The Basic Ideas of Critical Legal Studies

Critical Legal Studies and Legal Realism
Critical Legal Studies scholars share with legal realists a number of basic convictions, including (material provided by David Adams):

- The conviction that the rules that are taken by legal positivists to form the essence of law are in fact inherently indeterminate; that is, without a clear, fixed meaning. Karl Klare: “Legal reasoning is a texture of openness, indeterminacy, and contradiction.”
- CLS share the moral skepticism of some of the realists, rejecting the notion of a natural or rational moral order that could serve as a the basis for a natural law theory.
- Like the realists, the CLS proponents are deeply skeptical about the doctrine of following precedent, claiming that it provides very little in the way of constraining or challenging legal reasoning.
- Both legal realists and CLS scholars place more of an emphasis on the role played by factors other than the written law in the shaping of court decisions.

CLS and Legal Positivism
The central challenge of CLS is directed at the assumption—centrally a part of legal positivism—that the law consists of clear rules that can be applied in an objective and neutral fashion to reach predictable, correct results in a given case. What lawyers and judges call “rules” of law are often vague and indeterminate, in a way that conveniently hides their ultimately political nature. According to CLS scholars, courts do not, as positivists such as Hart would say, legislate only in the restricted “penumbral” zone, but all the time.

Key Elements of CLS

- Operative Claim: The law is infused with irresolvably opposed principles and ideals.
- An attack on the idea of neutral principles in law and morality. Neutral principles: those principles that can be agreed to by all rational beings, general principles of justice, fairness, or equality (Rawls, Dworkin).
- Influence of Legal Realism: rule-skepticism and legal activism, the realist account of the random processes and the personal factors that can generate and resolve legal disputes, especially at the level of ethical principles. While the realists stress competing rules, CLSers stress competing and irreconcilable principles and ideals. Yet, the basic theme is the same: the judge must make a choice which is not dictated by the law.
- Law is a patchwork quilt of irreconcilably opposed ideologies. Rejection of Dworkin’s rational/ethical reconstruction of the law: it is implausible to believe that any system of norms generated by such a process of struggle and compromise characteristic of the law will be capable of an ethically principled reconstruction.
Repudiation of the distinction between law and politics: all of those ideological controversies which play a significant part in the public debate of our political culture are replicated in the argument of judicial decision. The spectrum of ideological controversy in politics is reproduced in the law and the same ideological debates which fragment political discourse are replicated in one form or another in a legal argument.

Influence of Nietzsche, Marx, Freud, contemporary continental philosophy and literary theory (Derrida, Foucault). Left-wing political agenda (progressive movement). Demonstrating how discourse has turned contingency into necessity, revealing the repressed alternative interpretations, unmasking the unconscious ideological bias behind legal structures and procedures.

Influence of Nietzsche’s “inversion of values”: morality as a cultural artifact that evolved to rationalize and protect the interests of particular classes of people; and this he claimed that we could expect as many different moralities as there are social classes, and that we might also expect that some of these moralities would evolve as reactions against others.

- Since values are simply a product of power relations, there is no moral truth or objectivity and thus no point in taking morality very seriously as a fundamental source of social and legal evaluation and criticism.
- One would expect a complex culture, a culture with several subcultures of differing values, to manifest overall a radically inconsistent scheme of values—one that could not be unified, as Dworkin seems to hope, in a single comprehensive moral theory that would be equally compelling to all rational members of the community; for such a theory would inevitable be biased in favor of some views and beg the question against all others.
- The values of the powerless classes, although they may allow these classes to adapt to their powerlessness with some tranquility and illusion of self-respect, function through this very mechanism to keep them powerless.
- The stated public values of a culture function to validate and maintain oppression—a point we will always miss if we study only a culture’s public value rhetoric and fail to probe the underlying substructure of exploitive power relations.

Possible skeptical conclusion: once one fully understands the causal origins of values (as an outgrowth of power relations), one will no longer take value claims seriously and will thus not see them as an obstacle to the pursuit of one’s own political agenda.

Legal and moral doctrines are in fact merely after-the-fact rationalizations of a basic and hidden social reality—namely, political or power relations and the deep inequalities that such relations inevitably incorporate. These doctrines thus function to protect the interests of those having power against those who are powerless by fostering the legitimating illusion that the power inequalities are just in some neutral rational sense.

Focus on discourse and rhetoric: Law is not a repository of noble principles but a plastic medium of discourse that conditions how we experience social life.

- Legal discourses are discourses of power reflecting the interests and the perspectives of the powerful people who make most use of them.
Legal discourses are saturated with categories and images that for the most part rationalize and justify in myriad ways the existing social order as natural, necessary, and just.

Legal discourses have the legitimating power they do because they sketch pictures of widely shared, wistful, inchoate visions of an ideal—a society of dealings between genuinely free and independent equals, one so ordered that we could cooperate without having to worry that they would hurt or enslave us.

- Analyzing legal discourse: CLS people believe that when you take legal discourse apart and see how it works, you can start to reinterpret it and to gain the energy and motivation to engage in local political action that in turn can help to change the social context that the discourse has hardened.

- Civic Republication Tradition: Using history/genealogy to look for alternatives: historians have recently been revising the “republican” view of the purpose of politics as that of facilitating self-development through participation in community self-governance—a periodic rival to the dominant liberal view that the end of politics is only to facilitate the individual pursuit of self-interest.