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CYCLES OF CRITIQUE:

From Critical Legal Studies to the Critical Legal Collective

In the last gasps of the U.S. critical legal studies movement, in the early 1990s, as it was becoming anathematized, the annual conference was held in Washington D.C. In a panel on the history and projects of the movement, Mark Tushnet opined that the movement grew out of a generational sense that left intellectuals, such as himself, experienced themselves as having no place in the legal academy. Another panelist, Kimberlé Crenshaw, responded by saying that she had no interest in whether middle class white men, who seemed more than prevalent in law schools, felt as if they had a place. She had no intention of making them comfortable. Race, gender, and their intersections were what mattered. Sufficiently self-important to feel deflated by this remark, Tushnet stormed out of the lecture theatre. This time he excluded himself. The irony, however, is not only the visible splintering of the critical legal studies movement, but the sense in which Crenshaw's remark mirrored Tushnet's, and we were witness to the first glimmerings of identity politics.

For the inaugural drives of the critical legal studies movement exclusion meant primarily the political adiaphorism or lack of interest of the extant establishment. The elite, and so dominant legal academy, was deaf to left politics, and dismissive of the post-60s generation of Marxist and existentialist philosophies, hostile to the spirit of egalitarian change. The movement reflected the membership. The special issue of *Stanford Law Review*, emer-

gent in Orwell's new year, met with great excitement in January 1984, published 16 articles, with 18 authors, totalling 674 pages, and all were male, and all were white. The sense was that of a certain entitlement, and the exclusion of those represented, as also an anger at the complacency of legal theory, and the desire to express an alternative experience of the trauma of entering the law school as a pedagogue, the dreariness, and predictability of institutionalization, against which Duncan Kennedy so effectively and effusively railed. The extant Law School existed to train the latest batch of law students in deference, submission to the hierarchies that would maintain the *status quo ante bellum*. The extraordinary thing, in retrospect, is that the 18 white men and their mainly blanched networks, played a major role in opening the legal academy to leftist theory and to diversity in the gender, race and intellectual positions of those appointed. The face of the law school changed in significant part because the critical legal scholars in positions of influence were often true to their principles and insisted on diversity, on an intersectionality that brought not only historical materialism and deconstruction, but also feminism, race theory, latcrit and now in the U.S. at least, the Law and Political Economy movement and the neonate Critical Legal Collective, into the corridors and offices of the law professoriat. There is no question but that the institution has changed, diversified, pluralized, and the open issue is the arc of that transition and its future possibilities.

Like the calendar, the trajectory of critique seems cyclical. An eternal return, but of course never in the same form. In the breviloquence of a *précis*, historical materialism, which lay at the roots of the original European critical legal studies movement, and then the UK movement, proffered scientific Marxism, structuralist and post-structuralist theories of the juridico-political, which over time splintered into diverse groups, and morphed into a neo-materialism that seeks to predicate critique on and in new technologies and in their use to map the planetary impact

of the society that the rule of law shores up and maintains. The US movement, in a post-McCarthy environment (it was still necessary to affirm that one was not and had never been a member of the communist party to be admitted to the US) was less explicitly linked to Marxism and concepts of economic structure, although Kennedy's much cited structural analysis of Blackstone's *Commentaries* in terms of the 'fundamental contradiction' pitched the mode of production, private property, against false consciousness or the ideology of freedom, in Marxist terms, and continues to do so in the more recent incarnation as the Law and Political Economy movement. Positive and negative, the necessary path of critique is that of a break out from the academy, a breaching of the walls of the law school, transgression of the boundaries that divide the intellectual from the public sphere, or at least from the practice of law. In the critical legal studies movement, the first glimmerings of this impetus to impact was constrained by the Marxist theory that economy determined consciousness and so the academic operated in an isolated realm of ideology offering only flag waving support for the working class which was the motor of history. There was also, however, the critique of idealism and the somewhat ironic theory of practice — often rendered in Greek as *praxis*. In the realm of such actual operations and effects, the emergent research culture of the law school worked to open legal studies to other disciplines, to the sociology of the profession and its guild practices, as also to copulation with the new historicism, with economics, linguistics, rhetoric, narratology, psychoanalysis, film studies, aesthetics and now, in the context of the Anthropocene, environmental sciences, synaesthetics, and the push for recognition of the rights of the non-human.

Where Marxism denigrated appearance as illusion and promoted the invisible, the economic structure as real, deconstruction and the scintilla of critique in the new waves of feminism and critical race theory focused on appearances, on what is there, the who, when and why of the academy and of the other institutions

linked to legal practice. What appears, what manifests, is what is real, be it speech, text, or plural demonstrative interventions, viral relays, films, clips and memes. The early embrace of deconstructive method was a patient desire to stay with the text, to analyze critically the language, to take apart the binary structures that organize the argument, and to admit that we do not know where writing begins or ends. As it manifests in speech and in text, the context is also text, there is no outside of writing. Deconstruction is in other words a positive endeavour to build on the textual manifestation and materiality, to interfere in concrete and generative fashion, to excoriate the page so as to elicit the culture, the prejudices that the legal syntagm retails. Tropes and heliotropes, rhetorical figures and colours of words were wielded in a critical impugning of the complacency of legal literalism, the error of certainty and the arrogance of right answers wherever they were proselytized.

Duncan Kennedy early on spoke of the future of critical legal studies as being trench warfare ‘form here on out’. The *longue durée* was of slow moving change, of recognizing the small differences, of the similar engaged in war in the library, in polemics between professors, travelling from trashing to the hermeneutics of suspicion. While critical legal studies flashed briefly on the screens of public media, as a threat to law school conventions and to status rankings, it was really feminism and critical race theory that have activated the most significant legal change, both in decisional terms and in political responses and legislation. They broke the wall and instigated substantive and procedural rule advances, from repeal of rape laws to enforcement of civil rights claims, anti-discrimination to equal pay, none of which were entirely successful but all of which engendered alteration of cultural viewpoints and in their wake legal change both good and bad. In academic terms, the *Feminist Judgments* project actively rewrote case law, while intersectionality is a concept that has been picked up and used in national and international courts. Critique

appears, which is to say becomes real in changing the material and resources, the language and perceptions, the personnel and culture of decision making. It is not a fast moving or direct form of action but rather, at the level of theory, a long term conspectus, a contribution to the community of thought, desiderata and directions for moving forward that court clerks, judges and legislators can use as resources while economy and world move on.

Reverting to the theme of cycles and revivals, the return of the same and the reinvention of critique as the necessary form of generational transfer, of handing on, it bears note that the recycling involves novel axes of dissemination, new modes of acceleration, the *perpetuum mobile* of internet dialogue and diversity. To track the path of these developments, the cyclical in the contemporary, the principal theme, as old as it is novel, is one of expansion and embrace of the new and augmented sense of the relation of the human to the non-human. Comparing the birth of critical legal studies, both European and American, the new criminology, the delinquency conference, neo-realism and similar contexts from the 1970's and 1980's, to the currently roaring twenties, certain axes mark the cycle. In mortar and pestle, as outlined above, the points of transmission are from historical materialism to neo-materialism and Law and Political Economy, deconstruction — by which I mean grammatology — to synaesthesia, feminism to #MeToo, forensic rhetoric to intersectionality, and in titular sum, critical legal studies to the critical legal collective as an expanded community of thought and practical pedagogic and political endeavour. A recognition that critique is recollection, reflection, resistance, and reinvention of the communities to come.

The cycle leads to the collective, to a generational reinstantiation that involves both collect and collection, creed and commitment to action. Each of the cycles, the trajectories to the contemporary that are outlined above in somewhat debonair fashion, involve expansion and acceleration due to changes in material and medial environments. Reverting again to an antique concept,

the laws of the earth, *leges terrae*, now increasingly matter and materially impact the thought, action and collectivity of an Anthropocene humanity and law that cannot but respond to climatic and planetary disturbances. The universe, to borrow a phrase, has to be met half-way. In medial forms, global warming, global viruses, global web connectivity, change the nature and constituencies of groups, rendering community both serial, temporary, mobile and visible online. The visibility is the most accelerated form of change. What appears on the surface of the planet can be seen everywhere and forces response, even if the speed of viral circulation often precludes either verification or prolonged thought.

To end where I started, the concept of a critical legal collective is precisely that of expansion and embrace of diverse groups and experiences. The collectivity of thought is an exercise in inclusion, in critical openness that takes account, that listens in the manner that classically justice has always been the lending of an ear, the provision of a hearing, a space and time in which to appear and to speak. Law provides a forum for social apparition and legal theory is the critical accounting of the manner and the rules that will allow for critical manifestation and maximum visibility for those occluded by current structures of recognition or access. In their different ways, because of different positions, Tushnet and Crenshaw wanted to be heard, legitimated, seen. Critique, however, is neither simply the cry of the outsider, nor the flailing of narcissism, but rather the multiple modalities of reflection in which it is necessary to recognize that even the innermost thought is an image, an idea carried by spectral figures, an apparition both interior and exterior of the singular plurality of being. Identity, critical self-reflection, is the necessary point of entry, the green zone of the community of thought, which involves a species of micro-ontology of images, a recognition of the variations of the self as oneiric, affective, amicable, familial, institutional and forensic forms of the singular multiplicity in the

tessellations of being. There, in the skeleton, in the cellular structure, in the matterphor of thought, it is to the shared community of intellect, to the collectivity of atmosphere, environment and the diverse aggrupations of the social and the virtual that critical thought responds. To begin with identity, with the desire to be heard and seen, whether pink, yellow, black, brown, white, green, tattooed, hazed, human or some other but related anbiogenetic, alluvial form is the necessary instance that gives birth to critique. The cycle of critique renews.

