itself but, instead, as a style of legal discourse focused on the organization of American society.

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anti-Law and Economics group."). For a description of the "literal" beginning of CLS see Tushnet, *supra* note 2, at 1525.

[25] Alan Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. L. STUDIES 1, 4-7 (1986) (stating that CLS' criticism of legal liberalism was caused by the apparent rationality of the latter's discourse, which concealed social power). *See also* James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 688 (1985) (claiming that critical legal scholarship theories "share at least a certain assumption about the politics of reason: the social power of apparently rational discourse"). The force and focus of the earliest CLS pieces almost uniformly highlighted this claim. *See, e.g.*, Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 370-75 (1982-1983). For a more recent analysis of this issue see Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853, 909-66 (1992).

[26] CLS addressed not mere injustice, nor legal injustice, nor a technical variety of that, like a misconstrued search for the Framer's "original intention," but social injustice in its large and popular, as well as popularly-understood form, such as that which Sheila, the student protester, sings about in the ballad, "Easy to be Hard" in the musical, *Hair*. GALT MACDERMOT, *Easy to Be Hard, in* HAIR (1968).

[27] David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 591 (1984).

[28] Albert P. Cardarelli & Stephen C. Hicks, *Criminologyradicalism in Law and Criminology: A Retrospective View of Critical Legal Studies and Radical Criminology*, 84 J. CRIM. L. & CRIMINOLOGY 502, 516-17 (1993) (stating that CLS' mission was to attack "formalism" and "objectivism" in legal education and to show its shallowness regarding politics and ideology); ROBERTO M. UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 371 (1987) (arguing that law is one of the basic "structures" used by a faction to hold the majority "hostage to [that] faction").

On the other hand, CLS often seemed to confuse the two, attacking legal "formalism"[29] and "objectivism"[30] all the while encouraging the instrumental use of legal practice and legal doctrine to advance leftist aims.[31] By placing a belief in indeterminacy squarely at the center of judicial rhetoric,[32] CLS challenged the importance of the vindication of rights, especially constitutional rights.[33] CLS emphasized "the legal system's deviations from rules" and from that concluded, quite correctly,

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[29] Unger, *supra* note 2, at 564 ("What I mean by formalism in this context is a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary.").

[30] Unger, *supra* note 2, at 565 ("By objectivism I mean the belief that the authoritative legal materials—the system of statutes, cases, and accepted legal ideas—embody and sustain a defensible scheme of human association.").

[31] Trubek, *supra* note 27, at 591-94.

[32] About the indeterminacy thesis—the ambiguity of law due to the inherent ambiguity of language—and the ideology thesis, see Boyle, *supra* note 25, at 685; Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1766-76 (1976) [hereinafter *Form and Substance*]; Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211-19, 354-60 (1979) [hereinafter *Blackstone's Commentaries*]; Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Law*, 58 S. CAL. L. REV. 683 (1985); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 810-18 (1983); Whitehead, *supra* note 13, 705-21; Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

[33] Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CALIF. L. REV. 893, 903 (1994) ("Despite some sympathy with Critical Legal Studies, [Critical Race Theory] scholars rejected the CLS 'rights critique' because it ignored the importance of legal rights to racial minorities."); Tushnet, *supra* note 2, at 1520 (stating that "some feminist and minority scholars who share the cls political location have disagreed with some formulations of the indeterminacy thesis, and in particular with the use of that thesis to challenge the importance of the vindication of rights, especially constitutional rights").

that this "demonstrates a crisis of liberalism."[34] As a result, perhaps, CLS focused too much on language[35] and too little on substance.[36]

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[34] James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 775 n.6 (1995) (citing Kennedy, *Form and Substance*, *supra* note 32; Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973)).

[35] For examples of CLS rhetoric, see Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 298 (1985); Michael H. Davis, *Critical Jurisprudence: An Essay on the Legal Theory of Robert Burt's Taking Care of Strangers*, 1981 WIS. L. REV. 419, 423 (stating that legal concepts "focus attention on a very few and arguably irrelevant artificial details"); David Fraser & Alan Freeman, *What's Hockey Got to Do With it, Anyway? Comparative Canadian-American Perspectives on Constitutional Law and Rights*, 36 BUFFALO L. REV. 259 (1987); Alan D. Freeman & John H. Schlegel, *Sex, Power and Silliness: An Essay on Ackerman's Reconstructing American Law*, 6 CARDOZO L. REV. 847, 848 (1985); Gabel & Kennedy, *supra* note 18, 1; Allan C. Hutchinson, *Indiana Dworkin and Law's Empire* (Book Review), 96 YALE L.J. 637, 637 (1987); Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 245 (1984); Allan C. Hutchinson, *Part of an Essay on Power and Interpretation*, 60 N.Y.U. L. REV. 850, 859-60, 886 n.225 (1985); Mark Kelman, *Trashing*, 36 Stan. L. Rev. 293, 322 (1984); David Kennedy, *Spring Break*, 63 TEX. L. REV. 1377, 1385 (1985); Duncan Kennedy, *Cost-Reduction Theory as Legitimation*, 90 YALE L.J. 1275, 1282 (1981); William Nelson, *An Exchange on Critical Legal Studies Between Robert W. Gordon and William Nelson*, 6 LAW & HIST. REV. 139 (1988); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1037 (1980); Tushnet, *The Dialectics of Legal History*, 57 TEX. L. REV. 1295, 1305 (1979) (Book Review); Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1369 n.18 (1984).

[36] *See, e.g.*, George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 690 (1998) ("The lack of coherent political objectives in the CLS program induced many groups such as feminists and critical race theorists to spin off with their own particularist programs for social justice."). For a different opinion see MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977) (claiming the crits' most substantial achievement was their exposé of legal formalism as a disguise for the political and distributive functions of law); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) (stating that CLS uses history to criticize the social status quo); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. IN L. & SOC. 3 (1980) (surveying American legal thought and arguing that it should expose the social power structure).

At the same time, however, there were CLS adherents and scholars who kept their focus on social change as a means of achieving social justice.[37] Roberto Unger, perhaps the leading voice for societal transformation in the critical school, attempted to "transform legal doctrine into one more arena for continuing the fight over the right and possible forms of social life."[38] He viewed that transformation as taking place through an "internal development," in which the ideal conflicts of law are exploited to transform the actual law bit by bit, first changing the law, then revising ideal conceptions in light of that change, and then working for more change.[39] Overall, with all its self-imposed limits, CLS ended up having a measurable impact on legal education[40] or at least on post-modern schools of jurisprudence.[41] In the process,

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[37] According to Roberto Unger:

> Two main tendencies can be distinguished in the critical legal studies movement. One tendency sees past or contemporary doctrine as the expression of a particular vision of society while emphasizing the contradictory and manipulable character of doctrinal argument. Its immediate antecedents lie in antiformalist legal theories and structuralist approaches to cultural history.

Unger, *supra* note 2, at 561 n.1 (citing Kennedy, *Blackstone's Commentaries*, *supra* note 32; Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981)).

> Another tendency grows out of the social theories of Marx and Weber and the mode of social and historical analysis that combines functionalist methods with radical aims. Its point of departure has been the thesis that law and legal doctrine reflect, confirm, and reshape the social divisions and hierarchies inherent in a type or stage of social organization such as capitalism.

Unger, *supra* note 2, at 561 n.1 (citing Horwitz, *supra* note 36; David M. Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW & SOC'Y REV. 527 (1977).

[38] Unger, *supra* note 2, at 579.

[39] Unger, *supra* note 2, at 580; *see also* Eric A. Bilsky, *Metaphysical and Ethical Skepticism in Legal Theory*, 75 DENV. U. L. REV. 187 (1997).

[40] For example, David Kairys underscores that CLS was critical in exposing the indeterminate nature of law. KAIRYS, *supra* note 16, at 4.

[41] At least some commentators agree that CLS is a part of postmodern jurisprudence. *See* Ostas, *supra* note 24, at 208.

however, it gave birth to division instead of unity among its cadre,[42] rendering it impossible to act as the phalanx of anything but its own internal disputes. Therefore, while CLS could never have been the cosmetic nihilism suggested by one of its best known critics, Dean Carrington of Duke University,[43] it has not produced many meaningful results either. Perhaps, its apparently debilitating crisis of identity was caused by the unrelentingly hostile criticism it weathered both from outside and inside its own ranks.

Whatever the cause, it seems that CLS has stopped short of answering its own questions about the law's lack of neutrality or about its failure to function with any kind of reason or logic. David Kairys has observed this general preference for "debating other issues" instead of answering the above questions or even of acknowledging the fact that law functions to legitimate existing social and power relations.[44]

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[42] For example, critical race theorists became a "newly-organized splinter group" separating from CLS because their core belief was that "race was the real cause of disadvantage in society, and [not the] critical legal studies movement['s] debunking of liberalism." Jeffrey J. Pyle, *Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promises of Liberalism*, 40 B.C. L. REV. 787, 799 (1999). Also, "[m]any early feminist legal critiques grew out of, paralleled, or overlapped the interventions of [CLS]." Banu Ramachandran, *Re-Reading Difference: Feminist Critiques of the Law School Classroom and the Problem with Speaking from Experience*, 98 COLUM. L. REV. 1757, 1765 (1998).

[43] Dean Carrington has argued that CLS, like other schools of thought based on what he sees as "nihilism," is irrelevant to the proper mission of law schools. *See* Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) (stating that "professionalism and intellectual courage of lawyers . . . cannot abide . . . the embrace of nihilism and its lesson that who decides is everything, and principle nothing but cosmetic").

[44] KAIRYS, *supra* note 40, at 6. Kairys explained that shift in the debate by noting that:

> If law is not determinate or neutral or a function of reason and logic rather than values and politics, government by law reduces to government by lawyers, and there is little justification for the broad-scale displacement of democracy. The extraordinary role of law in our society and culture is hard to justify once the idealized model is recognized as mythic.

KAIRYS, *supra* note 40, at 6.

B. CLS and Its Self-imposed Crisis

The present crisis that CLS faces may be the logical result of CLS's limited focus on liberalism as a false ideology, instead of on conservatism, and its apparent shift of focus toward more modest goals, such as legal education in itself. In the mid 1980s, even a non-crit (to put it mildly), Clark Byse, was able to credit CLS with influencing legal education.[45] Despite its "eclectic character," Byse recognized the cohesion CLS achieved through its disenchantment with liberal legalism.[46] By the end of the century, however, it seems that, as G. Edward White had predicted fifteen years earlier, "liberalism will [have] absorb[ed] and convert[ed] Critical theory . . . [and in the end] very little will have changed . . . let alone have been transformed."[47]

CLS was born as an effort, however modest, to provide the future legal elite with the tools necessary for social change.[48] The choice, apparently, seemed to be between a radical critique—and what could this mean but something which, at least in its inspiration, shared the Marxist class analysis—or a critique involving "baby steps,"[49] which could allow continued membership in the

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[45] Clark Byce, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1081 (1986).

[46] *Id.*

[47] G. Edward White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649, 672 (1984).

[48] *See, e.g.*, Trubek, *supra* note 27, at 591 (explaining that, [w]hile Critical legal scholars seek to show relationships between the world views embedded in modern legal consciousness and domination in capitalist society, they also want to change that consciousness and those relationships"); Guyora Binder, *Beyond Criticism*, 55 U. CHI. L. REV. 888, 888-89 (1988) (addressing criticism of CLS as not sufficiently engaged and explaining that CLS scholars outlined "a theory of social change compatible with [their intellectual] commitments and a strategy for pursuing social change that could not only structure the political activity of [CLS] scholars, but could also provide a productive focus for their future teaching and research").

[49] "Baby Steps" was the title of Dr. Leo Marvin's glib pop psychology text that he tried to sell to his patient in WHAT ABOUT BOB? (Touchstone Pictures 1991). Kennedy tried to provide a pop version of "Marxism" via the same kind of "baby steps" that Dr. Marvin enlisted to provide a kind of pop version of

legal order, including the education of future lawyers, while at the same time afford the satisfaction of exposing the false claims of liberalism.

But, in large part, the issue of choosing between old Marxist theories and new post-modern ones acted as a substitute for focussing on the roles of legal philosophy and law in perpetuating the social system, a focus that had previously preoccupied CLS. As a result CLS distanced itself from Marxism,[50] and its (outdated) formal determinism,[51] and, in the process, from a general critique. Thus, it seems that CLS failed or refused to provide a coherent radical vision of social change[52] by refusing to reevaluate, and

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psychotherapy. *See infra* note 50.

[50] Kennedy himself, acknowledged that he is no "radical" in the sense he gives the term in the *Polemic*. The radical is "the person who wants to go further, right now, practically, to dismantle existing structures of hierarchy that look evil, and wants to go further, right now, practically, in confronting or subverting the forces that keep them in place." KENNEDY, POLEMIC, *supra* note 9, at 81. Kennedy reiterated his position for small-scale resistance in *Sexy Dressing*, as well as the limits of his strategy. KENNEDY, SEXY DRESSING, *supra* note 8, at 126. *See also Let's Talk About Sex, Baby!*, 107 HARV. L. REV. 745, 745-46 (1994) (book note of Kennedy's *Sexy Dressing*). He is not the only crit distancing the movement from Marxism. It should be recognized that crits often deny their Marxist heritage, frequently out of a fear of "mischaracterization":

> While it is true that a number of CLS scholars have traced their intellectual heritage to ideas associated with Marx and modern continental philosophers, it is wrong to conclude that CLS can be equated with vulgar marxism or sixties anarchism. Of course, the fact that CLS is openly a 'leftist' academic movement is partly responsible for generating a new 'politics of mischaracterization.

Minda, *supra* note 17, at 603 n.15.

[51] Duncan Kennedy, *A Symposium of Critical Legal Studies: The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 995-96 (1985) [hereinafter *Critical Legal Studies*]. *See also* Kennedy, *Gramsci and the Legal System*, *supra* note 20. (applying Gramsci's theory to legal studies and embracing with apparent relief a "Marxist" Gramsci who rejected the "vulgar" dichotomy of base and superstructure).

[52] *See* Oetken, *supra* note 8, at 1545 (questioning whether CLS provided a coherent vision of social change). For different opinions, see, e.g., Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1584 (1984) (emphasizing the role of CLS and demonstrating that the indeterminacy thesis helps to delegitimize "the apparently

then perhaps embrace, true Marxist legal discourse. This in no way resembles the rigidly narrow and somewhat de-intellectualized version of Marxism that Kennedy once trumpeted as the "unconscious exercise of powers [that] can lead eventually to the discovery of the powers."[53]

Kennedy distanced himself from Marxism by stating that while he was "not saying that capitalists don't exist, or that they don't oppress others, . . . this is only one in the list of modes of oppression, and no longer, if it ever was, the central one."[54] He also replaced the Marxist principles of base and superstructure, which he viewed as a simplistic unidirectional relation,[55] with post-modern ambiguity and eclecticism.[56] While this was definitely a departure and perhaps a new theme in his repertoire, whether it ever could have a lasting impact upon the previous goals of CLS seems to have been answered in the negative by the political as well as intellectual indolence that presently characterizes the movement. So far, the only result is an obvious and lamentable change in the direction of CLS, which is the regrettable subdividing of its "political place" into turf now variously claimed by "femcrits," critical race theorists, postmodernists, cultural radicals, and

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determinate character that rights-thinking acquires through reification"); Tushnet, *supra* note 2, at 1518 n.16 (assessing that CLS, as a political place, offers a "common opposition to a system of illegitimate hierarchy").

[53] Kennedy, *Critical Legal Studies*, *supra* note 51, at 972.

> In other words, Marx in *Capital* provides a model of how people actually exercise powers they don't know they have, of how that unconscious exercise of powers can lead eventually to the discovery of the powers, and of how the discovery of powers can make it obvious that we should exercise them consciously to achieve the goals we have.

Kennedy, *Critical Legal Studies*, *supra* note 51, at 972.

[54] KENNEDY, POLEMIC, *supra* note 9, at 86-87.

[55] KENNEDY, POLEMIC, *supra* note 9, at 86-88.

[56] KENNEDY, A CRITIQUE OF ADJUDICATION, *supra* note 2, at 1-20.

self-styled political economists,[57] mirroring Kennedy's own apparent identity crisis.

As a result of the splintering of the CLS movement, CLS has lost its voice in the legal community and now lacks a unified core position. In 1983 CLS was still challenging and questioning major issues of law and society and their relations to each other.[58] As the new century begins, this questioning has become one that examines social hierarchy and even the distribution of rights, but

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[57] In 1991 Mark Tushnet described the state of CLS as follows:

> At present . . . the political location of critical legal studies [is] occupied by certain feminists ("fem-crits"), certain theorists concerned with the role of race in law (critical race theorists), a group influenced by recent developments in literary theory (postmodernists), a group of cultural radicals, and a group that stresses the role of the economic structure in setting the conditions for legal decisions (political economists).

Tushnet, *supra* note 2, at 1517-18 & nn.10-14. Critical race theory, for example has been viewed as a response to CLS, which due to its desire to preserve the rights discourse has been described as "more sympathetic to legal liberalism than critical legal studies was." LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 177-78 (1996). *See* DERRICK BELL, RACE, RACISM AND AMERICAN LAW (3d ed. 1992) (addressing the issue of racial progress within the historic context of African Americans' demands for liberation and equality); Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992) (applying critical race theory in addressing "the black community" as a socio-economic and political space). *See also* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991) (addressing the virtues and the limits of "identity politics").

[58] As David M. Trubek noted, in the mid-1980s, CLS questioned its method and its ability to discover the true nature of social relations. Trubek, *supra* note 27, at 575-76.

> [P]eople within the CLS movement sometimes attack[ed] research that focuse[d] on attitudes, behavior, and impact as a form of 'social science mystification' that hides the true nature of social relations and the real importance of law in society. Participants in this debate seem to be arguing about method, and particularly about the value of 'empiricism' in legal studies.

Trubek, *supra* note 27, at 576.

in a far more atomized, and less generalized way.[59] Thus, while there had always been many aspects of CLS, in the 1980s, CLS had a core position, because its belief, as Joel F. Handler stated was "that there is no such thing as objective, neutral legal rules."[60] For CLS, legal rules were "socially constructed to reflect prevailing interests of power and domination, and [] the mythology of legal discourse serves to mystify and pacify the oppressed."[61]

Of course, this claim yielded dissenters. Some of them rejected CLS's methodology, preferring immediate though arguably modest results in the legal order,[62] while others went so far as to deny the

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[59] The shift in emphasis is most dramatically obvious in the increasing importance of so-called "identity politics" which, naturally, abandoned class analysis for other sources of social dysfunction. *See, e.g.*, Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997) (emphasizing the need to address class analysis within gay and lesbian legal discourse); Naomi Mezey, Book Note, *Legal Radicals in Madonna's Closet: The Influence of Identity Politics, Popular Culture, and a New Generation on Critical Legal Studies*, 46 STAN. L. REV. 1835, 1844 (1994) (doubting Kennedy's "wholehearted" embracing of identity politics while departing from class analysis in SEXY DRESSING, *supra* note 8). Mezey suggests that Kennedy's efforts are doomed and while he might try to adjust his beliefs, such changes would be unconvincing. *Id.* Mezey implies that Kennedy does not understand his own dilemma and persists in being "eclectic" and thus self destroying. *Id.* at 1846. *See generally* Frances Elisabeth Olsen, *Feminism in Central and Eastern Europe: Risks and Possibilities of American Engagement*, 106 YALE L.J. 2215 (1997) (implying that "class-based" strategies are incompatible with "gender-based" strategies and that because of what Olsen claims is the apparent failure of the former, the latter becomes, in some way, the favored strategy).

[60] Joel F. Handler, *The Legacy of* Goldberg v. Kelly: *A Twenty Year Perspective: "Constructing The Political Spectacle": Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOKLYN L. REV. 899, 959 (1990).

[61] Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 216-35 (1986). *See also* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 73-75 (1984); KELMAN, *supra* note 1, at ch. 2.

[62] *See, e.g.*, Fletcher, *supra* note 36, at 690 ("The lack of coherent political objectives in the CLS program induced many groups such as feminists and critical race theorists to spin off with their own particularist programs for social justice.").

very notion of a legal order.[63] Furthermore, while some dissenters questioned the ability of the method employed by CLS to "produce valid knowledge about law in society,"[64] others concentrated on more concrete but regrettably atomized issues involving the effect of CLS's "critique of rights" on various social groups identified by gender or race, for example, which had the effect, of prioritizing those issues over economic class.[65] Still others adopted an eclectic post-modernist attitude toward law and its social role.[66] Thus, legal scholars who identify themselves as minority or feminist scholars criticized CLS for its failure to focus on the possibility that various minorities might be empowered through civil rights activism.[67]

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[63] According to Trubek, CLS has defined itself by its "critique of legal order [by challenging] the idea that a legal order exists in any society." Trubek, *supra* note 27, at 577.

[64] Trubek says that the "method Critical scholars employ stresses the study of appellate cases and other indicia of legal doctrine, but overlooks 'empirical' evidence of the social 'impact' of law or the behavior of legal actors." Trubek, *supra* note 27, at 576.

[65] To the extent that Marxism demands a focus on economic and class issues (because of its conviction that social stratification into classes is determined by economic differences), and to the extent that what CLS identifies as the illegitimate power structure is based on class structure, any focus on what therefore necessarily become collateral issues, such as the vindication of class-derived and class-rooted rights undermines the unity of CLS as a Left movement. As Peter Gabel noted, a focus on the vindication of rights, for example, means to adopt "the very consciousness [feminist scholars] want to transform"). Gabel & Kennedy, *supra* note 18, at 26.

[66] KENNEDY, A CRITIQUE OF ADJUDICATION, *supra* note 2, at 1-20 (Duncan Kennedy himself seems to favor post-modern ambiguity and eclecticism).

[67] Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1356 (1988) (discussing the subordination of African Americans in a society that is formally dedicated to equality); Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 431 (1987) (discussing the aspect of CLS that rejects rights-based theory, particularly with respect to African Americans). *See also* Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from Movement*, 61 N.Y.U. L. REV. 589, 611-52 (1986) (discussing the dynamics of the interrelationship of rights and politics); Cornel West, *CLS and a Liberal Critic*, 97 YALE L.J. 757 (1988).

As a result of this array of dissenting and conflicting interests, CLS has been left with no cohesive voice, and it appears now as a mere witness to the powerless atomization of an emasculated radical Left discourse. This atomization may have promoted certain group solidarities, and possibly offered short term relief. But, despite CLS's influence on legal discourse, it never seemed able to attain even a partially-unified leftist discourse. This failure might be the cause of mutual estrangement among all of its "members"—or at least a failure to offer a common core—that eventually risks oblivion for the movement as a whole. In response, CLS now must rediscover its voice in the legal community, even though the old leftist habits and texts have far less luster and glitter than fashionable literary theories.

II. THE RESUSCITATION OF CLS

The *Polemic* captured the essence of CLS. Divided into nine parts and a "Utopian Proposal" for a legal curriculum, the *Polemic* addressed "the role of legal education in American social life"[68] by emphasizing its role in perpetuating legal hierarchy and consequently, the total hierarchical social and class structure.[69] As shown below, the six traits Kennedy identified as defining the social hierarchy misrepresent the fact that far more people are situated at the "bottom of the diamond," than at its top. By refusing to acknowledge that the hierarchy is pyramid-shaped, instead of diamond-shaped, Kennedy missed the fact that the bottom of the social pyramid[70] has expanded. Thus, more than ever, an all-embracing and honestly non-discriminating poverty has become the true melting pot of whites and non-whites, aliens and citizens, men and women, all together.[71] Additionally, by ignoring the role of

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[68] KENNEDY, POLEMIC, *supra* note 9, at i.

[69] KENNEDY, POLEMIC, *supra* note 9, at 85.

[70] As will be seen, a major part of this discussion concerns first, whether we live in a social pyramid or, as Kennedy insists, a social diamond and, second, what the implications of that societal structure might be.

[71] Contrary to that evidence, Kennedy nevertheless stated that "[t]hose at the very bottom of the diamond of hierarchy are few in numbers, demoralized, and functionally marginal to the totality." KENNEDY, POLEMIC, *supra* note 9, at 86.

the state as an important device in perpetuating the social hierarchy, Kennedy also missed the opportunity to expose the unique features of the state as a tool of oppression. As shown by the *Polemic*, CLS lost—or abandoned—the opportunity to elaborate the Marxist concepts of base and superstructure, and because of that, CLS may well have missed the opportunity to become a strong leftist movement—instead of an almost cartoon-like caricature of one—with an enduring legacy. It is time, and perhaps overdue, for CLS to reconsider these issues.

A. *Shortcomings of the* Polemic

The *Polemic*, a short essay privately printed and addressed mainly to American law students, purportedly invited its audience to "[r]esist the ideological training for willing service in the hierarchies of the corporate welfare state,"[72] because that training—legal education—"contributes to the reproduction of illegitimate hierarchy in the bar and in society"[73] As Robert Coles' book review of the *Polemic*[74] acknowledged, Kennedy explained the need to "resist" in opposition to the obvious trend of young initiates in the law to be willfully and gratefully "beaten into submission . . . by a system meant to indoctrinate its enrollees with the proper attitude toward contemporary corporate capitalism" in order to enhance the respect they receive from others.[75] Kennedy suggests resisting as a means to change the system leftwardly, and that is the core of the *Polemic*, at least in this author's reading of it.[76] The *Polemic*, a symbol of CLS at its radical peak,[77] (but

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[72] KENNEDY, POLEMIC, *supra* note 9, at i.

[73] KENNEDY, POLEMIC, *supra* note 9, at i.

[74] Robert Coles, *Hierarchy and Transcendence*, 97 HARV. L. REV. 1487 (1984) (reviewing KENNEDY, POLEMIC, *supra* note 9).

[75] *Id.* at 1491.

[76] However, in *A Critique of Adjudication*, Kennedy circumscribes the act of resisting the oppression to only those circumstances in which it is "worth paying," meaning avoiding losing one's job, for example. *Supra* note 2, at 376.

[77] I call this the radical peak of CLS for several reasons, all of which explain why I feel the *Polemic* itself deserves the attention it is given in this Article. First, it was around the time of the *Polemic's* publication that CLS seems to have shifted from a determined class and economic analysis to, first, one of

even then, as shown below, containing the germ of its eventual decline), takes a "piecemeal"[78] approach to social and political change. First, Kennedy jettisoned the classic social pyramid that has seemed to describe capitalism so aptly since well before Marx and Engels.[79] In an obvious battle with his Marxist instincts,[80] Kennedy describes a diamond-shaped polity, with a blurred proletariat and an unimportant state, claiming that there are more people in the middle than at the extremes.[81] He explains this social structure as one composed of cells that can and should be changed only one by one, through "baby steps,"[82] because when all the cells are changed the system will have been changed more or less automatically (I am tempted to say, magically).

The obvious problem with this view is that it reminds one more of cancer than anything else. This modest approach is more or less explained by Kennedy's disdain for grandiose theories, such as Marx's, and his own belief—or, perhaps, despair—that the Left cannot fashion a general solution that might encompass the wide

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post-modern indeterminism and, second, to one of seeming psychological personal fulfillment. Second, it is around the same time that Kennedy and Klare published their bibliography of CLS literature which raised the national profile of CLS but also seems to have ushered in the divisive individual and self-centered tracts which, while riding the coattails of CLS, also robbed it of its center. Kennedy & Klare, *supra* note 1, at 461.

[78] KENNEDY, POLEMIC, *supra* note 9, at 91.

[79] Alexander Hamilton in the 1700s, for example, was in favor of placing "'men of property' . . . close to the top of the political and social pyramid." GERALD STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 91 (1970); THE PAPERS OF ALEXANDER HAMILTON 621 (H. Syrett ed. 1962). For an interesting discourse on CLS scholars as anti-Hamiltonians, see John Batt, *American Legal Populism: A Jurisprudential and Historical Narrative, Including Reflections on Critical Legal Studies*, 22 N. KY. L. REV. 651 (1999).

[80] Apparently Kennedy is only a "disillusioned existentialist," who favors "eclecticism." *See* Galloway, *supra* note 8, at 279 (stating that seemingly, Kennedy accepts the label of "disillusioned existentialist"); KENNEDY, A CRITIQUE OF ADJUDICATION, *supra* note 2, at 17 (providing an account of judicial decision-making written from a "left wing and culturally modernist/postmodernist" point of view).

[81] KENNEDY, POLEMIC, *supra* note 11, at 85.

[82] *See supra* note 49 (discussing the notion of "baby steps" as a method for change).

mass of people who, in his view, are irretrievably atomized.[83] His claim was this: "The left should not pretend that it has a solution, especially a proposed *institutional* solution to the problem of how substantive (not formal) equality of power and reward can exist in a world where people are different from one another, irreducibly and also valuably different."[84] Although the *Polemic* recognizes the "endless attention [given] to trees at the expense of forests,"[85] it is filled with the same stark, powerful, and jarring sense of realism that Sartre observed in any number of Marx's works.[86] Despite its "baby steps," and the divisions that appeared in CLS's development within the decade following its publication, the *Polemic* remains a point of reference in American leftist legal thought.

Certainly, the *Polemic* deserves praise for its accurate "perception [of] hierarchy [as] both omnipresent and enormously important," especially in light of its author's "position in the system of class, sex, [religion,] and race (as an upper middle class white male), and [his] rank in the professional hierarchy (as a Harvard professor)."[87] Remarkably, however, while Kennedy understood and described society's disproportionate distribution of power and rights through the clear lens of Marxist tradition, his theoretical model, as shown below, rejected that tradition. Within that tradition, Kennedy clearly observed the unjust social hierarchy and directly encouraged the legal community to oppose it.[88] His theoretical model discussed below, however, treats that hierarchy gingerly and offers a remedy, which in Kennedy's own words is "not at all revolutionary."[89] His "take" on social hierarchy follows

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[83] However, Duncan Kennedy has his own project for changing the world: "My project for changing the world through artifact production is left wing and culturally modernist/postmodernist." KENNEDY, A CRITIQUE OF ADJUDICATION, *supra* note 2, at 17.

[84] KENNEDY, POLEMIC, *supra* note 9, at 92.

[85] KENNEDY, POLEMIC, *supra* note 9, at i.

[86] *See generally* SARTRE, *supra* note 13, at 3-35 (explaining the perennial topicality of Marxism).

[87] KENNEDY, POLEMIC, *supra* note 11, at 75.

[88] KENNEDY, POLEMIC, *supra* note 11, at 104.

[89] KENNEDY, POLEMIC, *supra* note 11, at 104.

from his disbelief in the extinction of capitalism.[90] But, he favors a transformation of the "system of hierarchy . . . done cell by cell, until we reach the critical point at which the interconnectedness of the system makes it possible to develop it as a whole toward a new unity."[91]

Thus, his theory is at odds with his instincts and observations. Kennedy's model of hierarchy has the following traits:

> First, the structure is diamond shaped rather than dichotomous or pyramidal, with more people in the middle than at the top or the bottom.
>
> Second, at a given level, regionalism and the division of labor, along with race and sex, create sharp cleavages in tastes, capacities, and values.
>
> Third, the whole is organized into corporate cells, each of which includes people from different strata doing different tasks; to some extent people identify with 'their' corporate cell rather than with their class position.
>
> Fourth, each of the corporate cells roughly mirrors the internal hierarchical arrangement of all the others, and of the hierarchy viewed as a totality.
>
> Fifth, every one of these internally hierarchical elements supports by analogy the legitimacy of each of the others, while at the same time contributing to the functioning of the whole through what it produces.
>
> Sixth, there are no 'primary' or 'fundamental' parts of this structure, no part that is 'material' as opposed to 'superstructural,' and every part is constituted by a complex blending of the use of threat of force with ideological cooptation.[92]

There are, of course, several problems with this analysis. Among the six traits Kennedy embraces, the first and sixth are the most immediately problematic. Viewing the social structure as a diamond, instead of as a pyramid (the first trait), Kennedy avoided

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[90] KENNEDY, POLEMIC, *supra* note 11, at 104 ("This point of view is not at all revolutionary: . . . it is certainly not based on a theory that capitalism is doomed by its own internal contradictions to succumb to the rising proletariat.").

[91] KENNEDY, POLEMIC, *supra* note 11, at 98.

[92] KENNEDY, POLEMIC, *supra* note 11, at 85.

the reality that the many at the bottom of the pyramid (or even those at and below the middle of the hypothetical diamond) have fewer rights and entitlements than those at the top. By positing a diamond-shaped society, Kennedy avoided recognition of any meaningful social differences within the legal discourse of rights and entitlements. He also rendered irrelevant the construction of a coherent legal discourse about the socio-economic roots of law. Simplistically put, if there is no significant jarringly obvious bottom to the polity, there is no reason to question what role law plays in keeping it there.

It is important to understand the stark significance of Kennedy's rejection of the social pyramid in favor of a diamond. First, in simple topographical terms it becomes clear both visually and theoretically that a pyramidal society oppresses and exploits the vast majority of its people. Second, and more dramatically, is the visual and theoretical conclusion offered by a comparison between the linear base and the literal point at the apex. Mathematically, the base of the pyramid is infinitely larger, and thus infinitely more abused, than the apex. Both of these conclusions disappear with the advent of a diamond. The lower part of the diamond is no larger than the top, of course, but more importantly the bottom is, like the apex, a point—a location with neither width nor height. No one lives there! Kennedy has fashioned a description of capitalism in which it is possible to satisfy Rawls' demand that the system be judged by how it treats "the least advantaged members of society."[93] In the diamond, the least privileged do not exist! This is, of course, an exaggeration and surely a distortion of Kennedy's intent, but his diamond, after all, is surely an even larger exaggeration and more serious distortion of how people really live in America.

The sixth trait also shows a desire to avoid a discourse of differences, at least of the classically Marxist economic kind. There are most assuredly "fundamental" parts in our society, and, as shown below, the state is not just one more "corporate cell" among many. However, what is still more telling is the fact that although the pamphlet version of the *Polemic's* theoretical model may have

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[93] JOHN RAWLS, A THEORY OF JUSTICE 75 (1971).

"homogenized" the social structure beyond recognition, there is no similar theoretical model of social hierarchy in the condensed Chapter Edition of the same work.[94] Because the Chapter Edition, including its 1998 edition, does not address the above mentioned traits, the discussion below is limited to the perceived inaccuracies of the traits as they are explained in the *Polemic*.

B. Social Pauperization and the Social Pyramid

The pyramid has often described the traditional European feudal society: A "hierarchical social and political structure with the sovereign at the apex of this conceptual pyramid," who had no "heavenly" checks circumscribing his power and was answerable to no one.[95] Ironically, despite Kennedy's insistence that the diamond, not the pyramid, characterizes our situation, the latter may more accurately describe present American society,[96] where the few individual and corporate interests at the very top have become answerable to no one.[97]

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[94] *Compare* KENNEDY, POLEMIC, *supra* note 9, *with* Kennedy, *Legal Education as Training for Hierarchy*, *in* THE POLITICS OF LAW, *supra* note 12, at 54.

[95] Melanne Andromecca Civic, *A Comparative Analysis of International and Chinese Human Rights Law—Universality Versus Cultural Relativism*, 2 BUFF. J. INT'L L. 285, 294 (1996). *See also* STORZH, *supra* note 79, at 91 (explaining Alexander Hamilton's idea of placing "men of property" at the top of the political and social pyramid).

[96] Frank Levy, *Rhetoric and Reality: Making Sense of the Income Gap Debate*, HARVARD BUS. REV. (Sept.-Oct. 1999) at 169. ("The Federal Reserve Board reports that in 1995 . . . the richest 1% of households . . . owned about a third of all net worth; the next richest 10% of households . . . owned approximately another third; and the remaining [89% of] households owned the rest."); David Cay Johnston, *Gap Between Rich and Poor Found Substantially Wider*, N.Y. TIMES, Sept. 5, 1999, at 16 (noting that the gap between the rich 1% and the bottom 50% has increased).

[97] For more contemporary accounts of pyramidal structures of social power see, e.g., David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 965 (1999) (discussing the pyramid of power regarding legislative policy making); Ronald Smothers, *A Step to End Newark's Chapter in High-Rise Public Housing*, N.Y. TIMES, Sept. 2, 1999, at B1 (discussing the negative effect of any

The present distribution of wealth and resources is such that a larger and poorer base than ever forms the bottom of the social pyramid.[98] The plight of various minorities has worsened. More African-Americans in their twenties do not have jobs, and spend time in jails.[99] In fact, one in seven adult black males has lost his voting rights as a result of jail time.[100] As one commentator notes:

> The status of being a minority, poor or handicapped is routine in America. 'Growth in real wages virtually halted in 1973, and families today spend a higher proportion of their incomes on housing, transportation, health care, higher education, and taxes. Poverty rates among young families have almost doubled since the 1960s.' And the composition of these poor families has changed too: Today, one in four children in the United States is raised by just one parent, usually a divorced or unmarried mother. Many grow up without the consistent presence of a father in their lives. One of every five children lives in a family

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tax cuts which, in the opinion of Andrew Cuomo, the Secretary of Housing and Urban Development, "again would give most of the surplus to those on the top 1 percent of the income ladder"). *See also* Stanley A. Gacek, *Revisiting the Corporatist and Contractualist Models of Labor Law Regimes: A Review of the Brazilian and American Systems*, 16 CARDOZO L. REV. 21, 47 (1994) (discussing the coherent pyramidal structure at the labor union level). Kennedy freely speaks about the pyramid-like structure of liberal and conservative ideologies, but again, he focuses on the "middle term." KENNEDY, A CRITIQUE OF ADJUDICATION, *supra* note 2, at 48 ("The crucial part of the pyramid is the middle term.").

[98] *See infra* note 101 and accompanying text (discussing the rising number of impoverished Americans). *See also* Nina Bernstein, *Poverty Rate Persists in City Despite Boom*, N.Y. TIMES, Oct. 7, 1999, at B1 (stating that, "despite the strongest economy in years, nearly one out of every four [New York City] residents had income below the Federal Government's poverty threshold last year"); Robert Pear, *Gore Pledges a Health Plan for Every Child*, N.Y. TIMES, Sept. 8, 1999, at A1 (acknowledging that the number of Americans without health coverage has increased steadily in the 1990s and today exceeds 43 million).

[99] Rodger Doyle, *Behind Bars in the U.S. and Europe*, SCI. AM., Aug. 1999, at 25 (citing Marc Bauer, THE SENTENCING PROJECT, WASHINGTON, D.C. (1997); U.S. Bureau of Justice Statistics for 1998).

[100] *Id.*

> without a minimally decent income. Many of these families are desperately poor, with incomes less than half the federal poverty level. Each year, half a million babies are born to teenage girls ill prepared to assume the responsibilities of parenthood. Most of these mothers are unmarried, many have not completed their education, and few have prospects for an economically secure future.[101]

Even a large part of the middle class of the burgeoning 1980s have lost that social status: most of them have aged out of their privileges. They (or their parents) live now on Medicaid/Medicare benefits in housing for the aged, clearly impoverished, with aging widows and widowers living worse than intact couples.[102] Their children—high school and even college graduates—also are often

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[101] Rev. Raymond C. O'Brien, *An Argument for the Inclusion of Children Without Medicare*, 33 U. OF LOUISVILLE J. OF FAM. L. 567, 575-76 (1995) (citing BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS 65, Dep't Commerce (1990). "Between 1959 and 1969, the poverty rate in the United States declined dramatically. By 1971 it had increased slightly, and then it decreased again during 1972-73, to a point when, at 11.1 percent, it was the lowest poverty rate in a 24-year period. After 1978, the poverty rate rose steadily, and in 1992, the rate was 14.5 percent, or 36.8 million persons." *Id.* (citation omitted). *See also* Guy Gugliotta, *Number of Poor Americans Rises for 3rd Year; 36.9 Million Live in Poverty and 37.4 Million Lack Health Insurance, Census Bureau Says*, WASH. POST, Oct. 5, 1993, at A6.

[102] As has been reported:

> With long-term care costs reaching toward $100,000 a year in most metropolitan areas, thousands of older people have faced poverty in paying for the care of a loved one. Others have deliberately and legally impoverished themselves by transferring or giving away modest estates to qualify for Medicaid nursing care, a program designed for the poor now being used increasingly by middle-income, working-class Americans because it's the only long-term care program the nation offers.

Saul Friedman, *Gray Matters/Long-Tern Care Demons*, NEWSDAY (N.Y.), Feb. 26, 2000, at B8.

unable to get a job perpetuating those privileges.[103] Their experience is closer to the following description:

> For most of our history, American parents have delighted in seeing their children achieve more than they did themselves. Overall, each generation has been better educated, better housed, more skilled, and more economically secure than the previous one. But for many Americans, those days are over. . . . Middle-income families report greater difficulty making ends meet. For perhaps the first time since the Great Depression, American children will no longer routinely surpass their parents' standard of living.[104]

At the top of the pyramid or diamond, of course, economic, political, and social status remain unchanged—perhaps because major corporate interests are never threatened. As Kennedy has noted, "[t]he presidential campaigns that epitomize American politics are determined by how skillfully rival candidates within the political center spend millions of dollars 'marketing' themselves, like soap powders, through intellectually empty advertising and vacuous campaign speeches designed to play a few seconds on the local television news."[105]

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[103] Rachel Astrachan, *Benefit to Aid Kin of Cabbie*, BUFFALO NEWS, July 14, 1997, at B1 (describing the plight of a college graduate who could not find work in his field and became a taxi driver to support his family); Nancy Cleeland, *Hey Dude, What Economic Boom? Poll: Young Minorities, Non-college Grads Have Most Negative Job Outlook*, NEWSDAY (N.Y.), Sept. 5, 1999, at F9 (addressing the low-paid, no-benefits jobs available to young, minority non-college graduates); Peter T. Kilborn, *Low-Wage Businesses Add to Number of Uninsured Workers*, N.Y. TIMES, May 2, 1999, at A20 (addressing the fact that under-educated workers can obtain only low-paid and no-benefits jobs).

[104] Gary B. Melton, *Children, Families, and the Courts in the Twenty-first Century*, 66 S. CAL. L. REV. 1993, 1998 n.22 (1993) (citing NAT'L COMM'N ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 8 (1991)).

[105] Duncan Kennedy, *Radical Intellectuals in American Culture and Politics, or My Talk at the Gramsci Institute*, *in* 2 RETHINKING MARXISM (1988), republished in KENNEDY, SEXY DRESSING, *supra* note 8, at 3. *See also Presidential Bidding*, NATION, Aug. 23, 1999, at 3 ("In the first six months of this year, the presidential candidates took in about $103 million, three times the amount raised at the same point four years ago."); *The Costliest Race in the World*, ECONO-

Finally, it is interesting to note that even Kennedy deleted the diamond-shaped structure from his Chapter Edition. His more recent efforts, such as *A Cultural Pluralist Case for Affirmative Action in Legal Academia*,[106] for example, address single facets of social pauperization, abstracted from any larger theoretical system, such as minorities' status and their lack of rights and powers.[107] Still, such a focus could have been the first step in a Marxist retrospective, had it not been coupled with Kennedy's suggestion that minorities' disenfranchisement be cured through promotion based on race as a "unique scholarly credential"[108] instead of through, for instance, intensive investments in truly non-discriminatory public education leading to a color-blind meritocracy. Radically revamping public education costs money, of course, while treating race alone as merit has no immediate economic effect. But why not, after all, choose a non-economic cure when the diamond denies that class and economics are the cause? While it is true that social mobility depends upon access to knowledge, Kennedy's suggestion is obviously unworkable,[109] especially in light of the former Eastern Bloc's experience; the only thing that system achieved by artificially creating intelligentsia out of people based on their social identity rather than their merit was its own destruction.[110]

MIST, July 31, 1999 at 23-24 (noting that "[n]o presidential candidate has ever raised as much as George W. Bush by this stage").

[106] 1990 DUKE L.J. 705 (reprinted in KENNEDY, SEXY DRESSING, *supra* note 8, at 34-82) (questioning the social definition of merit and whether merit can be divorced from culture).

[107] KENNEDY, SEXY DRESSING, *supra* note 8, at 34-35, 42-43, 54-55.

[108] KENNEDY, SEXY DRESSING, *supra* note 8, at 44.

[109] Kennedy's solution certainly contests Randall Kennedy's definition of "merit"—achievement based on some standard indifferent to the individual's social identity. *See* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1772 n.114 (1989).

[110] Take Ceausescu, the late Romanian dictator, for example, whose final reward as president of a country which promoted or manipulated him into high office based solely on his credentials as that of a cobbler's apprentice, was death by a firing squad.

C. *Within the Structure/Super-structure Division, the State Is Not a Mere Corporate Cell*

While the pamphlet edition of the *Polemic* stated that there were no "primary" parts of the social structure of power, and while it may be true that "the use of threat of force with ideological cooptation"[111] is felt in all social strata, the Chapter Edition[112] does not address the erroneous or the viable elements of this trait. Nothing related to the power structure is present in the Chapter Edition, which is the only version still in print and thus available in the post-1990s era. It seems as if CLS's attempt to "demystify the symbolic authority of the State" as exemplified through the trappings of the law[113] has succeeded in ways unintended. While it is true, as Kennedy pointed out in 1983, that many features and functions of the state as a variety of public corporation have been transferred to private corporations,[114] and that, for instance, people may commit less crime, not necessarily because they fear police brutality[115] but because of the social pressure to avoid trouble in order to keep their corporate jobs, the state certainly, and despite Kennedy's claims to the contrary, still remains an important and unique tool that holds the social pyramid together.[116] Both

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[111] KENNEDY, POLEMIC, *supra* note 9, at 85.

[112] Kennedy, *Legal Education as Training for Hierarchy*, *supra* note 12, at 54.

[113] *See* Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 376 (1983) (urging lawyers in dealing with the legal system to "develop a relation of genuine equality . . . with [the] client" and to reshape the way the law represents conflicts, bringing out "the true socioeconomic and political foundations of legal disputes"); Gabel & Kennedy, *supra* note 18, at 40 ("Rights analysis is a way of imagining the world. . . . One way to give it order and coherence is to imagine that it is a drama in which there is a state, and then the rights bearers, and stuff like that.").

[114] KENNEDY, POLEMIC, *supra* note 9, at 87.

[115] *See* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354 (1997) (stressing the idea that fear of criminal punishment is not as much a deterrent as expected).

[116] *See* Levy, *supra* note 96, at 164 (discussing government involvement in the market from the Carter to the Clinton administration).

domestically and internationally, the United States government continues to act (or refrains from acting) to maintain the social hierarchy. Thus, the state's use of authority to maintain and organize the current social structure of power, class, and wealth ought to be addressed by today's CLS adherents, in order to preserve their left political place.[117]

1. *The State as a Promoter of the Corporate Interest Abroad*

As only one, but a crucial example of the unique and irreplaceable role played by the state, it has successfully promoted the interests of American corporations abroad[118] under the rubric of global well-being, and of creating, legitimating, and enforcing a tax structure that cannot and does not benefit anyone but the rich[119]

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[117] Addressing the role played by the state has been and continues to be a defining line between left and right. *See e.g.*, GILLES LIPOVETSKY, L'ERE DU VIDE, 141-151 (1983) (addressing the role of the state from his and Daniel Bell's perspective).

[118] The Clinton Administration succeeded in securing Congressional implementation of two controversial agreements, the North American Free Trade Agreement ("NAFTA") and the General Agreement on Tariffs and Trade ("GATT") Uruguay Round Agreements. North American Free Trade Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993); Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994). In fact "both the Clinton and Bush administrations have been supportive of both the GATT and the NAFTA and have gone to great lengths to avoid conflicts between the terms of these agreements and their policies." Robert F. Housman, *Democratizing International Trade Decision-making*, 27 CORNELL INT'L L.J. 699, 740 (1994).

[119] For example:

> The Reagan-Bush White House cut taxes for the wealthy, theorizing that the wealthy would invest their money so that the benefits would 'trickle down' to the middle class and the poor. Federal funds available for domestic problem solving were reduced significantly. While the wealthiest Americans prospered, most families did not benefit from the decade's growth. The richest 1% of the population received 60% of the economic growth. Their average pre-tax family income swelled from $315,000 in 1977 to $560,000 in 1989. By the end of the decade, according to the *Wall Street Journal*, the 2.5 million Americans at the top of the income scale were taking in as much each year as the 100 million people at the bottom.

and the corporate interest.[120] The state may well have been joined by the corporation at the apex of the pyramid but, despite Kennedy's argument, it clearly remains an indispensable partner in the social penthouse it shares with corporate America.

United States government and state officials, in their singular roles, advanced corporate interests abroad both worldwide, through the General Agreement on Tariffs and Trade ("GATT"),[121] and regionally, through the North American Free Trade Agreement ("NAFTA").[122] And it was only in that singular role as the state

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Peter Dreier, *America's Urban Crisis: Symptoms, Causes, Solutions*, 71 N.C. L. REV. 1351, 1363 (1993). *See also* Charles O. Galvin *Tax Policy—Past, Present, and Future*, 49 SMU L. REV. 83, 88 (1995) (explaining that taxes are to protect the public interest in a democratic society); *A Favor-the-Rich Tax Plan*, N.Y. TIMES, June 11, 1997, at A24 (describing the proposed tax bill of Bill Archer from the House Committee on Taxation, which supported cuts in capital gains and inheritance taxes, as "showering the rich with benefits").

[120] As Senator Russell Feingold has said:

> Americans are becoming disenfranchised from their own democratic process; they see lobbyists, lawmakers, policy experts and pundits creating a cozy circle of influence for themselves that few, if any, ordinary citizens can hope to enter. That's why you saw legislation like a $50 billion tax break for corporate tobacco interests anonymously inserted into revenue legislation in July 1997, or $331 million added to 1998's Defense Department appropriations bill for B-2 bombers that may not work and that the Pentagon certainly doesn't want. That's why you see a whole galaxy of federal subsidies rewarding some of the wealthiest interests in our nation survive despite the continued presence of a deficit and despite repeated efforts to trim them or kill them.

Senator Russell Feingold, *The Supreme Issue: Wisconsin's Leadership in Government Reform*, 1998 WIS. L. REV. 823, 825-26.

[121] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

[122] Dec. 17, 1992, 32 I.L.M. 605 (1993). "Economic integration under the NAFTA will touch trade in services, international investment, rights of establishment, and issues of environmental, labor, immigration, travel, intellectual property, and even competition law." Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 360 (1997). *See also* Edwin S. Flores Troy, *The Development of Modern Frameworks for Patent Protection: Mexico, a Model for Reform*, TEX. INTELL. PROP. L.J. 133, 134 (1998) ("As a net exporter of ideas, it was not surprising that the United States and Canada would require their trading partners within the agreement to

that it was accomplished. For example, the Clinton administration managed the current expansion of free-trade ideologies, which ensured the protection of some of the most profitable of our commercial sectors—medicine,[123] movies,[124] and software—through the internationalization of United States patent, trademark and copyright laws—laws which, until recently, had been universally recognized as purely internal, domestic regimes.[125] Beginning with the "Ministerial Declaration on the Uruguay Round, Punta del Este," in the 1990s,[126] the United States government played a crucial role in globalizing the enforcement of so-called

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recognize and enforce the intellectual property rights of all their citizens and corporations.").

[123] Stefan Kirchanski, *Protection of U.S. Patent Rights in Developing Countries: U.S. Efforts to Enforce Pharmaceutical Patents in Thailand*, 16 LOY. L.A. INT'L & COMP. L.J. 569, 582-83, 594 n.184 (1994).

[124] Sandrine Cahn, Daniel Schimmel, *The Cultural Exception: Does it Exist in GATT and GATS Frameworks? How Does it Affect or Is it Affected by the Agreement on TRIPS?*, 15 CARDOZO ARTS & ENT. L.J. 281, 281-82 & n.7 (1997) ("U.S. films today represent eighty percent of the films distributed in European movie theaters, and over fifty-five percent of the films shown on European television networks. The U.S. audiovisual industry is the country's second largest export industry, following the aerospace industry.") *See also* ELIO DI RUPO, OUVERTURE DES TRAVAUX, IN L'EUROPE ET LES ENJEUX DU GATT, DOMAINE DE L'AUDIOVISUEL 21 (1994); FRANKLIN DEHOUSSE & FRANCOISE HAVELANGE, L'EUROPE ET LES ENJEUX DU GATT, DOMAINE DE L'AUDIOVISUEL 99 (1994).

[125] *See* Carlos A. Primo Braga, *The Economics of Intellectual Property Rights and the GATT: A View from the South*, 22 VAND. J. TRANSNAT'L L. 243 (1989) (noting "the United States [through GATT] is trying to translate its domestic provisions into international standards"). This article points out that recent developments demonstrate that the United States is "exporting" extraterritorially intellectual property law that traditionally was always thought to be a domestic, or intraterritorial matter. *Id.*

[126] *Ministerial Declaration on the Uruguay Round, Punta del Este*, reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS 19, 25 (33d Supp. 1986). For an accessible summary of that declaration and the politics behind it see, e.g., Philip H. Trezise, *The Uruguay Round High Hopes, Hard Realities, and Unfinished Business, Regulation*, Vol. 14, No. 1, (1991) (visited Apr. 30, 2000) <http://www.freetrade.org/pubs/articles/reg14n1a.html> ("Each new GATT negotiation was convened at American initiative. Few of the contracting parties were prepared to send home the negotiators from the world's largest economy with no progress to report to an unpredictable U.S. Congress.").

intellectual property rights securing international monopolies in the above mentioned and other American products[127]—a goal that had long occupied the international "free-trade" negotiating agenda[128] of GATT[129] and of those at the apex of the interna-

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[127] Marina Lao, *Federalizing Trade Secrets Law in an Information Economy*, 59 OHIO ST. L.J. 1633, 1636-37 (1998) (stating that, "NAFTA and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which arose out of the Uruguay Round of trade negotiations under [] GATT, were the first international agreements to deal with trade secrets"). TRIPS, part of the revisions to GATT, imposed stricter copyright, patent and trademark laws internationally, the effect of which, by definition, is to expand intellectual property claims across national borders that has previously prohibited all or many of these monopolies. *See* Agreement on Trade-Related Aspects of International Property, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 1197 (1994).

[128] The Clinton Administration's Trade Representative, Ambassador Mickey Kantor, stated:

> One of my principal responsibilities as USTR is to open foreign markets and break down barriers to U.S. manufactured goods, agricultural products, and services. This includes pursuing the strong protection of U.S. intellectual property, so important to our high technology industries. When all is said and done, opening foreign markets is our main objective in the Uruguay Round; it is the impetus, from our standpoint, for the North American Free Trade Agreement (NAFTA); it will be a principal focus of our efforts with respect to Japan and China, as well as in other nations around the world. . . . Consequently, we need to use every tool at our disposal—multilaterally where possible, and bilaterally where necessary—to make sure that other markets are comparably open to our own.

Michael L. Doane, *TRIPS and International Intellectual Property Protection in an Age of Advancing Technology*, 9 AM. U.J. INT'L L. & POL'Y 465, 468-469 (1994) (citing testimony of Mickey Kantor, United States Trade Representative, before the Senate Committee on Finance, Mar. 9, 1993).

[129] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994). GATT and the TRIPS Agreement were ratified as part of the Uruguay Round on December 13, 1995. 19 U.S.C. §§ 3501-3624 (Supp. I 1995). *See also Results of the Uruguay Round Negotiations: Hearings Before the Senate Comm. on Finance*, 103d Cong., 2d Sess. 6-7 (1994) (statement of Ambassador Mickey Kantor, U.S. Trade Representative (regarding the merits of the "largest, broadest trade agreement in

tional social pyramid. This clearly disfavored those less developed nations dramatically in proportion to their proximity to the bottom of the global pyramid.[130] At the same time it denied their citizens access and perhaps even rights to such basics as health care and information generally, including that most basic of international raw materials, education.[131] It would be interesting to speculate on how convincing Kennedy's thesis would be if it were globalized—that is, that the global population resembles more a diamond than a pyramid. Thus, under the guise of international "free trade," American corporate interests have thrived at the top, while labor,

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history"). *See also* GATT Secretariat, Draft Final Act Embodying the Results of the Uruguay Round of the Multilateral Trade Negotiations (1991); *U.S. Framework Proposal to GATT Concerning Intellectual Property Rights*, 4 INT'L TRADE REP. (BNA) 1371 (Nov. 4, 1987); *State Department Program Examines "GATT and Intellectual Property,"* 31 PAT. TRADEMARK & COPYRIGHT J. (BNA) 497 (Apr. 10, 1986).

[130] Anne Orford, *Locating the International: Military and Monetary Interventions After the Cold War*, 38 HARV. INT'L L.J. 443, 472-73 (1997) (addressing the TRIPS agreement's adverse effects "on poor and rural populations," particularly in the southern hemisphere by "radically limiting policy options previously available to governments"). TRIPS mandates privatization of "much of what has been understood since the nineteenth century as public—utilities, education, libraries, information, hospitals, and roads." *Id.* at 473.

[131] Commentators criticized in vain the connection between "free trade" and intellectual property as facilitating international protection of information as private property rather than as a public good. TRIPS, for example, obliges every state, including those from the Third World, to implement patent and copyright laws and to provide infrastructure to support such regulatory schemes, and protects public goods as pieces of private property, thus privatizing "much of what has been understood since the nineteenth century as public—utilities, education, libraries, information, hospitals, and roads." Orford, *supra* note 130, at 472.

the bottom of the social pyramid, suffers domestically[132] and internationally.[133]

2. *The State as a Promoter of the Domestic Corporate Interest*

Domestically, the state also operates as a protector of the corporate interest. Through a regressive tax structure,[134] the state

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[132] NAFTA, for example, caused the loss of many jobs of working class Americans.

> A study by the Economic Policy Institute (EPI), *NAFTA's Casualties: Employment Effects on Men, Women, and Minorities*, attempts to get a more precise gauge of NAFTA on particular communities of workers. In addition to the data collected on women and workers of color, EPI estimated a much larger number of job losses than the official reports issued by the Clinton administration. The model created by EPI looked at the net job impact of NAFTA rather than simply just the number of NAFTA-created jobs that the administration used. Employing this methodology, EPI determined that 'NAFTA resulted in a net job loss of 394,835 jobs in the period 1993-1997.' This number accounts for the difference between the 385,834 domestic jobs lost by NAFTA-related imports from Mexico and the 158,171 created by exports to Mexico; and the 411,481 jobs lost by NAFTA-related imports from Canada and the 244,309 created by exports to Canada. In total, domestic jobs lost as a result of NAFTA totaled 797,315. This figure was offset by only 402,480 new jobs.

Clarence Lusane, *Persisting Disparities: Globalization and the Economic Status of African Americans*, 42 HOW. L.J. 431, 444-45 (1999).

[133] *See* Orford, *supra* note 130, at 472. (noting that TRIPS and GATT have been criticized for the effects they are likely to have on poor and rural populations); CHAKRAVARTHI RAGHAVAN, RECOLONIZATION: GATT, THE URUGUAY ROUND AND THE THIRD WORLD (1990) (explaining the developing countries' needs for weak intellectual property protection in order to protect a supply of essential goods, especially in education and medicine, despite the Western industrialized countries' portrayals of this as criminal "piracy" and "counterfeiting").

[134] The tax structure in the United States is progressive in name only. Morris Berstein, *Social Security Reform and the Growth of Inequality*, 8 KAN. J.L. & PUB. POL'Y 57, 63 (1999) (stating that "among the chief causes of the growth in inequality . . . [is] an increasingly regressive tax system"); Marc Linder, *Eisenhower-Era Marxist-Confiscatory Taxation: Requiem for the Rhetoric of Rate Reduction for the Rich*, 70 TUL. L. REV. 905, 907 (1996) ("Successive Congresses since the first Reagan administration have so thoroughly subverted

threatens equality of opportunity. Basic elements of social justice, such as public schools and health care, are further jeopardized[135] by threats to cut education funds and an already limited Medicare system of national health care.[136] Kennedy's elimination of the state as a, or possibly *the*, major element in the social pyramid (or diamond) ignores the strategy of privatization and self-abnegation by which the lower portions of the pyramid are barred from access to fundamental human needs such as health care. It is surely significant that the state, through the Clinton administration,

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the legitimacy of high and progressive income taxes for the rich that an advocate runs the risk of facing the same derision that the economist and comptroller-general of the ancien regime, Turgot, icily reserved for the draft of such a tax more than two centuries ago: 'Il faut executer l'auteur, et non le projet'."); Alan Schenk, *Value Added Tax: Does This Consumption Tax Have a Place in the Federal Tax System?*, 7 VA. TAX REV. 207, 269 (1987) ("For many years, the federal tax system relied on steeply progressive individual income tax rates to implement our concept of vertical equity. However, since the early 1960s, Congress has cut the top individual tax rate from ninety-one percent to twenty-eight percent."); William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1461 (1986) ("As the Social Security payroll tax grew from a negligible portion of federal revenues in 1939 to more than one quarter of them in 1977, the tax system became less progressive. This distributional tendency has been compounded by the income tax exemption for Social Security benefits—a regressive tax expenditure estimated for 1977 at $5.1 billion."). Of course, other basic elements, such as decent housing, are threatened by tax cuts. *See* Smothers, *supra* note 97, at B1 (discussing the negative effect of any tax cuts which, in Andrew Cuomo's opinion, "again would force exclusion of the poor [and] would give most of the surplus to those on the top 1 percent of the income ladder").

[135] Dan W. Brock & Norman Daniels, *Ethical Foundations of the Clinton Administration's Proposed New Health Care System*, 271 J. AM. MED. ASS'N 1189, 1191 (1994); *The Great Tax Giveaway*, NATION, Aug. 23, 1999 (discussing the Republicans' pledge to use most of the trillions of dollars in surpluses "for a massive tax cut that is morally offensive, dishonest, corrupt and reckless," instead of addressing "long unmet needs—shor[ing] up Social Security, extend[ing] and protect[ing] Medicare, insur[ing] that every child gets a healthy start, [and] invest[ing] in the schools and teachers vital for the next generation").

[136] While the number of people without health insurance has been rising in the last decade and now exceeds 43 million, the current Republican proposal in the Senate vows a $792 billion tax-cut. Eric Schmitt, *Lott Says Veto Is Likely to Kill Tax Cut in '99*, N.Y. TIMES, Sept. 9, 1999, at A1; Pear, *supra* note 98, at A1.

promoted the private sector, while de-emphasizing the role of the state, in the provision of health care.[137] When the effort to provide a national health insurance system failed, the state essentially was admitting that health care is a private, not a public, good—that is, that private insurance was the only solution—which seemingly legitimized the failure to obtain any kind of national health plan. It is surely not the same to claim that the state is unimportant as it is to observe that the state itself claims that it is unimportant. While many health care theorists compare health care to other basic state responsibilities, such as primary and secondary education, and view them "as fundamentally important in securing equality of opportunity," the state is nevertheless engaged in disavowing its responsibilities for both health and public education.[138]

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[137] John D. Blum, *Universality, Quality & Economics: Finding a Balance in Ontario and British Columbia*, 20 AM. J. L. & MED. 203, 225-228 (1994) (addressing the differences between universal health care systems subsidized by the state for all residents, such as the Canadian system, and the "Clinton reform," which tried "to finance care in the context of the current [health insurance] system"); David T. Morris, *Cost Containment and Reproductive Autonomy: Prenatal Genetic Screening and the American Health Security Act of 1993*, 20 AM. J. L. & MED. 295, 298 (1994) ("On October 27, 1993, President Clinton formally introduced to Congress his administration's plan to provide the nation with universal health insurance coverage. If enacted into law, the Health Security Act [H.R. 3600, 103d Cong., 1st Sess. (1993)] promise[d] to restructure the delivery of health care in the United States.").

[138] Laura E. Cunningham, *National Health Insurance and the Medical Deduction*, 50 TAX L. REV. 237, 257-58 (1995). In Florida, one commentator acknowledged that "our crabbed tax system has prevented investment," for example, in "the education and health care of pre-school children, [although] this is the area where our need is so great." Talbot "Sandy" D'Alemberte, *The 1997-98 Constitution Revision Commission: Reflections and Commentary from the Commission's First Chairman*, 25 FLA. ST. U. L. REV. 19, 23 (1997). In New York, Timothy G. Kremer, the executive director of the New York State School Boards Association, believes that "it would be shortsighted to stint on preparing children to compete in a 21st century economy just to save a few nickels now on the local tax rate," and that a voucher system would not be "smart social policy when the money would come from struggling public schools that will still have to educate the vast majority of students. Those schools already face financial challenges trying to supply basics like books or heated classrooms." Timothy G. Kremer, *School Districts Didn't Steal Tax Cut*, BUFFALO NEWS, Jan.

Thus, while Kennedy's diamond asserts the contrary,[139] the state remains the singular and irreplaceable device by which the hierarchy is secured, maintaining the social pyramid through a host of domestic and international strategies, including legal rules. Surely this merits study, not denial.

CONCLUSION

Within certain limits, CLS has delivered a coherent legal discourse about social injustice and the role played by the legal community. Its limits are famously identified in Kennedy's work, especially in the various editions of the infamous little red book. But, it seems tragic and lamentable to note that CLS's self-imposed limits also caused its intellectual death—an irony that evokes the many lives and deaths of Kenny, the cartoon character who does not always understand what happens to him or why he is dead (again). CLS has now reached a point of crisis, however, at which it cannot function. It cannot attack liberal theories, as it is one of them, and it forgot how to challenge conservative ones. Thus, for CLS there is only one route out of oblivion: to become a truly leftist movement and achieve resurrection with a purpose.

1, 2000, at 3C (internal quotation marks omitted).

[139] For a crit critique of the Marxist theory of the state *see* Kennedy, *Critical Legal Studies, supra* note 51, at 993.