LEGAL CRITICISM AS STORYTELLING

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In this paper, the author discusses the use of storytelling by certain members of the Critical Legal Studies Movement (CLS). She describes the stories told by three CLS scholars and offers the thesis that the methodology and attitudinal perspective present in their narrative voices promote a program to unmask, demystify, contextualize, and reform the law as well as to act as a foil to traditional legal scholarship. In this regard, the use of storytelling as a component in CLS' methodology is impressive and effective. However, the author also questions CLS' use of storytelling as a rhetorical device and subtextual strategy against counter-argument. To this extent, the author contends, CLS disregards the very standards and values of its own critique.

Dans cet article, l'auteure discute de l'utilisation des récits par certains membres du mouvement Critical Legal Studies. *Elle décrit les récits de trois universitaires membres de ce mouvement et soutient que la méthodologie et la perspective personnelle utilisées dans ces narrations visent à démasquer, démystifier, mettre en contexte et réformer le droit et aussi à mettre en contraste les recherches juridiques traditionnelles. A cet égard, l'utilisation des récits comme élément de la méthodologie du mouvement est impressionnante et efficace. Cependant, l'auteure met aussi en question cette utilisation des récits comme procédé rhétorique et comme stratégie qui repose sur un texte sous-jacent servant à réfuter une argumentation opposée. En définitive, l'auteure soutient que le mouvement ne tient aucun compte de ses propres normes et valeurs en matière de critique.*

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I. INTRODUCTION

This paper is about Critical Legal Studies and storytelling.[1] It seeks to identify, in the scholarship offered by certain members of the Critical Legal Studies Movement (CLS), a dual purpose embedded in the technique of narration and in the quality of narrative voice present. Storytelling and narrative voice are used as rhetorical devices and as components of methodology or attitudinal perspective. Rhetorically, they seek to insulate the CLS scholar from any obligation to speak directly and to address the scope of the claim actually made; methodologically, they embody that which is professed because argument is advanced through manifestation.

This paper is divided into several parts. Part II provides a brief introduction to the CLS movement and the nature of its critique. Part III describes the stories told by three CLS writers and offers the thesis that the heuristic methodology implicit in storytelling consciously promotes a program to unmask, demystify, contextualize and reform modern law as well as to debunk traditional legal scholarship. Part IV provides a critique of CLS' storytelling and reveals its primary subtextual strategy. Finally, in Part V, I offer some conclusions regarding CLS' storytelling technique.

II. THE CLS MOVEMENT[2]

CLS is well known as a radical form of leftist critique which had its first meeting in 1977 in Madison, Wisconsin. It began as a movement of American law professors who, in the late 1960s and early 1970s,

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[1] I am using the word "storytelling" in its ordinary sense and not as it is employed by legal scholars such as Richard Sherwin, who traces the relationship between literary and legal interpretation, or Robin West, who establishes a correlation between jurisprudence and myth: *see* R.K. Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling* (1988) 87 MICH. L. REV. 543, and R. West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory* (1985) 60 N.Y.U. L. REV. 145 [hereinafter West]. No argument is taken with Robin West's assertion that CLS uses experiential and historical method to rebut positivistic, formalistic, or naturalistic accounts of the law and accordingly, there is conceptual overlap between our papers: *see* West at 172-73. Our work is distinct, however, to the extent that I analyze CLS' methodological use of the histories of actual people and events in its legal criticism as opposed to entering a Westian discussion of the aesthetics and "plots" inherent in the articulation of various jurisprudential traditions. Our work is also distinct to the extent that I expressly discuss CLS' active use of its own narrative voice as an element in its critical legal methodology.

[2] It is difficult to summarize what CLS stands for because its membership stakes out a variety of positions. As Robert W. Gordon states: "We [members of CLS] do not have a uniform view of the world — in fact we seem always to be quarrelling fundamentally, if also most affectionately, with one another." *See Unfreezing Legal Reality: Critical Approaches to Law* (1987) 15 FLA. ST. U.L. REV. 195 at 197 [hereinafter *Unfreezing Legal Reality*]. Accordingly, my objective is merely to posit major CLS tenets and not to provide an exhaustive catalogue.

experienced "extreme dissatisfaction" with the quality of the legal education they had received.[3] Since then, CLS' points of reference have solidified into an iconoclastic style of deconstructionist legal scholarship which targets a routine set of ideas and values.

It is not within the scope of this paper to review CLS' political, legal, and academic program. Given the qualities of its storytelling technique, however, it is important to highlight certain aspects of the CLS project. First and foremost, CLS attacks what it takes to be the tenets of legal liberalism celebrated in and preserved by modern law, including the liberal focus on individual as opposed to communitarian values and the liberal contention that all people are autonomous legal agents.[4] For CLS, legal doctrine is precariously constructed on a legal liberal myth which claims that judicial outcomes are the product of a "distinctly legal reasoning, of a neutral, objective application of legal expertise."[5] According to CLS theorist David Kairys, this myth is the source of the legitimacy accorded to and the mystique surrounding our judicial system.[6]

CLS seeks to "unmask" the law, revealing it to be a partisan and antinomial human construct.[7] Accordingly, members of the Movement devote considerable effort to uncovering contradictions both within legal doctrines and between so-called precedents.[8] In addition to revealing contradiction, CLS makes the related argument that our formalistic system of rules simply does not produce determinacy of legal result. In short, there are no necessary outcomes in a given case: all one can claim

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[3] *Ibid.* at 196-97.

[4] C.A.D. Husson, *Expanding the Legal Vocabulary: The Challenge Posed by the Deconstruction and Defense of Law* (1986) 95 YALE L.J. 969 at 970 [hereinafter Husson].

[5] *See* D. Kairys, *Legal Reasoning* in D. Kairys, ed., THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (New York: Pantheon Books, 1982) 11 at 13 [hereinafter Kairys].

[6] *Ibid.*

[7] Husson, *supra*, note 4 at 970-71.

[8] *E.g.*, Clare Dalton has written a lengthy article revealing what she contends are contradictions in modern contract law. She argues, *inter alia*, that there is a vexing antinomy in the will theory of contract which emphasizes subjective intent and a "meeting of the minds" as the source of contractual obligation. According to Dalton, such a theory inevitably leads to fiction and contradiction because "it is not in practice possible to separate out a court's understanding of the parties' meaning from a meaning made for and imposed on the parties by the court." *See An Essay in the Deconstruction of Contract Doctrine* (1985) 94 YALE L.J. 997 at 1039 [hereinafter Dalton].

In a parallel enterprise, David Kairys detects contradiction amongst a series of legal precedents, concluding that:

> Unstated and lost in the mire of contradictory precedents and justifications [is] the central point that none of these cases was or could be decided without ultimate reference to values and choices of a *political* nature. The various justifications and precedents emphasized in the opinions serve to mask these little-discussed but unavoidable social and political judgments.

See Kairys, *supra*, note 5 at 13 (emphasis added).

to do is to make more or less accurate predictions.[9] CLS attributes legal indeterminacy to the fact that all law is political and that no amount of theorizing on its objective and neutral quality can alter its fundamental character. As Jeffrey Standen writes:

> What CLS ultimately unmasks is not so much the introduction of value judgments as it is the folly of pretending that adjudication can ever be neutral. In the view of critical legal scholars, the realists suffer from the same naiveté that afflicted the formalists. The realists fail to appreciate the basic indeterminacy of legal doctrine and the impossibility of constructing a value-free jurisprudence. They fail, in other words, to realize that "[l]aw is simply politics by other means."[10]

Not surprisingly, CLS views traditional legal scholarship as marginalized because the latter is apologist for an incoherent legal system. Attempts by traditional legal scholarship to rationalize precedents, to explicate legal doctrine, and to identify "some coherent conceptual ordering scheme"[11] in the legal system are exercises in fiction, CLS warns. Indeed, because traditional legal scholarship ties itself to a talisman long debunked in other disciplines, namely that rules are capable of having objective content, CLS feels obligated to locate such scholarship on the "edges of serious intellectual activity."[12] CLS proposes an alternative approach to law which, for CLS members such as Roberto Unger, involves reformulating society on the basis of a communitarian vision of human interaction.[13] More immediate and relevant to this paper, however, is its reliance on the notion of "contextualizing" as a method of facilitating social change.[14] Contextualizing replaces a systemic focus on legal abstractions, which obscure and falsely sanitize human problems, with social context. For example, in his article *Unfreezing Legal Reality*,[15] Gordon relocates the legal debate in *Vokes* v. *Arthur Murray,*

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[9] R. Gordon, *Critical Legal Histories* (1984) 36 STAN. L. REV. 57 at 125.

[10] *Critical Legal Studies as an Anti-Positivist Phenomenon* (1986) 72 VA. L. REV. 983 at 997, quoting Kairys, *supra*, note 5 at 17.

[11] R. Gordon, *Historicism in Legal Scholarship* (1981) 90 YALE L.J. 1017 at 1018.

[12] M. Tushnet, *Legal Scholarship: Its Causes and Cure* (1981) 90 YALE L.J. 1205.

[13] *See, e.g.*, R. Unger, THE CRITICAL LEGAL STUDIES MOVEMENT (Cambridge: Harvard University Press, 1986).

[14] Contextualizing is a technique which CLS spends more time doing than actually talking about and, accordingly, it is difficult to locate a CLS scholar who thoroughly explains the concept. Nonetheless, Robert Gordon shows leadership in this regard when he argues that commonplace legal discourse can "*misdescribe* social experience" and:

> ....produce such seriously distorted representations of social life that [its] categories regularly filter out complexity, variety, irrationality, unpredictability, disorder, cruelty, coercion, violence, suffering, solidarity, and self-sacrifice.

See Unfreezing Legal Reality, *supra*, note 2 at 200.

[15] *Ibid.*

Inc.[16] from legal concepts which legitimate exploitation and vulnerability to stories about people. By emphasizing altruism, democratic participation, and equality,[17] he neatly contrasts the story which could be told about the plaintiff in this American decision to the story which was told in court. In short, for Gordon, every case — "like every other instance of legal discourse, is a tiny enterprise of world creation,"[18] and so, we can choose to tell different stories by meeting head on the social situation inherent in a given case. Accordingly, the Movement argues for a legal method which would be:

> ....concerned with appearance as opposed to essence, that reduces abstract universals to concrete social settings, and that emphasizes how patterns of domination, exploitation, and oppression within those settings relate to the abstract universals used to rationalize what is and hence to promote complacency about or acceptance of those patterns and those settings.[19]

Narrative context thus becomes a reform-based linchpin[20] for many CLS writers because it locates the law, as well as its application, squarely within the world of human beings.

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[16] 212 So.2D 906 (Fla. Dist. Ct App. 1968).

[17] *Unfreezing Legal Reality*, *supra*, note 2 at 220.

[18] *Ibid.* at 216.

[19] A.D. Freeman, *Truth and Mystification in Legal Scholarship* (1981) 90 YALE L.J. 1229 at 1236.

Contextualizing, as envisioned by Freeman and Gordon, has much in common with the "call to context" discussed by T. Massaro in *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds* (1989) 87 MICH. L. REV. 2099 [hereinafter Massaro]. According to Massaro at 2101, a call to context relates to regarding others empathetically, to perceiving directly legal cases as concrete human stories instead of through the filter of legal abstractions and, at 2124, to cultivating a perpetual skepticism regarding legal categories and paradigms. Like CLS, "empathy" theorists rely on storytelling because:

> Stories tend to work directly from "experiential understanding," which the empathy writers encourage us to use. Consequently, narrative may be a particularly powerful means of facilitating empathic understanding: a concrete story comes closest to actual experience and so may evoke our empathic distress response more readily than abstract theory. Telling stories can move us to care, and hence pave the way to action.

See Massaro at 2105.

It should be noted that Massaro, at 2125, goes on to criticize aspects of empathy theory — it fails, for example, to rank priorities and provide "concrete proposals for legislative, doctrinal, structural, and procedural reform that will encourage greater responsiveness to multiple voices and communities" (footnotes omitted): *see* Massaro at 2124.

[20] As Richard Delgado astutely points out in the MICHIGAN LAW REVIEW's issue on legal narrative:

> Stories, parables, chronicles, and narratives are powerful means for destroying mindset — the bundle of presuppositions, received wisdoms and shared understandings against a background of which legal and political discourse takes place. (footnotes omitted)

See Storytelling for Oppositionists and Others: A Plea for Narrative (1989) 87 MICH. L. REV. 2411 at 2413 [hereinafter Delgado].

III. THE CLS THEORIST AS STORYTELLER

In this section, I propose to explore three kinds of stories told by CLS. The first, exemplified in the work of Clare Dalton, narrates the story of those who are marginalized and dispossessed. The second, evident in the work of Morton Horwitz, tells the "counter-story" of legal history. The third, implicit in Mark Kelman's article on "trashing", tells the story of the storytellers; it is an instance of CLS narrating the story of its own voice.

A. *Clare Dalton*

In *An Essay in the Deconstruction of Contract Doctrine*, Clare Dalton discusses several legal doctrines to demonstrate her thesis that modern contract law is a chimerical method of hierarchy in duality which emphasizes private over public, objective manifestation over subjective intent and which thereby hides the revelation that "we can neither know nor control the boundary between self and other."[21] Dalton highlights what she sees to be the doctrinal inconsistency and indeterminacy in the law and warns, therefore, that its inherent uncertainty can lead to a systemic, though perhaps "unconscious",[22] oppression of the weak. To illustrate her contention, Dalton analyzes two American decisions concerning the enforcement of a cohabitation contract and concludes that the inequitable treatment accorded by male judges to female cohabitants can be partially explained by judicial attitudes regarding women who would involve themselves in such "irregular" relationships. Dalton states:

> One powerful pair of contradictory images of woman paints the female cohabitant as either an angel or a whore. As angel, she ministers to her male partner out of noble emotions of love and self-sacrifice, with no thought of personal gain. It would demean both her services and the spirit in which they were offered to imagine that she expected a return — it would make her a servant. As whore, she lures the man into extravagant promises with the bait of her sexuality — and is appropriately punished for *her* immorality when the court declines to hold her partner to the agreement.[23] [emphasis in original]

For Dalton, it is because the law is inconsistent and indeterminate that such illegitimate attitudes are able to find a subtextual play in judicial decisions.

Dalton's most important and rhetorically effective technique for simultaneously demonstrating the perceived legitimacy and judicial acceptance of such images is through narration of the story of Victoria

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[21] *Supra*, note 8 at 1113.
[22] *Ibid.* at 1006-07.
[23] *Ibid.* at 1110-11 (footnotes omitted).

Hewitt, the respondent in *Hewitt*.[24] As recounted in the Dalton article, Victoria Hewitt brought suit against a man with whom she had cohabited for 15 years but had never married. The two had met in college at which time she became pregnant. Robert Hewitt proposed that the two not marry but nonetheless present themselves as husband and wife. He promised to share his "life, future earnings, and property with her."[25] Over the next 15 years, the Hewitts had two more children. Victoria Hewitt borrowed money from her family to assist Robert Hewitt in attending professional school, helped him set up his practice, and "otherwise fulfilled the role of a traditional wife."[26]

Notwithstanding this life-story, the Illinois Supreme Court held that Victoria Hewitt was not entitled to any share in the profits and property accumulated in Robert Hewitt's name over those 15 years. The Court stated that to recognize property rights between unmarried cohabitants may enhance the attractiveness of domestic arrangements other than that of marriage and, accordingly, would contravene the public policy inherent in Illinois marriage legislation.

Most readers of the Dalton article are, I suspect, appalled at the outcome in *Hewitt* and baffled by the judicial reasoning it manifests. Indeed, by refusing to enforce Victoria Hewitt's claim to accumulated property, the Court just as surely rewards Robert Hewitt as it punishes Victoria for participating in the same "irregular" relationship. It is within this charged context that Dalton locates her thesis concerning doctrinal inconsistency and indeterminacy as well as the role of judicial misogyny. And it is precisely because of this context that her thesis assumes increasing persuasive force.

But Dalton as narrator of the story of Victoria Hewitt is not merely offering us an example of how and why the law can be badly applied. Were this the case, her technique would be unremarkable. It is because Dalton assumes the role of storyteller to further the CLS project in very specific ways that the technique merits discussion. Through Victoria Hewitt's story, Dalton implicitly reveals and condemns as illusory the neutrality generated by legal semiology which translates the "'real' phenomena of the social world" (in this case, the claims of a mother of three who worked in a 15-year relationship with the same man) into a "formalized realm of abstract concepts."[27] Accordingly, Victoria Hewitt is transformed, through contortion, into a "plaintiff" who has filed an "amended complaint", asserting the "property rights" of an "unmarried cohabitant" whose "rights" are created by "express contract", "implied contract", "equitable relief", and "constructive trust". Dalton's story tells us that, far from assuring a neutral and fair result, this semiotic

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[24] 77 ILL.2D 49, 394 N.E.2D 1204 (Ill. 1979) [hereinafter *Hewitt*].

[25] *Supra*, note 8 at 1097.

[26] *Ibid.*

[27] J. Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought* (1985) 133 U. PA. L. REV. 685 at 694, discussing the work of Realist critic Felix Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 COLUM. L. REV. 809.

translation merely hides the fact that legal doctrine betrays a misogynist bias. As Dalton writes:

> The problem with doctrinal rhetoric is twofold. First it recasts our concerns in a way that distances us from our lived experience of them. Second the resolution of the cases that the application of doctrine purports to secure offers us a false assurance that our concerns can be met — that public can be reconciled with private, manifestation with intent, form with substance.[28]

Accordingly, Dalton seeks to unmask and demystify the law's superficial legitimacy by contextualizing the social facts inherent in *Hewitt*. A concomitant objective is to act as foil to traditional legal scholarship which accepts semiology as valid and which is a mere apologist for a legal system founded on self-delusion. Finally, the story of Victoria Hewitt validates Dalton's call for reform in its revelation that:

> the world portrayed by traditional doctrinal analysis is already not the world we live in, and is certainly not the only possible world for us to live in. And in coming to that realization, we increase our chances of building our world anew.[29]

In this way, the CLS project is furthered both by the words of Victoria Hewitt's story and the eloquence of her biographical image.

B. *Morton Horwitz*

In his 1974 article, Horwitz provides an historical interpretation of the foundations of modern contract law.[30] He argues that contract law had an equitable emphasis in the pre-commercial days of the 18th Century which saw the justification of contractual obligations as based on the "inherent justice or fairness of an exchange"[31] and on a substantive doctrine of consideration. This same century favoured a title theory of contractual exchange wherein the contract simply functioned as a means of immediately transferring title to its subject matter.[32] Such a view of contract dovetailed with a society which did not have extensive markets, within which goods were not generally thought to be fungible[33] and where, by definition, the executory contract was a rarity.[34]

By the late 18th Century and early 19th Century, a market economy had been established, the executory contract had come to the forefront and, most significantly for Horwitz, an equitable theory of contractual

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[28] *Supra*, note 8 at 1108-09.

[29] *Ibid.* at 1114.

[30] M.J. Horwitz, *The Historical Foundations of Modern Contract Law* (1974) 87 HARV. L. REV. 917 [hereinafter Horwitz].

[31] *Ibid.* at 917.

[32] *Ibid.* at 920.

[33] *Ibid.*

[34] *Ibid.* at 922.

exchange was being eclipsed by the development of the will theory of contract.[35] In sum, the source of contractual obligation came to be based on a meeting of the minds of the contracting parties and not on the inherent fairness of the bargain.[36] Horwitz accordingly bemoans the increasing separation between contract and natural justice as well as the generation of a formalistic system of rules divorced from the "ancient precepts of morality and equity."[37]

Horwitz presents his historical narrative as an antidote to that of liberal meliorism which sees contractual history as tracing the "gradual recession of error before the advance of commerce, liberty, and science — an advance modestly but invaluably assisted by ever more efficiently adaptive technologies of law."[38] Instead, Horwitz provides a "deviant" history by telling the story of the "dark side of capitalism."[39]

By narrating the counter-story[40] of history, Horwitz assumes the voice of a radical storyteller. The assumption of this persona advances the CLS program to unmask and demystify the historical vision of legal liberalism, to reveal as fraudulent and marginalized liberal attempts to bury or rationalize inescapable legal contradictions contained in a formal system of contractual rules, and to reveal the political nature of law. Indeed, his historical analysis is valued by the Movement if only because:

> the new availability of major deviant story-lines about the main action in modern social/legal history has the effect of *relativizing* the old story-lines, of making them look not like uncontroversial assumptions but like what they are: some among many possible interpretive frameworks in which to stick historical evidence.[41] [emphasis in original]

But beyond trashing old styles of thinking through the telling of a deviant story, Horwitz also seeks to contextualize the history of contract. He does this through a poetic lyricism which identifies the fallen heroes of the late 18th Century. Indeed, for Horwitz, the transformative history of contract law is encapsulated in the image of the 18th-Century farmer and trader (flourishing in a small town legal and ethical culture) being

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[35] *Ibid.* at 932.

[36] *Ibid.* at 951.

[37] *Ibid.* at 955-56.

[38] *Critical Legal Histories*, *supra*, note 9 at 96.

[39] *Ibid.* at 96-97. Note that Gordon's reference here is to Horwitz's book entitled THE TRANSFORMATION OF AMERICAN LAW, 1790-1860 (Cambridge, Mass.: Harvard University Press, 1977) of which Horwitz's article on modern contract law forms a part.

[40] The expression "counter-story" is also used by Delgado, *supra*, note 20 at 2415-16 in reference to stories told by those outside the dominant group. It is the dominant group which, by virtue of its position, creates and defines the "stock" story or conventional wisdom.

[41] *Critical Legal Histories*, *supra*, note 9 at 98. Delgado, *supra*, note 20 at 2415-16, makes a similar claim when he asserts that "counterstories, competing versions....can be used to challenge a stock story and prepare the way for a new one."

displaced by the judicially promoted interests of the commercial class and their distinctly uncommunitarian view of the law.[42] Through this image, and the counter-story of which it is a part, Horwitz as storyteller subtextually constructs a rebuke and a call for reform.

C. *Mark Kelman*

Mark Kelman, in a 1984 article, defines the CLS technique of legal textual analysis known as "trashing". What follows is Kelman's definition of trashing which, for my purposes, is significant both for what it says and how it is said:

> Take specific arguments very *seriously* in their own terms; discover they are actually *foolish* ([tragi]-*comic*); and then look for some (external observer's) *order* (*not* the germ of truth) in the internally contradictory, incoherent chaos we've exposed.[43] [emphasis in original]

This one sentence sustains a great deal of textual analysis which, in turn, reveals qualities in CLS' narrative voice.[44] First, the sentence flaunts an informality which is uncommon in scholarly writing so as to generate a colloquial tone of intellectual accessibility; it thereby provides a stylistic and, by implication, a substantive foil to atticistic, "high falutin" legal scholarship. This effect is achieved, in part, by omitting the conjunctive "that" on two occasions, namely between "discover" and "they" and between "chaos" and "we've". Both omissions are grammatically acceptable but do identify the writing as stylistically informal.[45] Second, the sentence overuses italicisation[46] in order effortlessly to assume a sardonic stance against the value of traditional legal concepts. For the same reason, it contains hyperbole, and tautological hyperbole at that, as in the phrase "incoherent chaos". Third, the sentence uses several taunting words enclosed in parenthesis so that the style of its criticism imitates the attack of a sniper. This same stylistic technique implies the familiar CLS contention that traditional legal concepts are so intellectually confused that they are indeed easy to "pick off". Fourth, the sentence is intentionally protean, moving in an unexpected direction after initially suggesting that trashing involves a suspension of disbelief concerning the integrity of traditional legal concepts. At the word "discover", the sentence quickly, suddenly, and unapologetically becomes partisan: there is nothing to "discover" after all because every traditional legal concept analyzed will inevitably be trashed by this method. The sentence structure and content are thus consciously brash and contradictory in

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[42] Horwitz, *supra*, note 30 at 953.

[43] M.G. Kelman, *Trashing* (1984) 36 STAN. L. REV. 293.

[44] Of course, this is not to suggest that CLS only has one narrative voice. *See* comments *supra*, note 2.

[45] H.W. Fowler, A DICTIONARY OF MODERN ENGLISH USAGE (Hertfordshire: Omega Books, 1984) at 632 [hereinafter Fowler].

[46] Kelman has almost certainly decided to flout the rule that over-italicization is stylistically unacceptable in good writing. *See* Fowler, *ibid.* at 304-06.

suggesting, on the one hand, an open-minded style of legal analysis and, on the other hand, an inherited and invariable conclusion. Fifth and finally, in this sentence Kelman refers to the CLS Movement as "we" thereby dividing the world into two ideological groups (*i.e.* "we" and "they").[47] The pronoun "we" implies that Kelman's group talks the way Kelman talks; he is speaking in their voice and on their behalf.

The narrative style suggested in Kelman's definition of trashing is manifest throughout the article. In it, Kelman passionately defends the CLS program against its detractors, but his defence is more attitudinal than substantive. That is, while his response to the criticisms made against CLS is at times measured, he consciously downplays the normal prominence given to content and relies instead upon the rhetorical posturing first invoked in his definition of trashing. Kelman is, in turn, sardonic, taunting, argumentative, brash, contradictory, and given to hyperbole.

For example, Kelman has a curt reaction to the charge that CLS has nothing to unmask or demystify because law is concrete, detailed and empirically based. He replies: "How droll".[48] In response to other schools of legal analysis which purport to be empirical, rational, and unmarginalized, he asserts:

> I *could* take all this seriously (Tricky Dick, you were so right), but it would be wrong, that's for sure. Arguing that standard legal argument is vague, nonempirical, windbag rhetoric is just not worth it.[49] [emphasis in original]

But his article is not simply a study in petulance; it is a creative endeavour wherein the CLS program described in Part II is implicitly advanced through the "attitude" of Kelman's narrative persona. As illustrated in the preceding quotations, this attitude involves treating irreverently legal concepts which traditionally have been considered sacred; it means being unapologetically partisan and seemingly unrehearsed; it requires presenting oneself as being more reflexive and less reflective, as more conversational and less oratorical. The attitude is very much like that of a streetfighter on the side of a self-evident truth.

What is remarkable about Kelman's trashing article is that through the attitude of his narrative persona, Kelman generates a prototypic voice which has embedded within it the story of why CLS speaks in the way that it does. In short, Kelman relies upon attitudinal resonance for the

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[47] K.L. Scheppele comments that a good deal of legal scholarship is now composed in "consensual terms to an audience that it constitutes as 'we'." *See Foreward: Telling Stories* (1989) 87 MICH. L. REV. 2073 at 2077 [hereinafter Scheppele]. It should be noted that, here, Kelman is doing something quite different. His narrative perspective is to regard the audience with a certain amount of aggression and hostility — the audience is the "they" until they prove themselves otherwise.

[48] *Supra*, note 43 at 305. It should be noted that Kelman goes on to refute certain mainstream legal arguments but he does so in only marginal depth.

[49] *Ibid.* at 320.

dual purpose of creating a voice and justifying its quality. True to his style then, Kelman's account is not formally reasoned and methodically articulated; instead, it lies in Kelman's brashly tautological implication that his narrative persona speaks in the only voice available to one who sees our legal system for the sham that it is.

In sum, Kelman's narrative persona performs two functions. First, the narrative persona is called upon to advance CLS' program described in Part II of this paper by defending CLS efforts to demystify the law, to unmask legal contradictions, to show the soft underbelly of traditional forms of legal scholarship. He advocates CLS as an alternative way of viewing the world and advances the CLS program by the counter-example of contextualizing human problems rather than rendering them as abstractions.[50] Second, and as important, his persona is called upon to act as an illustration or case study; he is intended to encapsulate why CLS' voice inexorably became radical, iconoclastic, and combative. He thereby manifests the story of CLS' own voice.

IV. Critique of the CLS Storytelling Technique

It was argued in the previous section of this paper that the stories told by Dalton, Horwitz, and Kelman openly promote CLS' program to deconstruct and reform. In this capacity, the storytelling technique generally and Kelman's narrative voice specifically, have valid heuristical qualities: they become vehicles of perspective through which the reader is able to achieve independent insights regarding potential conceptual poverty in legal doctrine and structure. At other times, however, the story is offered as a self-justifying alternative to ordinary legal research which may or may not detect such poverty. In this part of my paper, I make the claim that offering the story for such a purpose — in the name perhaps of informality and alternative analytic strategies — is also tied to a strategy of subtextual and pre-emptive self-defence.

A. *Clare Dalton*

Dalton, in her article on deconstructing contract doctrine, betrays an unsustainably casual attitude to legal research. Her article implicitly undertakes the ambitious project of unmasking misogynist influences in the law, yet by claiming that she is merely "telling her story,"[51] she excuses herself from having to engage in a thorough review of the law regarding the enforcement of cohabitation contracts. It could be argued that her decision not to research the law in this area, or at least to remain silent about her results, is an act of protest against traditional legal

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[50] *E.g.*, Kelman warns that law and economics theorists could potentially rationalize the sexual harassment of a secretary by a theory of labour market perfection whereby, at minimum, the secretary could be harassed only to the extent that she were financially compensated. His reply to such a view is, "don't be too quick to accept that all pain is chosen": *ibid.* at 329.

[51] Dalton, *supra*, note 8 at 1113.

scholarship. Also, it could be argued that it is Dalton's right to limit the scope of her paper in this way. It is my argument, however, that an otherwise insightful article is greatly weakened by her refusal to be comprehensive, particularly given the traditional expectations of a law review audience. In short, it is part of Victoria Hewitt's story to know its coextension with the experience of other women seeking to enforce cohabitation contracts. And knowing whether Victoria Hewitt's experience is typical must form part of determining the shape which legal reform ought to take. For instance, if Victoria Hewitt's story is anomalous within the larger context provided by Illinois domestic relations law, then what is most immediately required is vigilance against the appointment of misogynist judges.[52]

The fact that Dalton manifests no intention to provide a thorough review of the law but merely to "tell her story" is a form of subtextual special pleading through which she obliquely seeks to avoid any sustained attack on her conclusions. In short, Dalton makes apparently wide ranging claims regarding the extent of misogyny, but cuts back her exposure by making the formally modest claim of simply telling a story. At the end of the day, however, this strategy means that Dalton's narration is unnecessarily fragmented, incomplete, and needlessly inconclusive.

B. *Morton Horwitz*

Like Dalton's paper, Horwitz's article on the history of contract law suffers from the ill effects of casual research.[53] A.B. Simpson, in *The Horwitz Thesis and the History of Contracts*,[54] renders an extensive critique of Horwitz's position that the commercial class contaminated the relatively benign and pre-commercial world of the 18th Century through an erosion of the equitable basis for contractual obligation and a judicial championing of its cause. While Simpson's critique cannot be taken as definitive,[55] he is able to make several convincing counter-arguments to which Kelman has offered no public reply.

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[52] Dalton would likely take issue with this statement due to its implication that the law can exist independently from the person who applies it. Notwithstanding, I contend that it is frequently possible to distinguish a misogynist law from a misogynist judge.

[53] The methodology of Horwitz's work has even been criticised by fellow CLS theorist Robert Gordon who, in reference to THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, *supra*, note 39, of which Horwitz's contract essay forms a part, states:

> I don't deny, and neither at this date would Horwitz himself, that there are problems with his thesis and that some of the specific criticism of his evidence and conclusions are sound.

See Critical Legal Histories, *supra*, note 9 at 98.

[54] (1979) 46 U. CHI. L. REV. 533 [hereinafter Simpson].

[55] The critique cannot be definitive because both Simpson and Horwitz are engaged in the same task which is to reconstruct legal history based on scattered insights and confusions provided by old reported case law and the jurists of the day.

First, Simpson questions the basis for Horwitz's romanticized view of 18th-Century society; the "good old law" for which Horwitz mourns was not in fact pre-commercial but merely pre-industrial. As Simpson points out:

> Although there is room for judgment here, the suggestion that English law reflected a relatively simple and primitive economy is odd.... England, even in the first half of the eighteenth century, was the greatest trading nation in the world, and its trade was supported by a sophisticated mercantile community well versed in techniques of shipping, financing, and insuring cargoes around the world. Equally important, England was second to none in the skill and depth of its commercial and industrial infrastructure....Important regional markets affected a large part of the population no later than the beginning of the century; just feeding and supplying London oriented much of the country towards producing for a market.[56]

Accordingly, Horwitz's dominating vision of small traders engaged in discrete, exchange-based contracts is unacceptably selective and speculative.[57] Second, Simpson shows the contentious quality of Horwitz's linkage between the rise of legal doctrines supporting the commercial class and the oppression of the poor.[58] Simpson urges the position that while the poor were hurt by aspects of contract law, they were not suddenly subjected to oppression because of the changing tide of contract law tailor-made and applied to serve the interests of a commercial class. Poverty had already done that job, it having always been the "misfortune" of the poor "to be outside the world in which such luxuries as legal actions at common law or bills in equity much mattered."[59]

A second repercussion of Horwitz's determination to beat contractual history into a cohesive narrative is that the story gets away from him. To a considerable extent, Horwitz appears to subscribe to a Marxist conspiracy view of the law wherein "powerful groups control the state and legal system and the law simply promotes their aims."[60] Without naming Horwitz specifically at this point,[61] Robert Gordon shows his disregard for teleological fabrications:

> Most Critical Legal Studies people have become....disenchanted with the project of trying to explain law as nothing more than the tool of the

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[56] Simpson, *supra*, note 54 at 539-40 (footnotes omitted).

[57] Simpson does not deny that parts of British society had little contact with commercial activity. What he finds unsupportable is Horwitz's premise that "there must be a national market embracing almost everyone in society before the groups that shape the law can be influenced profoundly by commercial interests and needs": *ibid.* at 540.

[58] Horwitz, for example, comments on the commercial class benefit and bias associated with judicial willingness to enforce penal provisions in labour contracts while refusing to do the same in building contracts: *supra*, note 30 at 955.

[59] Simpson, *supra*, note 54 at 601.

[60] Boyle, *supra*, note 27 at 722.

[61] Gordon does expressly criticize Horwitz in this article, however. *See* comments, *supra*, note 53.

> ruling class....[T]he crude versions of the law-as-an-elite tool theory are as vulnerable as mainstream functionalism to the critique which points out how incredibly difficult it is to relate events in the realm of "law" in any straightforward causal way to those in the realm of "society".[62]

In accord with Gordon's view that the matter is difficult, Simpson seeks to illustrate how Horwitz "has made a complex, confused story fall into a preordained pattern."[63] He thus is able to challenge cogently the very basis of the story which Horwitz tells.

Horwitz makes no excuse for his refusal to acknowledge the dangers and complexities in the task he set himself, perhaps because he was unaware of them at the time. Unlike Dalton, then, he offers no special pleading. His work is similar to Dalton's, however, to the extent that his storytelling about history provides him with a pre-emptive kind of self-defense. That is, Horwitz presents his imposed narrative account of contractual history as measured, inexorable and accordingly irrefutable. For the sake of the story, then, Horwitz suspends disbelief and asks his audience to do the same. But for the reasons given above, the story told ends up being a story which, for the most part, merely reflects an antecedent thesis.

C. *Mark Kelman*

Kelman, in his article on trashing, reaches a height of casual empiricism and disdain for research unparalleled in the work of Horwitz and Dalton. For Kelman, the law is in such a mess that there really is nothing to research or to analyze; as he tells us, he used to record in a notebook his many objections to standard legal argument but came to give it up because the exercise was too oppressive: "[M]ercifully, I've burned the notebooks."[64] This is the extent to which Kelman purports to offer any systematic or thorough basis for his blanket condemnation of the law. Instead of engaging in a disciplined form of legal analysis, Kelman chooses to destabilize and trash.

As discussed in some detail earlier, the style and voice of Kelman's narrative persona is consciously chosen and offered as a vanguard for reform. Kelman has no intention of creating a voice for CLS which is measured, nor does he have any desire to provide a tempered and scholarly justification for its combative tone. Kelman frequently passes over legally researched argument and chooses tautology and attitudinal resonance to tell the story of why CLS speaks in the voice that it does. At bottom, we are subtextually advised that CLS speaks the only way it can and we are most welcome to take that voice or leave it.

To a large extent then, Kelman refuses to provide a basis for his story; this refusal is both an act of protest and a defensive, subtextual strategy against counter-argument. Most significantly, however, in

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[62] *Critical Legal Histories*, *supra*, note 9 at 75. Simpson, *supra*, note 54 at 600, makes an identical point.

[63] Simpson, *ibid.*

[64] Kelman, *supra*, note 43 at 320-21.

refusing to explain himself, he narrates a story which is neither incomplete, like Dalton's, nor oversimplified, like Horwitz's, but one which is often simply made up. While it could have been otherwise, Kelman tells us very little about anything.

V. Conclusion

The first thing to be said about the CLS storytelling technique present in the work of Dalton, Horwitz, and Kelman is how forcefully and effectively it facilitates deconstructionist reflection regarding the objective and neutral qualities traditionally ascribed to legal doctrine and liberal democratic society.[65] The story then is not just illustrative or rhetorical — it is also constitutive of CLS theory and method. In doing the very thing which it describes, narrative generates a truly impressive symmetry: it provides contrast to sterile, abstract, semiotic commentary; it contextualizes; it reveals the inherent limitations of law and its inconsistencies; it pushes at the frontiers of legal discourse; it acts counter-hegemonically;[66] it manifests an ethic of care;[67] and it seeks to create new ways of thinking, new ways of being.[68]

But CLS must also accept a strong measure of criticism for the manipulative way its stories are told and the exaggerated importance the Movement attaches to them. No argument is taken with the aspiration to improve the world or to challenge through methodology the classical assumptions which sustain legal liberalism. And of course, no argument is taken with the proposition that a story can have value standing alone. However, when narrative is coupled with an unscholarly condemnation of legal doctrine or a romanticized longing for simpler times, then the story itself becomes a source of deception. The absence of a thoroughly researched foundation for the analyses offered by Dalton, Horwitz, and Kelman means that the reader must keep his or her distance from the conclusions they make or imply. To the extent that these three theorists choose to limit the range of their scholarship and defend this choice tautologically and subtextually is the extent to which they fail to speak openly and clearly. Rhetorical short-cuts create a narrative voice which, consciously or not, disregards the very standards and values of CLS critique.

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[65] In this regard, *see* Delgado's comment *supra*, note 20.

[66] Delgado uses this term to describe the quality of stories which challenge the prevailing ideology which, in turn, functions to make "current social situations seem natural and fair." *See* Scheppele, *supra*, note 47 at 2075.

[67] Accord Delgado, who argues that counter-hegemonic storytelling can "quicken and engage conscience." *See* Scheppele, *supra*, note 47 at 2075. *See also* Massaro's comment *supra*, note 19.

[68] For Delgado, *supra*, note 20 at 2441:

> Legal storytelling is an engine built to hurl rocks over walls of social complacency that obscure the view out from the citadel. But the rocks all have messages tied to them that the defenders cannot help but read. The messages say, let us knock down the walls, and use the blocks to pave a road we can all walk together.