

self-Criticism

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This is a short comment on reading one's own first article.¹ As I am both the reader and the author whom I discuss, the comment is clearly personal. Yet autobiography is not my aim. My hope is that by revealing a bit of myself, I can say something² about being a young professor, about tenure, about legal scholarship, and about critical legal studies.³

Several years ago, Mark Tushnet suggested that "something has gone wrong" with conventional legal scholarship, that its obsessive focus on doctrine relegates it to the margin of serious intellectual activity and contemporary social thought.⁴ Much of recent critical legal scholarship takes the marginality of legal doctrine as its premise. This body of work is concerned with theory—with debunking the claim that the law is neutral, determinate, or predictable;⁵ with exposing the structure (not explaining or justifying the content) of conventional and critical legal argumentation;⁶ with applying to law structuralist,⁷ deconstructionist⁸ and phenomenological⁹ principles developed in fields such as anthropology, linguistics, and philosophy. Articles of this genre¹⁰ cite few cases,

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1. Baron, *The Trust Res and Donative Intent*, 61 TUL. L. REV. 45 (1986).

2. When I say I aim to say "something" about critical legal studies, I mean just that. I do not claim to speak authoritatively or to break new ground. I mean only to describe an experience. Readers can assess its significance for themselves.

3. For many reasons, I will not attempt to define critical legal studies. See *infra* note 10 for some of those reasons. For those who wish an introduction to critical legal studies, see generally *The Politics of Law* (D. Kairys ed. 1982); *A Symposium of Critical Legal Studies*, 34 AM. U. L. REV. 929 (1985); *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984); *Symposium on Critical Legal Studies*, 6 CARDOZO L. REV. 693 (1985); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983); Note, 'Round and 'Round *The Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669 (1982).

4. Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1205 (1981).

5. See, e.g., Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

6. See, e.g., Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

7. See, e.g., Kennedy, *supra* note 6. See also Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984).

8. See, e.g., Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985).

9. See, e.g., Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003 (1985); Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).

10. For two reasons, it is probably unfair to suggest that there is a "tradition" of critical legal studies articles. First, critical legal studies is a relatively recent phenomenon. Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984). Second, critical legal scholars spend what some might think of as an

and discuss even fewer. Critical legal scholars use particular doctrines and cases illustratively, to demonstrate larger claims about legal thought generally; because the claims are broad, cutting across traditional doctrinal boundaries, almost any famous case or doctrine can be used to prove a given point.¹¹

There has been much discussion and criticism of critical legal studies lately.¹² I confess, however, that beginning in my first year of law school I have consistently found critical legal thought more interesting, more explanatory and more helpful than other approaches to law.¹³ And so it was with great chagrin that on reading my first article, completed more than eighteen months ago, I found it marginal and wrong in precisely the senses suggested by Professor Tushnet in 1981. The question is how I came to write a piece of which I can be so contemptuous.

To say that the answer to that question is "tenure" would be to oversimplify considerably. True, I wrote it when I did because of tenure. I had taught for two years half-time and one year full-time, and thus I needed to prove to my colleagues (and, in fairness, to myself) that I could write. True, as I wrote it a super-egoistical censor advised against formulations of thoughts that could even remotely be considered extreme and suggested, in addition, that I find *something* constructive to say. True, I wanted people to like the article. But alas it is equally true that I thought the article was correct, and not wrong or marginal, when I wrote it. And it is also true that no one within my institution stated or in any way implied that a different approach would meet with disfavor, or that announced allegiance to the critical legal studies movement would yield more than a curious shrug. The fact is that if the article is trivial, the blame is mine.

It would probably be useful, before going further, briefly to describe the article and what I find wrong with it. The article examines the doctrine that an express trust must have a res—ascertained or ascertainable trust property—and argues that the res requirement functions, in fact, to defeat rather than to effec-

inordinate amount of time discussing and debating whether they really constitute a unified "movement" and whether there is anything that truly links their diverse approaches to law and legal theory. See, e.g., Boyle, *A Symposium of Critical Legal Studies: Introduction*, 34 AM. U. L. REV. 929 (1985); Boyle, *supra* note 6; Gabel and Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); Schlegel, *Critical Legal Studies: An Afterward*, 36 STAN. L. REV. 673 (1984).

11. For example, Peller's 140 page article on *The Metaphysics of American Law*, *supra* note 8, cites less than 50 cases; only *Lochner v. New York*, 198 U.S. 45 (1905), and *Coppage v. Kansas*, 236 U.S. 1 (1915), are treated at any length. Boyle's 95 page article on *The Politics of Reason*, *supra* note 6, cites only three cases, discussing none.

12. I refer to criticism from those who do not consider themselves part of the critical legal studies movement. See, e.g., Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984); Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413 (1984); Levinson, Book Review, 96 HARV. L. REV. 1466 (1983). The Carrington article provoked a vehement response from a number of commentators. These responses are grouped together in a series of articles entitled "*Of Law and the River*," and of *Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985) [hereinafter *Nihilism and Academic Freedom*].

13. No article praising critical legal studies fails to thank Duncan Kennedy and Roberto Unger. I took wonderful courses from both at Harvard Law School between 1975 and 1978. I am certain that neither has the slightest recollection of me.

tuate donative intent.¹⁴ Its first half demonstrates that the rationales which have been offered to justify the res requirement do not, in fact, support it.¹⁵ The second half suggests that the concerns to which the requirement appears to be addressed—concerns about donative intent and about ensuring that the trustee has enforceable duties—can be met without requiring a res.¹⁶

When I wrote the piece, I had in mind a tradition of articles which analyze the formalities required for testamentary and inter vivos donative transfers and which argue that those formalities can be justified on functional grounds.¹⁷ These articles begin with the premise that the goal of donative transfers law is to carry out donative intent.¹⁸ They then demonstrate that formal execution and delivery requirements serve that goal by impressing the donor with the significance of her act, by providing reliable evidence of donative intent, and by protecting the donor against undue influence or the like.¹⁹ I saw my article as consistent with this "form/function" tradition. In essence it examines whether the res requirement, which operates analogously to the formalities required in cases of wills and outright gifts, serves any functional goals.²⁰

What strikes me now about my article—and the "form/function" tradition from which it derives—is how very much it takes for granted. It is perfectly reasonable to evaluate formal requirements in terms of their function if, but *only* if, their function is meaningful. Everything in the "form/function" tradition of scholarship hangs on the goal of effectuating donative intent. But critical legal theory suggests we ought to be skeptical about this goal, and that we ought to be skeptical on many levels.

First, and most obviously, permitting private individuals to dispose of their own wealth after death involves a choice that is easily assailed. There is no *a priori* reason why assets held at death should not pass to the state for redistribution to the needy, or to the needy directly, or to the owner's family members to the exclusion of those not related to him by blood. I have no more interest in defending any of these proposals than I have in defending the current order. My point is that the goal that forms the premise for my own tradition of scholarship

14. Baron, *supra* note 1, at 47.

15. *Id.* at 50-70.

16. *Id.* at 70-84.

17. See, e.g., Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941); Mechem, *The Requirement of Delivery In Gifts of Chattels And Of Choses In Action Evidenced By Commercial Instruments*, 21 ILL. L. REV. 341 (1926). Cf. Langbein, *Substantial Compliance With The Wills Act*, 88 HARV. L. REV. 489 (1975). For a discussion of form and function in contract law, see Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

18. See, e.g., Gulliver and Tilson, *supra* note 17, at 2 ("One fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power."); Mechem, *supra* note 17, at 350 ("It is not to be doubted that the tendency of the law has been . . . toward the policy of allowing intention to govern, or that such a tendency is a wise one."); Langbein, *supra* note 17, at 491 ("The first principle of the law of wills is freedom of testation.")

19. Gulliver and Tilson, *supra* note 17, at 5-13; Mechem, *supra* note 16, at 348-49; Langbein, *supra* note 17, at 492-97.

20. Baron, *supra* note 1, at 54-70.

is a politically controversial one—one that rests on all sorts of assumptions about “individual” or “societal” needs or what is “required” by our notions of “property ownership.”

Second, and more importantly, the structure of argumentation within the “form/function” tradition obscures the politically controversial nature of the premise. The articles posit at the outset that donative transfers law should carry out donative intent. The articles’ substantive discussion is entirely devoted to evaluating whether formal requirements do so. The reader is led to believe that any controversy concerns means, not ends.²¹ In other words, the structure of articles within the “form/function” tradition suggests that the intent-effectuation premise is just *there*, beyond question, and that what ought to concern us is not the premise itself but the working out of that premise in doctrinal form.

Finally, just as the doctrinal focus of the “form/function” tradition obscures the political nature of the tradition’s premise, the doctrines themselves obscure the fact that the categories and distinctions that seem meaningful to us in thinking about trusts and estates law are not just *there*, but are contingent and socially created. All discussions of formalities assume, for example, that individuals, unchecked by rules, might make hasty or ill-considered decisions about their property, to the detriment of “society” at large.²² Discussed in these terms, “society” appears as an independent entity, divorced and abstracted from any individual member, who is, of course, powerless to change it. The doctrine thus helps to constitute and create a world in which individual society members stand apart from and alone against an alien social body.

The point is that discussions within the “form/function” tradition, like all doctrinal discussions, are based on terms and distinctions which at once incorporate and mask value judgments that demand scrutiny. It is not enough, for example, to say that once we recognize that the choice to effectuate donative intent is political, articles such as mine in the traditional vein merely develop the implications of that choice and are therefore valuable. It is not enough because the attempt to develop the choice through doctrine unduly and unnecessarily limits the possibilities that get considered.²³ Open acknowledgement that the intent-effectuation premise is political leaves intact the assumption that donative intent actually exists and can be discovered or distinguished from other “non-dona-

21. The reader is led to this conclusion, of course, only by the author. One of the difficulties for a scholar new to the field of donative transfers is that, looking to the “leading” articles, she or he is tacitly instructed that the “significant” issues—the issues worth writing about—relate to means and not ends.

22. See, e.g., Gulliver & Tilson, *supra* note 17, at 5 (compliance with formal execution requirements precludes possibility that testator was acting in casual or haphazard fashion); Langbein, *supra* note 17, at 494-95 (formalities exist to lessen danger that testator may make testamentary dispositions without adequate forethought).

23. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 111 (1984). Professor Gordon stated:

[T]he legal forms we use set limits on what we can imagine as practical options: Our desires and plans tend to be shaped out of the limited stock of forms available to us: The forms thus condition not just our power to get what we want but what we want (or think we can get) itself. *Id.* at 111.

tive" forms of intent. But the doctrine which purports to find and carry out donative intent not only describes but also produces a social ordering principle, sorting from all the possible urges that humans feel toward other humans a separate category of "donative" urge which, the doctrine implicitly posits, is different. To speak in doctrinal terms is to accept this separation of "donative" from "non-donative" intent as both real and legitimate, instead of questioning whether it corresponds to anything we in fact do or ought to feel. The presumption that there is a "donative" intent separate and distinct from "other" intents is so deeply embedded in the doctrine that we do not even see it. So when we develop the implications of the intent-effectuation premise through doctrine, we ignore the possibility that there is no "intent" to carry out, aside from the intent that the doctrine itself creates.²⁴

What strikes me as wrong about my article and the tradition from which it derives is, in the end, that they are doctrinal. If it is important to know whether given doctrines in fact fulfill their purported goals, then articles in the "form/function" tradition are significant and useful. If, on the other hand, the critical legal scholars are correct in asserting that focusing on doctrine only obscures the political and social judgments made by the law, then articles in the tradition are, as Professor Tushnet suggested, marginal and wrong. The problem is having to choose between two kinds of legal scholarship, each of whose focus and concern is antithetical to the other's.

The problem faces all legal scholars, not just the young and untenured (or me). My experience, I think, helps explain why the label of "nihilism" is so often pasted on critical legal scholars.²⁵ There is something horribly corrosive about the notion that the doctrines we so patiently labor to make sense of to ourselves and to our students are essentially peripheral. It is frustrating and demoralizing to be repeatedly and vehemently told that one's analysis, in its own terms, is flawless, one's proposals logically sensible, and yet that one's article as

24. This point raises the obvious question whether someone who distinguishes in his own mind, between a donative transaction with his daughter and a commercial transaction with his broker has a false consciousness that the two interactions are different. I do not mean to argue that all distinctions people make are completely artificial and meaningless, though I suspect some deconstructionists might go that far. See, e.g., Peller, *supra* note 8. For present purposes I merely suggest that doctrine may not only be a product of consciousness but may help "to reproduce that consciousness by confirming it." Gordon, *supra* note 23, at 111. Boyle proposes the term "false necessity," meaning "The way that 'what is' gets converted into 'what ought to be.'" Boyle, *supra* note 11, at 930.

25. See Carrington, *supra* note 12. Carrington's "nihilism" critique and its implications for the teaching of law are treated extensively in *Professing Law: A Colloquy on Critical Legal Studies*, 31 ST. LOUIS U.L.J. 1 (1986). As was pointed out repeatedly in response to Carrington, it is not clear what he meant when he used that term. *Nihilism and Academic Freedom*, *supra* note 12, at 2-5, 14-15; Finman, *Critical Legal Studies, Professionalism, and Academic Freedom: Exploring the Tributaries of Carrington's River*, 35 J. LEGAL EDUC. 180 (1985).

For a recent discussion of the "nihilist" wing of the critical legal studies movement, see Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986). The authors identified as "nihilists" in Professor Stick's article, *id.* at 332-33 n.2., argue that law is neither determinate, objective, nor neutral. *Id.* at 332. It is not at all clear that the "nihilism" of the "nihilist" wing is the "nihilism" to which Professor Carrington refers.

a whole is irrelevant. For the fact is that the two kinds of scholarship are concerned with totally different questions.

I suppose the matter might be left there, with the two scholarly "camps" agreeing to disagree, if it were not for the fact that the divergent sets of questions represent opposed and irreconcilable views of what is really going on when lawyers, scholars and judges undertake to do legal analysis. In one view, practicing lawyers representing a client learn and manipulate doctrine to obtain a desired outcome, the judge hearing such a case decides, in effect, whether the doctrine permits or requires that outcome, and scholars assess the judge's decision to determine whether the doctrine was analyzed appropriately. Conventional scholarship thus purports to describe what is actually happening when a case is decided. The other view claims that something entirely different is going on in the course of deciding cases. Critical legal scholarship suggests that, although lawyers, judges, and conventional scholars may believe that they are examining the implications of given doctrines, in fact their focus on doctrine obscures from them social and political choices about how the world is and ought to be organized—choices they are actually in the process of making when they engage in conventional legal analysis. Critical legal scholarship thus purports to describe this ongoing process by which our choices are obscured from ourselves. The intent is not to blame anyone for engaging in traditional analysis, but to bring to the surface and to address openly a set of questions that doctrinal analysis renders invisible. Conventional scholarship is misguided, in this view, because by asking the wrong questions it contributes to the process of obfuscation.

My own exasperation with my first article is, then, this: by posing and purporting to resolve a doctrinal dilemma, I have helped create the sense that law is and can be rational, that trust law is or can be "okay." The critical scholar in me suggests that even were my article to be widely read and my proposals widely adopted, there would still be something artificial about trust law, and that exposing the confusion amidst its doctrinal premises is not even a half step toward exposing the more basic contradictions that gave rise to the doctrine in the first place. In short, to anyone sensitive to the claims of critical legal studies, doctrinal scholarship has become impossible.

This impossibility raises some further question about legal scholarship and legal practice. Clearly a practitioner may find it useful to know that legal doctrines can be manipulated; the positive side of doctrine's indeterminacy is that it is always possible to make a doctrinal argument for a given outcome.²⁶ I think it fair to assume that contemporary practitioners, judges and scholars, all of whose training was influenced heavily by legal realism, would be inclined to regard cynically any claim that a particular rule *requires* a particular result.²⁷ I wonder, however, whether they would go on doing what they have been doing if they believed that doctrinal manipulation was neither interesting nor important. To the extent that the "nihilism" critique has any bite, it has here: it is one thing

26. See, Feinman, *The Failure of Legal Education and the Promise of Critical Legal Studies*, 6 CARDOZO L. REV. 739 (1985).

27. On realism and cynicism, see Boyle, *supra* note 6.

to say that no case has a doctrinally correct outcome, but quite another to say that the search for such an outcome is fundamentally both misguided and conservative.²⁸

I have no idea what the world of legal practice would look like were the critical legal scholars to have the kind of influence legal realism has had.²⁹ Perhaps that uncertainty is what the critical legal scholars mean when they state that their effort is transformative.³⁰ Perhaps only if it becomes impossible to continue to believe that there is any intellectual validity to our established activities as lawyers and legal scholars can we decide if those activities are what we want to or ought to be doing.

28. On conservatism, see Boyle, *supra* note 6.

29. Many of the critical legal scholars who have addressed the question of the effect of critical legal thought in the future discuss how our *theorizing* about law should change. See Boyle, *supra* note 6; Singer, *supra* note 5. Yet while they do not discuss directly the influence of these changes in theory, they offer some suggestions as to the differences these changes might make in practice. See, e.g., Gordon, *supra* note 23, at 116-25; Singer, *supra* note 5, at 57-70.

30. See Feinman, *supra* note 26, at 757.

