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Book Reviews

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Book Reviews


reviewed by Jeremy M. Miller*

Even after reading Roberto Mangabeira Unger’s most recent book, The Critical Legal Studies Movement, the genesis and purpose of that movement remain perplexing and unclear. I have come to conclude that its birth lay buried in the clouded inaccessible recesses of Professor Unger’s mind; and its purpose, unfortunately, to be mired in a simplistic “yuppie” Marxism.

Critical Legal Studies (CLS) was the brainchild of Professor Unger and other Harvard Law School professors like Duncan Kennedy. It took name and notoriety about a decade ago. For a relatively new school of thought, it has gained much press. Most of this press, however, has been due to the furor it has caused on the Harvard law faculty: the proponents of CLS have, correctly or incorrectly, been accused of purposely disrupting the venerable halls of the crimson academy. Most impressive in the brief history of this school of jurisprudence has been its ability to attract other law professors into its fold. Further, since the national press has covered the “crisis at Harvard,” CLS has become a household word.

In the Introduction, Unger lets us know the political perspective of CLS . . . it is a “leftist” movement,¹ the aim of which is to undermine “the central ideas of modern legal thought.”² An overriding belief in “formalism” and “objectivism,” according to Unger, characterizes all present legal thought. By formalism is meant the

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2. Id.
belief that law is a system of all-inclusive rules. That is, that to any given legal query, there is a clear answer in the existing set of laws. Implicit in formalism is a legal analytic method whereby the "right" answer can be logically deduced from existing law. Thus, law as such is a closed system, isolated from the other facets of human and societal existence.

Unger defines objectivism as the belief that law is "intelligible" and representative of a "moral" ordering process. Objectivism includes the beliefs in legal rules and legal institutions. To Unger, however, both the belief in formalism and the belief in objectivism of law are sham concepts. Law is instead the means by which the power elite have amassed their power to the exclusion of all others. Unger wishes to use law to "redefine the meaning of radicalism" and to take power away from the present unjust ruling class. This is, of course, a derivation of Marxism.

The jurisprudential predecessors of CLS spring from Marx, just cited, and to a lesser degree, from the early 1900's school of legal thought, American Realism. Central to Marx's thought was a belief in the arbitrary quality of law: law was the means by which one class stayed in power over another. Also central to Marxist thought was the desire to destroy the present hierarchies in society thereby to create pure "egalitarianism."

American Realism, whose proponents have included Associate Justice Oliver Wendell Holmes and Judge Jerome Frank, viewed the written law as but a small aspect of the real workings of the legal system. Law, instead of being a set of rules, was rather, simply, what or whatever the judge said it was.

Unger has completely accepted the above cited Marxist and Realist tenets and has devoted a substantial part of this short book to proving their veracity. He characterizes the jurists of the nineteenth century as apologists of the free market. That is, the system of rules they devised, particularly contract rules, was created to protect the world as it was—or specifically, to protect big business. It is this system which CLS means to destroy. According to Unger,

3. Id. at 2.
4. Id.
5. Id. at 10, 98.
6. Id. at 4.
7. Id. at 121.
10. Unger, supra note 1, at 58-80.
the system is vulnerable because there is no unifying ideal to give direction to its supposed objectivism.

However, as stated earlier, Unger is not a pure Marxist. He does not believe in a violent revolution or even in an uprising of the "afflicted masses." His method is more subtle. Since lawyers control the power structure and since what lawyers call "law" becomes law, the best way to change the system is by changing the lawyers. Unger perceives a problem with this: law school teaches a moral anesthesia and the sophist skill of being able to argue (and perhaps believe) "too well or too easily for too many conflicting solutions."

Thus, the present world of law is basically lost. However, future lawyers can be remolded. The obvious agenda of CLS is to inculcate law students not with the joys of power, but instead with the CLS system of beliefs. These beliefs include a destruction of present economic power bases, a leveling of all social hierarchies, and a Marxist renunciation of the concept of law.

Unger is willing to see his plan come to fruition in steps. Thus, he suggests the development of a set of legal concepts called "destabilization rights." These are nothing more than laws which allow the existing power bases to be attacked. He classifies equal protection and employment discrimination laws as such. To further this economic decentralization, Unger also suggests that government make large sums of money available to small business.

I have several criticisms of Professor Unger's thought. Although it is now axiomatic that law is more than a system of written rules, it is troubling that Unger perceives no worthy human values behind the rules. His dislike of values is made clear by his admission that he views law as quasi-existentialist. That is, law is not a good thing, but instead is a primarily negative concept.

Such nihilism can only undercut the worthwhile protections in our society. The freedoms of the press, of speech, of religion, and of association, and the other human guarantees of the Bill of Rights lose all force and all meaning in Unger's system. Further, the great legal values of dignity, fairness, liberty, et cetera, also have no place in his "law." I fear a CLS-based legal system because

11. Id. at 8.
12. Id. at 112-13, 118.
13. Id. at 25-27.
14. Id. at 43.
15. Id. at 35.
16. Id. at 103-04.
it seems they do not believe in even freedom of expression.\textsuperscript{17}

I hardly consider Judge Richard Posner’s \textit{Economic Analysis of Law},\textsuperscript{18} Professor Ronald Dworkin’s \textit{Taking Rights Seriously},\textsuperscript{19} or even my own view as an apology for the United States system. However, Unger has made it clear that in his view all those not with CLS are apologists for the present power structure. This kind of argument is a sophistry. Lumping together all of those who oppose you is called “heaps”\textsuperscript{20} and is \textit{per se} unsatisfactory criticism.

Posner’s economic analysis believes law should promote maximization of societal wealth by maximizing efficiency. Dworkin’s rights thesis argues that even “costly” human rights like equality are implicit and should be promoted in law. These two systems are very different—yet to Unger since they are not his system, they are the same. This kind of radicalism is intellectually silly—but becomes dangerous if naively accepted.

I am further troubled by Unger’s deprecation of the existing United States court system as being concerned with only trivialities.\textsuperscript{21} For whatever mistakes courts might make, their dealings with life, confinement, death, reputation, and large sums of personal wealth are \textit{not} trivial. This frenzied out-of-touch radicalism of Unger is perhaps best typified by his concluding paragraph, where he describes present United States law, law practitioners, and law teachers: “When we came, they were like a priesthood that had lost their faith and kept their jobs. They stood in tedious embarrassment before cold altars. But we turned away from those altars and found the mind’s opportunity in the heart’s revenge.”\textsuperscript{22} This frenzied call for change, which I would characterize as “intellectual terrorism,” is reminiscent of closing words in other radical writings.\textsuperscript{23}

\textsuperscript{17} Freedom of expression is not one of Unger's emphasized platforms. Further, the reported behavior of the CLS proponents at Harvard indicates a disrespect for this value. Finally, the world's existing Marxist countries are characterized by a lack of freedom of expression.


\textsuperscript{21} See Unger, \textit{supra} note 1, at 19-20.

\textsuperscript{22} Id. at 119.

\textsuperscript{23} Unger's words are reminiscent in tone of the following:
The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communistic revolution. The proletarians have nothing to lose but their chains. They have a world to win.
Working men of all countries, unite!
In explicable naivete, Unger has failed to cognize the history of human government. There will be no classless egalitarian society. The choice is instead between big government and Jeffersonian republicanism. Unger's system, if it ever gains proponents, will not lead to a utopia, but instead to one more form of totalitarianism.

Further, the CLS desire to destroy all hierarchies is not only untenable but also damaging. Although certain hierarchies are wrong and unfair, other hierarchies—those based on merit—are essential to worthwhile human society. The flaw of any absolute egalitarianism, and Unger's is one, is that it chokes off all liberty. Further, there is nothing wrong with respect for elders, with respect for those in honored positions, and with respect for law.

I am also troubled by Unger's hypocritical view that law is "a realm from which prophets and plain people are banned so that power may be wielded in a hush." Although Unger is partly correct in that all lawyers must make it their primary project to teach law to all United States citizens, he is hypocritical because his own writing is either purposely or negligently drafted so as to bar reading to all but those trained in the law. His linguistic obfuscations are prevalent and may fairly be called "doublespeak." For example, his vocabulary includes the following terms: "deviationist," "collective mobilization," "collective life," and "social transformation." Such can be approximately translated as revolutionary thought, revolution, communism, and evolution to communism, respectively. Moreover, the book is such difficult reading that its ideas, far more than present United States law, are what is truly in "a hush."

It is certain that corporate greed and government corruption and bureaucracy are grievous errors in the United States legal system. However, Unger's and CLS' impish ignorance of the great virtues of this system is unforgivable. In a rather dull era, I can only surmise that CLS has gained its notoriety not so much as a good idea, but instead as an interesting one. I earlier characterized its form of Marxism as "yuppie" because, like that new movement, it means to appeal not to the common person, but instead to the "go-

Marx, supra note 8, at 116.
24. See generally Unger, supra note 1, at 38.
25. Id. at 91.
26. Id. at 85.
27. Id. at 110.
28. Id. at 113.
29. Id. at 22.
go" lawyer. It has found its home in the walls of Harvard and Un-
ger admitted his basic audience to be that kind of elite law stu-
dent. I hope they listen, evaluate, and are critical . . . as he has
been critical.

reviewed by Mark D. Yochum*

The Potomac is an estuary; when the ocean rises, Chesapeake Bay backs up the Potomac and water pools by Washington. Rivers wash; estuaries slosh, back and forth. In Washington, some of the dirt always stays in the Tidal Basin. Nearby is the Watergate, hard by a foggy bottom, where the air is not always clear and the smell, not always clean. For over a decade, Watergate, the phrase, the event, the place, has been used as a symbol for what is wrong with lawyers, the sense of something rotting. For the modern hopeful student and lawyer, I recommend Ethics and the Legal Profession, edited by Davis and Elliston, for an education in the finer sense of ethics.

For many lawyers who consider themselves good, Watergate's invocation still causes chagrin. Because of it, we are lumped in jokes with sharks, thieves, and used car salesmen. Because of it, young people shun our profession because they search for honest work. While Watergate still challenges the profession, lawyers themselves grow foggy discussing their ethics. Lawyers, while adept at dealing in shadings of meaning, shift uncomfortably when there is not a case or rule, some solid verity to which to cling. The haze is a vagueness of feeling, the belief that some things are right, wrong, good, or bad but the inability to express clearly or derive logically what those things might be. This clammy doubt is not necessarily about right and good for their private selves but rather about themselves acting in that special role as lawyer, selfless servant to a client yet obliged in some fashion to serve us all. When, however, self, society, and the client present a conflicting array of judgments and objectives, the air thickens. A sense of loss leads lawyers to hallucinate harbors where there are none or to drift further away from the truth, through use of metaphor and aphorism. Another

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course had been often taken: do not discuss ethics at all; steer clear. Be detached.

The legal profession’s once placid disregard of ethics or detachment from moral or ethical issues was disturbed by the “wake of Watergate.” This nautical metaphor anchors much of the last decade’s frothings over the lawyer and his professional responsibility. The dark wave of Watergate passed through the profession, chastening us to consider the good and the right, to resolve firmly to sin no more, and to endeavor to make our brothers and new initiates likewise sinless. It is virtually impossible to find any writing in the last ten years that does not use some variant of the articulation that Watergate is the catalyst to modern ethical analysis by lawyers.

An historian of the law may in later years evaluate whether, in fact, Watergate itself generated this outpouring of ethical concern. Certainly, the altruistic may have been shocked that so many lawyers, including the President, participated in crimes, if not heinous, at least disrespectful to our law and system. But many of us knew that lawyers could be that bad; some of us thought that what they did was not so bad; further, some of us thought that the bad they did was because of the people they were, not because they were lawyers.

Davis and Elliston, in their collection of articles from a variety of sources (with discussion problems of their own added), *Ethics and the Legal Profession*, hearken to Watergate. This collection is designed for classroom use to provide counterpoint and fullness to the idea of the ethical lawyer. The educational arm of the complex legal institution of the United States, one would hope the more thoughtful branch, responded to Watergate reflexively, approaching the problem as it might remedy a perceived deficiency in competency in a substantive area of law. Using Watergate as the focusing event, the issue became what problem to the profession does it present? Why are these lawyers (high priced with the highest placed of clients in the highest positions, both client and lawyer, of public trust) not acting ethically or with trustworthiness? Two possible answers were given short shrift by legal education. First, possibly, these lawyers were bad people. If so, there is nothing that we, the educators for the profession, can do to protect against aberrant conduct; there will always be criminals and consigliori. Second, possibly, legal education and practice itself produces an atmosphere which encourages moral and ethical detachment from, at least, one’s own judgment and submission to a client oriented de-
votion. The way law is practiced, a lawyer can become corrupt if his client is corrupt. By definition, the profession must say that cannot be so. The law is good; the legal system is good. Fundamental, if not revolutionary, changes would be required in the legal system and our view of law if what are commonly thought of as the virtues of the lawyer actually compound evil.

Rather than reexamining the responses to the question of why these lawyers were bad, the legal community viewed more seriously the problem of a growing lack of confidence in the profession. Watergate produced a decline in public trust and respect in the lawyer which was the result of unethical activity brought brightly to national attention. Public trust in the profession is essential to the success of the profession’s role in society, counselor and co-trustee with the courts of the grail of justice. No one will believe our counsel; no one will believe we seek justice. Why then are the lawyers not acting with professional responsibility: because (here is the reflexive response of legal education) they do not know what ethics are; we, the law schools, will volunteer to teach them.

All ABA accredited institutions have courses now, often required, of one or more credits, titled Professional Responsibility or Ethics. Without empirical study one can but guess the content but those who have endured a post-Watergate course may find this description familiar. The course is taught by a lawyer whose principal text is a casebook and the Code of Professional Responsibility or the Model Rules. He is often adjunct to the school’s main faculty, often a litigator by trade or a jurist. The tone taken here is not to suggest the litigator or jurist should not be engaged in this task but merely to illustrate that when ethical problems are discussed they are most frequently given a litigation context. The lying witness, the guilty defendant, the meritorious but vexatious suit, pleading technical defenses to just debts, and the client who plans criminal activity are the regular stock in trade of the course. Properly, taking this view, litigators do have more facility or experience in these questions than, for example, an average academic with a Property bent or a quirk for Administrative Law. The Socratic and case study methods are often employed. There is an examination involving, in large measure, as most law school examinations do, questions asking what one can and cannot do without risk of sanction.

Further, licensing institutions, the state bar examiners, part of the legal education institution (we test what you teach; we teach what you test), often test ethics, more so now than before the wa-
tershed of Watergate. Again, the question asked is often answerable through reference in the law school manner to a code with prescriptions. My education was at Georgetown University Law Center, a fine school, which also produced John Dean. If Dean and I had had to be educated in ethics in pre-Watergate days along the lines employed above and tested accordingly (we were not so required), I am sure we both would have been licensed to practice and if grades were given, as a guess, I would say he would do better than I.

Again, without an opinion survey to study, my judgment is mere speculation but the course which I have described must lead to some decline in enthusiasm for the subject. Often taught and taken in the final days of legal education to students who may be growing bored with academic statutory analysis and cases, Professional Responsibility, taught perhaps like some slightly heightened specialized course in crimes (only this time, crimes committed by lawyers), can seem like one more area which can be easily handled if the need arises in practice. The mental state of the student may be: I know I cannot represent opposing sides; I know I cannot tell my client’s secrets; I am a good person; what else is there but dull rules on commingling trust accounts or putting an accountant on the firm’s letterhead or allowing a paralegal to go to court? Certainly, a wealth of detail exists presenting ethical problems which the student cannot imagine which, if the student is unable to perceive in practice, will cause trouble. In fact, certain situations exist where goodness or human charity, if practiced, will result in an ethical violation under our rules. For educating the young lawyer for confrontations where his simple goodness is not enough, the lawyer-like approach to education in Professional Responsibility in part is worthwhile.

Elliston and Davis, two philosophers by trade, have put together a compilation of articles and problems to challenge both the cold approach of a purely code course and the natural lethargy of the tired student’s mind. Their title, Ethics and the Legal Profession, indicates their perspective; think about Ethics first and then apply those notions to the Law. The result is a set of provocative and sophisticated but accessible readings which go beyond code compliance and reach the fundamental ethical question of being a good lawyer and a lawyer who is good.

Lawyers have acquired for the practice of law the complimentary term, profession. A profession is a learned art, imparted with some ritual solemnity and not without difficulty; to be competent with
its tools, it requires of you much time; it has an organization of acolytes to some higher good who govern admission and standards of the practice of the art; this higher goal, its primary duty and reason for being, as an institutional whole, is the public good. In fact, absent this latter amorphous notion, there would be no other justification for self-governance other than that the arts are too mysterious to be guided by the unpracticed. Given, too, as part of honored profession status, is that the law the lawyers preach is on the whole likewise good.

Lawyers have had handed to them, explicitly by schools, implicitly through the traditions they experience in practice, a way of operating, of performing their function which, in the imparted wisdom, is for the public good. Among the tests a practitioner must meet are acting as an advocate, acting as an adversary, avoiding conflicts of interest between clients and between the clients and himself, and aiding all who wish it in the ability to have legal representation. Elliston and Davis's essayists examine the standard responses to these events; that is, common legal ethics require this result; is this result for the public good? If the text merely went to challenge standard ethical responses and their effectiveness in achieving the articulated goals, its contribution would not be significant. The failures of the adversary system in achieving truth, justice, and efficiency are documented elsewhere as they are again here. That advocacy, blind and singleminded, can result in activity contrary to your clients' interest, delays, anger, alienation, time, lost money, misery, and pain are illustrated again. To me the value of this book is that its authors have taken care to emphasize the human toll such professional ethics take on the lawyer himself. For often, the ethics of professional responsibility, the ideology of the law, alienate the lawyer from his own personal ethics and often require him to act in a way in which he, if acting for himself, would consider wrong or bad.

As suggested above, questioning whether the professionalism itself causes evil to occur because personal ethics are drummed out of the initiate (for example, in his judgment whether to represent a client or in the manner of the representation) can lead to radical ideas generally not parcel of the common approach to Professional Responsibility. Wasserstrom's *Lawyers as Professionals: Some Moral Issues* reviews the moral dissonance created by role-differentiated behavior, acting like a lawyer detached from what you would do as a human being, and suggests that the distance between lawyer and client should be minimized by deprofessionaliz-
ing the law. Simplify the language, simplify the rules, and perhaps client and lawyer would interact more humanely.

The advocacy system is not only reviewed from the achievement of its articulated objectives but from its human costs, disaffection of clients, amoral behavior by lawyers and resultant unethical (in human terms) conduct. The young lawyer may be amazed to read the seminal defense of the advocacy method of the legal profession advanced in Fuller and Randall's *Professional Responsibility: Report of the Joint Conference Committee*. Advocacy, devotion to a client, is there argued as the only appropriate method to find truth given human frailties. Fuller and Randall argue that a judge could not be counted on to reach the truth himself because, as a human must, when first presented with the case, he would form an opinion. Any further information would be bent by the judge to fit to the first-formed theory or would be discarded. Man, even a judge, can only handle so much, before cognitive dissonance sets in; advocates are needed to keep his mind clear and open to the truth. As the more cynical might suspect, the truth often makes no appearance in reality even though tenacious advocates tug toward the great ideal center. Byrne's *The Adversary System: Who Needs It?* illustrates that lawyers do not use the adversary system to create truth or justice. Simon's *The Ideology of Advocacy: Procedural Justice and Professional Ethics* argues that a greater human toll is taken by adoption of this old ideology because the lawyer must abandon his personal ethics to embrace it. All the legal profession as structured provides is some hollow procedural fairness, not some actual good.

These views are not left undebated in the text and are not recommended for swallowing whole. Leavening, seasoning, and digestion are required. Nonetheless, the student and the lawyer should at least chew over whether certain of our cultish practices do contribute to John Dean-like behavior: cover-up of illegal activity; shameless devotion to a corrupt client's interests; a willingness to send the client over if you yourself are caught. Here is an opportunity to go beyond ethics of the profession as they are frostily handed down as divine confections.

Perhaps, however, separate from, or systemic with, problems with the profession as a whole, the real Watergate problem was that bad people became lawyers. No amount of radical alteration or sagacious tinkering about what lawyers do, save for the elimination of the species (a proposition which could be rationally supported) will prevent swift thinkers with black hearts from practic-
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Elliston asks in *The Ethics of Ethics Test for Lawyers*, whose ethics set the standard? Is the lawyer tested for his adherence to the ethics of the bar, the community, or some greater notion of objective responsibility? If the purpose of professionalism is to protect the public, should we not adhere to public morals? But, in our achievement of this goal, lawyers often do things moral people would not, that usual litany of horribles, defending the child molester, foreclosing on the widow, using a technical defense to crimes or debts.

(A chilling thought may be here injected that the moral public may be finding the horribles less horrible. Lawyers must know that the law provides for minimum standards of conduct and does not require of the citizen, the good. When a society has no other ethical standards save legal ones, the moral health of that society must be at a very low ebb. There is not much to commend in a society when the courts become the final moral arbiter. The law is ill equipped to handle such functions; the law tends toward the lowest morals. Theoretically, a morally healthy society resolves moral issues through human interaction and charity rather than resort to a court-like decision maker with, by definition, a standard of minimal conduct. In a morally unhealthy society, I suppose we must have morally bankrupt lawyers. Let us assume that our society has not reached such a point that we cannot still find honest people to be honest lawyers.)

Obviously, bar testing of ethics is, in any case, inadequate to achieve a response to this post-Watergate cry: how can we make lawyers better people? Elliston recommends, at least, a social audit, a peer review conducted at intervals during practice, if mandatory *pro bono* work is viewed as unfair or unworkable. A sort of regular confession would occur wherein, like priests receiving absolution from priests, the lawyer tells his Confessor the good he has done or the sins he has committed and is given a Penance of works to perform, tailored to the moral needs. The soul of the profession might improve if its souls were routinely searched. Nonetheless, the search for the public good is the objective. The real issue for the advance of the profession is where are the lawyers
who act pro bono publico without the stick of a continuing licensing requirement?

Much of the human misery caused by the law, to lawyers and their clients, develops from the interpersonal relationship between us structured by this notion of professionalism. Lawyers can represent people who are inimical to their personal ethics only through creation of an imposed feeling of detachment. I treat this person as a case, I am advocate for a cause. Mine is not to influence this person for good but to serve him and so serving him (and all who come to me and those like me) the world is served for good.

Part of this detachment comes from the grim reality that the law is complicated and requires aptitude and study. This cause I represent, this action (not this person), requires my guidance. Because of this, lawyers impose structures and ways of doing things on clients that they would not have employed for themselves. Do not accommodate, do not negotiate, says the lawyer, we have the upper hand. He was my friend, says the client. Or, settle, says the lawyer, you cannot tell with a jury. But, I wish to fight on principle, says the client.

The issue is how much of yourself, your humanity, you should inject into your dealings with your fellows and with a client. This text offers an intelligently argued surge of responses. Some argue that a lawyer's personal morality, if interjected, will lead to enhancement of the public good and, certainly, fewer maladjusted lawyers. Some argue that the law itself is too complex, should be deprofessionalized to reduce this human gap between lawyer and client. Still others argue that, in most cases, if your moral intervention may not prevent an evil from occurring it makes no difference whether or not you intervene. Certainly, however, regardless of point of view or perception, one must admit that discussion of the responsibility of the lawyer as a human being must be central to the development of any meaningful response to the deluge Watergate. Lawyers can craft rules of ethics and inculcate them in the young. Mere rules of ethics, however, cannot make the law itself less susceptible to creating an atmosphere of loss and alienation among lawyers and clients. More rules do not an ethical lawyer make or attract good people to our profession or keep the good people that have chosen this life. This book offers thought and sensitivity to these issues which heartens the old lawyer and might enlighten the new one.