

# CLS and a Liberal Critic

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[\*757] The battle now raging in the legal academy between the Critical Legal Studies movement (CLS) and its critics has taken a decisive turn. Battles over decisions not to hire or give tenure to scholars associated with CLS have been front-page news in the academic community, and the tone of scholarly discussion has become decidedly negative. Much of the criticism has been aimed at one person often considered a guru to CLS, Roberto Unger. His work has inspired sharply negative commentary both here and abroad, and his most recent work, *Politics*, has received several scathing reviews.

William Ewald's evaluation of Unger's philosophy n1 is the latest salvo in the offensive against Unger and, through him, against CLS. Ewald throws down the gauntlet in the name of logical rigor and analytical precision, historical accuracy and argumentative soundness, looking closely at "the sheer breadth of Unger's knowledge and the unrelenting force of his analysis.' Neither," Ewald concludes, "is as great as his followers believe." n2 Consequently, Ewald argues, both Unger's credibility as a scholar and the quality of his philosophical contribution to CLS as a whole should be seriously questioned.

CLS is indeed in need of serious and thorough treatment by left, liberal, and conservative legal scholars. The sooner, the better; the more, the merrier. In the

recent wave of commentary, unfortunately, hostile gut reactions have replaced guarded respectful responses; passionate political [\*758] and cultural evaluations have supplanted balanced intellectual assessments. Nowhere is this more apparent than in Ewald's essay.

The overall impression the essay leaves is not one of fruitful critique but rather one of a mean-spirited academic putdown. This is apparent from Ewald's strategy, which is to devote more than half of his long article to a few pages of *Knowledge and Politics*. Ewald apparently believes that Unger's work can be dismissed because a close reading of Unger's first book, published almost thirteen years ago, discloses an objectionable interpretation here and a contestable reading there. He then proceeds to view Unger's later books through the narrow and often blinding lens of this first youthful effort.

This fundamental mistake regulates Ewald's overall strategy: *He refuses to acknowledge the "epistemological break" between Unger's first book (Knowledge and Politics) and his later work (The Critical Legal Studies Movement and Politics)*. By "epistemological break" (Gaston Bachelard's term popularized by Louis Althusser's interpretation of Marx), I mean Unger's crucial historicist turn in his work from a self-styled neo-Aristotelian perspective (or a

teleological and essentialist view) to a full-blown anti-foundational orientation. This basic shift has three major consequences in Unger's work. First, he gives up the unpersuasive talk about "intelligible essences" and moves toward immanent critiques of the rhetoric and practice of democracy and freedom in contemporary societies. Second, he abandons "total criticism" and links his immanent critiques to concrete historical investigations and specific programmatic formulations. Third, he rejects his ahistorical "trashing" of liberalism and puts forward his new project in the name of super-liberalism. n3

Ewald's efforts are faulty in that they assume that there is a smooth linear progression from the early to the later Unger. This unwarranted assumption leads him to conclude that *Knowledge and Politics* is the core of Unger's corpus and that the later works are mere embellishments and elaborations of the early book. Ewald is blind to the shift in Unger's work and adduces no textual evidence that this shift does not occur. Therefore his detailed criticisms of Unger's early work are interesting -- a few even convincing -- yet the grand claims he makes about what these criticisms imply regarding Unger's overall philosophy and project are bloated. The edifice Ewald believes he has dismantled is not a palatial mansion in which CLS dwells but rather an old decrepit doghouse abandoned by Unger long ago. If Ewald's criticisms are to have the broad implications he wants to draw, he must engage in a detailed reading of Unger's later philosophy with the same tenacity with which he examines Unger's early philosophy and then show that Unger's own self-criticisms of his earlier work do not

prefigure the more significant points made by his critics. Until [\*759] Ewald puts forward such an account he commits the fallacy he accuses Unger of: The fallacy of agglomeration, of treating clashing and contradictory bodies of thought (i.e., early and later Unger) as if they were a single body of coherent and consistent thought.

Ewald's essay not only fans and fuels an immobilizing ideological polarization, but also hides the basic issues at stake between CLS and mainstream legal scholarship. Ewald's dismissive approach -- that vents its undeniable venom behind a "disinterested" critique of microanalytic units of Unger's texts -- forces us to raise fundamental questions regarding the complex relations between scholarship, ideology, and philosophy in the legal academy. Within the limited confines of this Comment, I shall address some of these issues.

There is a special irony in Ewald's efforts to "trash" Unger in that they violate the very standards of academic objectivity and scholarly care he lauds. Ronald Dworkin -- for whom Ewald has the distinction of having written many of the non-textual footnotes to *Law's Empire* n4 -- has argued that CLS theorists are not entitled to claim that liberal legal texts and doctrines embody "fundamental contradictions" n5 unless they can justly

claim to have looked for a less skeptical interpretation and failed. Nothing is easier or more pointless than demonstrating that a flawed and contradictory account fits as well as a smoother and more attractive one. The internal skeptic must show that the flawed and contradictory account is the

only one available. n6

Dworkin's persuasive point here is simply that we must try to present the most subtle and sympathetic interpretations of an opponent's viewpoints before we uncharitably "trash" them. And we must ask: Has Ewald followed his mentor's sound advice and shown that his reading of Unger as a flawed, vague, and contradictory philosopher is the only one available? I suspect not, and I wager that most readers of Ewald's article will agree. If so, then the razor-sharp blade Dworkin uses on uncharitable readers is double-edged -- cutting both "trashers" within CLS or a trasher of the trashers like Ewald. Vigorous criticism rises above the level of trashing when it locates and appreciates both insights and blindnesses, tensions, and inconsistencies within the views of a worthy opponent. Dworkin's remarks simply restate the sensible morality of public discussion articulated in chapter II of John Stuart Mill's *On Liberty* and affirm the Nietzschean endeavor of proving that one's opponent "did you some [\*760] good." n7 Like the trashing wing of CLS, Ewald fails to meet these intellectual standards.

These introductory metacritical remarks suggest two types of response to Ewald. One is a microanalytical approach that examines a few specific criticisms he makes of Unger, assessing the accuracy of his critiques, agreeing if warranted or offering competing readings if not. These indeed are important exercises -- already enacted in the early versions and rewritings of his essay in light of early drafts of this Comment. n8 Yet, given the limited space, I find it more important to show that a more useful

reading of Unger is available -- a reading that is both critical and sympathetic. I shall attempt to lay bare the nature of the larger CLS project, discern the specific role and function of Unger's still-developing work in this larger project, understand why Unger's texts are so seductive to some law students and professors, and then put forward some objections to these texts in light of my own agreements and disagreements with various aspects of the CLS project. n9

CLS bears the marks of its birth in elite law schools, and its members are exorbitantly preoccupied with the liberalism of the legal academy, that is, the liberalism of their teachers in elite law schools. They thus see as especially important those works, such as Unger's, that combat the theory of their teachers on the theoretical turf their teachers had for so long claimed as their own. Thus, the extravagant praise of Unger by some CLS members cited by Ewald is a truthful reflection of the movement's reaction to those works. It is, however, only a partial truth. People attracted to CLS are also motivated by concern for specific sorts of injustices, and they recognize that theoretical works such as Unger's can provide at best indirect and obscure guidance in their search for answers to these more specific problems. What is important in CLS is the nature of the relationship between theory and practice -- theorists do not tell those with more practical interests what to do, but rather their theory amplifies the lessons of practice, pointing to ways that deviations from the norms of behavior and institutional organization can be viewed as norms that can serve as bases for new forms of social organization. This is what Unger sees as the focus of his notion of "deviationist doctrine," an

idea Ewald sees as primarily an odd form of unprofessional behavior. This view of the relationship between theory and practice implies that the demise of theory will not undermine practice in the way it might seem to in a more traditional academic movement: Theory is a form of practice in CLS, and, [\*761] while other forms of practice can learn from it, they are not dependent upon it. Members of CLS are clearly aware of this. For example, James Boyle, whose praise of Unger Ewald refers to several times in the essay, has also explained the limited role Unger's theoretical work plays in the broader project of CLS:

Unger's *Knowledge and Politics* gives us a total critique of liberalism that tells us nothing about sexual harassment in the workplace, racial discrimination in the classroom, or the multiple oppressions of a welfare office. . . . It takes apart the formalized structure behind liberal political discourse, and liberal political discourse *is* narrow. . . .

So Unger's total critique is best read as a *local* critique because it is (and must be) implicated in the artificial categories it helps to explode. Of course, there are teachers, editorial writers, politicians, people involved in ethical arguments, who produce the mode of discourse that Unger deconstructs. But the claim to "totality" can be misunderstood because of the strong prejudice that emanates from within liberal thought -- the prejudice that the deepest and most important level of what is going on is the theory of the state with its attendant moral, psychological, and legal postulates. The point is that such a structural prejudice, and the diminished visibility that it implies for all the other

little exercises of power going on in the world, is part of the *problem* and not the *solution*. n10

It is of course possible that Ewald could reconcile the ideas in this quotation with his implication that criticizing Unger undermines CLS. What is shocking, however, is that he fails even to point to this passage. As a result, the praise of Unger he quotes so liberally presents at best a partial picture. The very sources he quotes deny precisely the link between Unger and CLS he describes them as exemplifying. Is this "up to the mark both in its historical assertions and in its reasoning?" n11

To take another example, consider Ewald's "meritocratic" challenge to Unger's theory of organic groups. Ewald argues that Unger's theory is unworkable because it fails to consider seriously the importance of efficiency and meritocratic criteria in the operation of key desirable institutions. Ewald suggests that the staff of a large urban hospital simply could not operate in an acceptable manner (that is, could not care for the hospital's patients) based on Unger's "non-meritocratic" viewpoint. n12 Too much democracy in the name of "eradicating domination" fails to acknowledge the high level of skill and knowledge requisite for effective [\*762] physicians; too much "meritocratic hierarchy" precludes the kind of radical democratic arrangements Unger's theory promotes.

Ewald's example is ingeniously misleading in three ways. First, a hospital is an institution that renders desirable services to human beings rather than a production site in which people produce inanimate commodities,

as in a large factory. Unger's formulations focus on the latter. n13 Both hospitals and factories indeed constitute present-day workplaces of importance, yet Unger makes it clear that his remarks pertain more to a goods-producing context than to a service-rendering one. Nevertheless, his three institutional principles of organic groups -- the community of life, the democracy of ends, and the division of labor -- do apply to all contexts of the workplace in modern society, so at this point Ewald's example is slightly uncharitable but warranted.

Second, Ewald's characterization of Unger's "non-meritocratic" hospital -- an example Unger does not use -- relies principally upon the first two institutional principles of organic groups. It is highly revealing that Ewald quotes liberally from the sections on the community of life, n14 the democracy of ends, n15 and the state. n16 And when Ewald mentions Unger's understanding of the role of the division of labor in organic groups he claims it to be vacuous. n17 Yet his criticism of Unger relies principally on Unger's inability to balance democracy and meritocracy, people's control with the specialization and differentiation of indispensable and desirable labor tasks. When we actually look at what Unger has to say about the division of labor in organic groups (hospital or factory), we discover that "[t]hough the principle of the division of labor requires that specialization be tempered, it does not prescribe that it be abolished." n18 Hence Unger's imaginary hospital is not "non-meritocratic" but rather a place where the high level of skill and knowledge of doctors, nurses, and maintenance staff is best put to use in order to cure patients

under maximally communal and democratic conditions. Unger states explicitly, "the organic group must start by combining a standard of merit with one of need." n19 On the one hand, "[t]he mere possession of skills can never in itself justify material advantages or the exercise of power." n20 On the other hand, "a relentless insistence on deciding collectively all significant matters . . . would undermine the possibility of a division of labor in which the talents of each could be brought to fruition, for specialization allocates meritorious [\*763] power." n21 Unger then significantly though vaguely suggests that the route between the Scylla of pure meritocracy and the Charybdis of inefficient democracy "must be resolved by prudential judgment." n22 Hence, Unger rejects exactly the simplistic viewpoint that Ewald attributes to him. And Ewald's claim about the emptiness of "prudential judgment" is based on Unger's incomplete elaboration, not his lack of insight.

Last, Ewald holds that the positive program outlined in the theory of organic groups is "little more than a blur." n23 But Unger makes it clear that he is no utopian radical democrat. He knows that his organic groups will not "eradicate domination." He repeatedly reminds us that his ideals are "incapable of being completely realized in history." n24 Therefore, his aim of creating a universal community "is meant to serve as a regulative ideal rather than as the description of a future society." n25 Thus, again, Ewald's attempt to link Unger's failure to put forward a detailed description of a social world of organic groups to naive utopian sensibilities is unconvincing. n26 Rather, Unger's

religious realism leads him to reject naive utopianism; just as his open-endedness leaves him reluctant to predetermine the concrete arrangements of the desirable society.

Also troubling is Ewald's criticism of how Unger uses the word "liberalism." (Indeed, to signal his distaste he puts the word in a special type face, suggesting thereby that Unger's use of the word deviates from usual practice.) All Ewald's talk about how to define "liberalism" would seem to be more the subject of lexicographic squabbles than legal scholarship were it not for the fact that on the meaning of "liberalism" turns the viability of Ewald's most important criticism of Unger. Ewald's central claim is that Unger is able to find contradictions in liberalism only because he defines the term so as to lump together thinkers who disagree with one another. By "agglomerating" thinkers whose thoughts clash, Unger has, according to Ewald, put the rabbit into his hat, all so he could feign surprise when the contradictions came jumping out of it.

In fact it may be Ewald who is guilty of smuggling presuppositions into his definition of the term. He assumes that the term "liberalism" must refer to something that could be recognized as a coherent, internally consistent body of thought that is defined in terms of the rigorous logical standards he espouses. For his own purposes in the common rooms at Oxford, such standards may be appropriate. But Unger is not interested in debunking the claims of philosophers to have found a "liberalism" that is not internally contradictory. He is instead interested in the connection [\*764] between types of knowledge and the

exercise of political power -- hence the title of the book, *Knowledge and Politics*. The "liberalism" he criticizes is the set of those ideas that have routinely been used as justifications for the use of power by politicians and their apologists since the seventeenth century. These people have confronted different situations, their purposes have differed from one another's, and the ideas they have used differ accordingly. Yet the leaders of Western societies have tried over the last 150 years, almost without exception, to describe their policies as "liberal." The term "liberalism" thus has come to us with no unitary meaning, but instead with a dynamic and flexible "open-textured" quality<sup>n27</sup> that developed from the diverse and contesting influences acting upon it. It is therefore perfectly acceptable for Unger to point out that, over the years, the term has been used to justify the exercise of power in ways that contradict one another, and that its value as a legitimating force for using power is now useful only insofar as people do not see that it can be used for both every situation and its opposite. In doing so, he takes advantage of common uses of the term liberalism. There is no agglomeration here, at least not by Unger.

Ewald misses the basic issue dividing CLS and its liberal critics. He invokes criteria, such as "historical accuracy" and "soundness of argument," as if they are not being contested on a deeper intellectual and institutional level. Such an appeal may be heart-warming and image-boosting to one's peers, but it does not meet the fundamental critique CLS is putting forward against mainstream legal scholarship. CLS neither rejects appeals to historical

accuracy nor abandons sound argumentation. Rather, it probes the ways in which such criteria have been and are deployed in order to preclude certain kinds of appeals to historical accuracy to delegitimize specific forms of argumentation. The premature -- and usually ideologically-motivated -- attempt to view such intellectual probing as irrational is both untrue and unfair. In fact, such a misleading characterization of the intellectual work of CLS reflects a refusal of liberal legal scholars to engage at a deeper level of theoretical exchange. There is no doubt that legal liberalism can put forward a plausible reply to this CLS critique, but it must be done on the metaphilosophical and metainstitutional levels -- that is, reflections that seriously interrogate and justify the kind of prevailing standards, the present institutional arrangements of legal scholarship and education, and their link to the liberal legal status quo. It is quite telling that no liberal legal theorist has yet done this in response to CLS. Instead we get implicit appeals to the sheer facticity and entrenched immovability of the present conditions of legal scholarship and education or, as with Ewald, pronouncement of the supposedly self-evident standards of the liberal consensus. Yet as the power and potency [\*765] of CLS escalates, such sophisticated liberal defenses will come -- for thoughtful proponents of a status quo always emerge when they feel it is sufficiently threatened.

The first basic issue dividing CLS and mainstream legal scholarship has to do with the cultural context in which legal scholarship and education take place. This is why Ewald's attempt to invoke criteria of historical accuracy and soundness of argument as if they are

context-free, universal standards untainted by ideological prejudgments and outside of power-struggles and political conflict is problematic. The commonsensical reply to such suspicion is that without these standards we are left with a nihilistic epistemic situation in which "anything goes," or in which "might determines right," etc. n28 Such a reply misses the point. The issue here is not the non-existence of standards but rather the way in which prevailing standards are part and parcel of a larger form of life -- a cultural context of legal scholarship and education with great authority and power that invokes its standards, in part, in order to reproduce itself. This reproduction marginalizes and devalues certain perspectives, orientations, questions, answers, styles, and persons. If we view this complex process of reproduction as a thoroughly historical and political affair -- from the kind of standards invoked to the type of members admitted -- we are forced to become more relentlessly critical and self-critical of its results.

Surely the efforts to create the present cultural context of legal scholarship and education constitute a long and arduous battle. Both the liberal rule of law and civilian government -- two grand achievements of most advanced capitalist societies -- result from much bloodshed; bloodshed from those who fought and fight to create and sustain them as well as bloodshed from those who have been and are victimized by their flaws, imperfections, and structural deficiencies. Given this crucial link between legal systems and their regulatory impact on the legitimate instrumentalities of violence, as well as legal systems' crucial role in inhibiting or enhancing the well-being of the

populace, CLS begins with an historical and social analysis of the present cultural context of legal scholarship and education. This analysis -- aided but not dictated by theorists such as Marx, Weber, Foucault, Du Bois, De Beauvoir and others -- leads CLS to contest its own context while finding a place within it. The aim of this critique is not simply to understand better how the cultural context of legal scholarship and education is reproduced, but also to change this context. This change is promoted on the intellectual plane by means of a thorough questioning of the assumptions and presuppositions of the kind of standards invoked, the role these standards play in encouraging certain viewpoints and discouraging [\*766] others, and the way in which these standards legitimate the deployment of key notions such as impartiality, disinterestedness, objective due process, and value-free procedure. These key notions of liberal perspectives have indeed contributed greatly to minimizing bloodshed and enhancing the welfare of the populace. But they also hide and conceal systemic relations of power that continue to encourage bloodshed and inhibit people's well-being.

A basic purpose of CLS is to disclose the degree to which liberal perspectives are unable to be truthful about themselves owing to the blindnesses and silences reinforced by their assumptions and presuppositions. The "standards" of judgment that shape liberal discourse make it difficult and even *illegitimate* to discuss certain issues -- especially those that contest the very "impartiality" and "objectivity" that hide the operations of power in liberal discourses. Those liberal standards of judgment are especially delegitimizing to those who contest them

in an interrogative and visionary style which differs from the traditional propositional form of professional journals. Like Foucault, some members of CLS -- especially Unger -- try to show the complex ways in which partiality and partisanship are at work in the dispassionate styles and forms of liberal discourse, including their implicit silences, blindnesses, and exclusions. n29 These blindnesses and silences are not simply logical contradictions and analytical paradoxes. Rather, they are unintentional turns away from or intentional justifications of operations of power that scar human bodies, delimit life-chances for many, and sustain privilege for some. This point is made forcefully in a contemporary classic essay by Robert Cover. n30 Within the cultural context of legal scholarship and education -- a context parasitic on contexts in the large society, such as multinational corporations, and profoundly conditioning for other contexts -- serious reflections on these operations of power have been taboo. n31 Like the recent work of Jacques Derrida in literary studies, Richard Rorty and Paul Feyerabend in philosophy, Catharine Mackinnon and Mary Daly in Women's Studies, Edward Said in Middle Eastern Studies, Noam Chomsky on United States foreign policy, and Maulana Karenga in Black Studies, the intent of CLS to contest its context requires that scholars make the very operations of power in their own academic milieu an object of investigation -- in the name of intellectual integrity, critical intelligence, and moral responsibility. This means creating and sustaining new subcultures of critical discourse within the very contexts one is contesting. This practical strategy is not a crude Leninist

tactic of boring-from-within, because CLS has no [\*767] group, party, or organization outside of its own milieu. Rather, CLS feeds on the very constituency it both is and wants to convince.

The second basic issue between CLS and its liberal critics has to do with the role of historical consciousness and theoretical reflection in legal scholarship. CLS does not simply view law as politics but rather tries to show how and why dominant legal practices support a particular kind of politics -- namely, a liberal politics unmindful of its contradictions and deficiencies and unwilling to question thoroughly its theoretical limitations and social shortcomings. By means as diverse as the controversial "fundamental contradiction" thesis of Duncan Kennedy and the provocative historicist claims of Roberto Unger, CLS thinkers have forced legal scholars to grapple with the complex links between law and structural constraints imposed on it by contingent dynamics in the state, economy, and culture -- links often concealed by liberal versions of legal formalism, legal positivism, and even much of legal realism. This salutary stress on the worldliness of legal operations has rudely awakened many law students and professors from their procedural slumber and persuaded them to read pertinent texts in historiography, social theory, and cultural criticism. n32 Such an awakening may indeed lend itself to a shallow diletantism -- yet it also undeniably broadens and enriches rather insular legal discourses in exciting and relevant ways, for it links legal studies to instructive and insightful discourses in the humanities and social scientific disciplines too often ignored

by legal scholars.

Historical consciousness in Anglo-American legal thought for too long has been associated with the legal realists' limited appeal to experience and with the narrow institutional concerns of the law and economics school. CLS helps us perceive legal systems as complicated structures of power which both shape and are shaped by weighty historical legacies of class exploitation, racial subjugation, and gender subordination. The type of historical consciousness promoted by CLS is inseparable from theoretical reflection because attention to structures of power over time and space requires description and explanation of the dynamics of these structures. Such a requirement pushes one into the frightening wilderness of social, political, and cultural theory. Unfortunately, "theory" has often been simplistically invoked as a mere weapon with which to beat legal formalists and positivists over the head. A more subtle grasp of the role of theory discloses the degree to which ideological frameworks circumscribe the options of legal scholars and the way in which intellectual consensus on prevailing paradigms prohibits reflection about the function of authority and power in legal discourses. In this way, CLS has justified the centrality of [\*768] Marx, Weber, Durkheim, Simmel, Lukacs, Foucault, and other social theorists in contemporary legal scholarship.

Ewald's essay does not touch on any of these contributions of CLS to legal studies. Instead he views CLS as some foreign intrusion into the civil conversation of properly trained liberal legal thinkers. His approach implies that CLS is but a morbid symptom --

perpetrated by ex-New Leftists -- of muddleheadedness to be exorcised by means of logic, scholarship, and good sense. In light of recent tenure denials and battles over CLS scholars at such liberal bastions as the Harvard Law School and the University of Pennsylvania Law School, we must ask whether Ewald's rhetorical strategy is to legitimate the use of power in law school faculties against the placement and retention of CLS professors and to promote the authority of legal liberalism in contemporary ideological debates.

My general complaint about Ewald's readings is that he makes Unger appear less intelligent, learned, and sensible than Unger actually is. And, by implication, Ewald suggests that those attracted to Unger's work have been duped. Yet Ewald gives us no account of why so many law students and professors have been misled. Surely, it is not simply because they have rejected Ewald's criteria of historical accuracy and sound argumentation. There are two main reasons for which some of the brightest law students and young law professors pay attention to CLS in general and to Unger in particular. First, there is a widespread disenchantment with the curriculum in elite law schools. The older legal pedagogical methods are viewed by many as boring, tedious, and irrelevant. Law classes are viewed as tangentially interesting academic hoops through which one must jump in order to pursue a careerist and private quest for money, position, and status in the conservative world of corporate law practice. Many law students and professors who fuse broad intellectual curiosity with progressive political commitment not only find this quest problematic, but also find CLS

attractive.

Second, CLS serves as a kind of shortcut to the classics of left social theory, cultural criticism, and philosophy. By this I mean that CLS often serves as a kind of overnight education in those oppositional intellectual traditions -- Marxism, feminism, black radicalism -- which are marginal or absent in law schools. Indeed, much of both the intellectual creativity *and* theoretical mediocrity of CLS thinkers is due, in large part, to the self-taught character of these thinkers. This character is accentuated by the process by which law students become law professors -- a process that provides little time for serious and sustained reflection and research prior to appointment. Therefore, few CLS figures are thoroughly grounded in the very traditions of left thought they propound. Instead, they are forced to play catch-up while they simultaneously wean themselves from and furiously attack the liberal tradition in which they have been taught.

The role of Unger's texts are instructive in this regard. They are seductive [\*769] to many CLS people precisely because they combine painstaking research, passionate commitment, aversion to classic liberalism, prophetic vision, and exposition of left intellectual traditions. Unger's work provides instruction *and* inspiration to young prospective CLS people. And for the less disciplined ones, his texts serve as a substitute for homework. In this way, Unger's work -- though some of the most significant and provocative thought on the left today -- is overrated by some CLS people. This is understandable given the grand contribution Unger's texts make to the intellectual formation

of people who are bursting out of the insular and parochial constraints of legal education. Furthermore, Unger's literary style stands in stark contrast to the bureaucratic prose of much of legal scholarship. As a social theorist, intellectual historian, political activist, *and* prophetic visionary, Unger speaks to the head and heart of his CLS sympathizers. There is no doubt that he is a towering figure in CLS -- though he is not the paradigmatic or exemplary one.

Despite his unique style and distinctive perspectives (especially his religious sensibilities), the work of the early Unger (now corrected in his later work) shares some of the intellectual limitations and political shortcomings of his fellow CLS thinkers. The major issue here evolves around CLS' thoroughly negative attitude toward liberalism. This attitude has an intramural character that tends to ignore the historically ambiguous legacy of liberalism and thereby to downplay some of its grand achievements. To minimize the importance of these achievements -- a strong motif in CLS work -- is to be historically amnesiac and politically naive. Such a view overlooks liberalism as an ideology which informs and inspires crucial aspects of oppositional left movements. Instead, CLS sees almost exclusively the crucial ways in which liberalism serves as a brake on such movements. This seamy side of liberalism is hidden by the liberal scholars who are hegemonic in legal education -- as CLS thinkers rightly emphasize. Yet outside elite law schools and inside concrete movements for social change in the larger society, the ambiguous role of liberalism looms large.

There simply is no intellectually acceptable, morally preferable, and practically realizable left social vision and program that does not take liberalism as a starting point in order to rethink, revise, and reform it in a creative manner. The kind of basic problems to which liberalism is a response must be reconceptualized and retheorized in light of both the grand achievements and structural deficiencies of liberalism. Since I view the latter as (to put it crudely) the inability of liberal *capitalist* practices to take seriously the ideals of individual liberty, citizen participation, and democratic checks and balances over forms of collective power that affect the populace, liberalism is not so much a culprit (as CLS thinkers argue) but rather an incomplete historical project impeded by powerful economic interests (especially corporate interests), and culturally circumscribed institutional structures like racism, patriarchy, and homophobia. I find it [\*770] ironic that as a black American, a descendant of those who were victimized by American liberalism, I must call attention to liberalism's accomplishments. Yet I must do so -- not because liberal thinkers have some monopoly on rigor and precision -- but rather because these historic accomplishments were achieved principally by the blood, sweat, and tears of subaltern peoples. Liberalism is not the possession of white male elites in high places, but rather a dynamic and malleable tradition the best of which has been made vital and potent by struggling victims of class exploitation, racist subjugation, and patriarchal subordination. In this regard, liberalism signifies neither a status quo to defend (as with Ewald) nor an ideology to trash

(as with some of CLS), but rather a diverse and complex tradition that can be mined in order to enlarge the scope of human freedom. In other words, the United States Constitution lends itself to a perennial struggle for legitimation -- with contested interpretations the primary motor in this struggle.

My kind of left oppositional thought and practice builds on and goes beyond liberalism as a kind of *Aufhebung* of liberalism. And, I believe, deep down in the CLS project there is the notion that the most desirable society will look liberal in some crucial ways. Yet the intramural character of CLS forces it to be excessively rebellious against the truncated liberalism of its fathers in order to sustain much of its *elan vital*. Intellectual integrity and political urgency force me to sidestep such childish games. This is why, though I find CLS intellectually exciting and politically inspiring, I prefer the democratic socialism of John Dewey and R. H. Tawney, the cultural criticism of C. Wright Mills and Thorsten Veblen, the political economy of Paul Sweezy and Alec Nove, and the anti-racist, anti-sexist, and anti-homophobic perspectives of W. E. B. Du Bois, Sheila Rowbotham, and Audre Lorde over that of most of CLS.

The thoroughgoing negativism of much CLS scholarship leaves the legal left with little to do other than occupy slots and challenge the curriculum in the legal academy; that is, it tends to limit its political praxis to pedagogical reform in elite law schools. This indeed is a noble endeavor, but it channels intellectual and political energy away from constructive proposals and programs for the larger society and culture. More pointedly, it

relieves CLS of the burden of specifying and consolidating linkages with other oppositional forces in the United States and abroad. Because it lacks this kind of self-reflection on how to contribute to the building of a broad progressive movement at this particular historical moment -- beyond that of legal pedagogical reform -- CLS remains an isolated and insulated oppositional affair within the ivy halls of elite law schools that displays the major features of a Freudian family romance. Ewald's essay is a less than powerful response in defense of the liberal fathers. I am sure more serious ones will follow. Yet to remain inscribed within this intramural affair by mere negativistic trashing of the liberal fathers is to [\*771] remain too enamored of their power, influence, status, and authority. To ignore the liberal fathers is indeed foolhardy -- but the aim is to link rebellion in the legal household to social change in the larger polis. It is time for CLS to both grow up and grow out by historically situating the contributions and shortcomings of its liberal fathers in relation to their project and by politically situating their own breakthroughs and blindnesses in relation to the progressive struggles in this country and in the rest of the world.

#### **FOOTNOTES:**

n1. See R. UNGER, KNOWLEDGE AND POLITICS (1975) [hereinafter KP]; R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1983); R. UNGER, POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY (3 vols. 1987).

n2. Ewald, *Unger's Philosophy: A Critical Legal Study*, 97 YALE L.J. 665, 668 (1988).

n3. See R. UNGER, *supra* note 1, at 338-40 (rev. ed. 1984).

n4. See R. DWORKIN, *LAW'S EMPIRE* ix (1986).

n5. The "fundamental contradiction" thesis to which Dworkin refers is found in Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979).

n6. R. DWORKIN, *supra* note 4, at 274.

n7. F. NIETZSCHE, *On the Adder's Bite*, in THUS SPOKE ZARATHUSTRA, in THE PORTABLE NIETZSCHE 180 (W. Kaufmann ed. 1954).

n8. See, e.g., Ewald, *supra* note 2, at 723-24 (extended remarks on the "leftism" of Unger's theory).

n9. For an example of this approach regarding Unger's *Politics*, see West, *Between Dewey & Gramsci* 81 NW. U.L. REV. 941 (1987); West, *Reassessing CLS*, LOY. L. REV. (forthcoming).

n10. Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 775-76 (1985) (emphases in original).

n11. Ewald, *supra* note 2, at 690.

n12. *Id.* at 720-22.

n13. See R. UNGER, KP, *supra* note 1, at 264-65.

n14. See Ewald, *supra* note 2, at 721 n.215.

n15. *Id.* at 719 n.208, 721 n.215.

n16. *Id.* at 722 & nn.221-22, 723 & n.223.

n17. *Id.* at 721.

n18. R. UNGER, KP, *supra* note 1, at 275-76.

n19. *Id.* at 272.

n20. *Id.* at 273.

n21. *Id.*

n22. *Id.*

n23. Ewald, *supra* note 2, at 722.

n24. R. UNGER, KP, *supra* note 1, at 260.

n25. *Id.*

n26. See Ewald, *supra* note 2, at 722-24.

n27. See H.L.A. HART, THE CONCEPT OF LAW 124-25, 249 (1961).

n28. For an exemplary response of this sort, see Fiss, *The Death of the Law*, 72 CORNELL L. REV. 1 (1986). Fiss's rather flamboyant title is a bit misleading in that he shows how such a "death" is unlikely given the "thickness" of the legal form of life in American society.

n29. Regarding Foucault's analysis, see, e.g., Smart, *The Politics of Truth and The Problem of Harmony*, in FOUCAULT: A CRITICAL READER, 157-73 (D. Hoy ed. 1986); Bove, *Introduction to The Foucault Phenomenon: The Problematics of Style*,

in G. DELEUZE, FOUCAULT, vii-xl  
(1988).

n30. *See* Cover, *Violence and the Word*,  
95 YALE L.J. 1601 (1986).

n31. *See* Brosnan, *Serious But Not  
Critical*, 60 S. CAL. L. REV. 259  
(1987).

n32. CLS is principally responsible for  
the recent refreshing appearances of  
Christopher Hill, E. P. Thompson,  
Eugene Genovese, Sheila Rowbatham,  
and other social historians in the pages  
of major law journals.