Duncan Kennedy and Corinne Blalock

Provocation as Strategy: An Interview with Duncan Kennedy

Duncan Kennedy is a retired Harvard law professor and one of the founders of Critical Legal Studies (CLS) in the 1970s. CLS took aim at the dominant discourse within the legal academy at that time—a form of left-of-center liberalism that professed faith in the courts as mechanisms for progressive social change—as well as the hierarchies of legal education. It emphasized the creation of a left school of thought within the legal academy, the politicization of the elite discourse of law, and the reception of Continental critical theory into legal studies.

This interview with Duncan Kennedy is an excerpt taken from a series of wide-ranging and at times unruly conversations with me, Corinne Blalock, conducted over the last few months, which covered everything from neoliberalism and vulgar Marxism to elitism and the Sex Pistols but were then transcribed and edited down. In light of Kennedy's central role in the formation of the last critical legal movement, it is perhaps unsurprising that the themes that repeatedly emerged were questions of strategy and tactic, as well as the very different political moments in which CLS and the emerging Law and Political Economy movement are situated.

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CORINNE BLALOCK: A lot of readers of *SAQ* are outside of the legal academy and may not be fully acquainted with CLS. Taking into account the heterogeneity of CLS as a given, if you were to identify the central principles that defined CLS for people outside of law, how would you do that?

DUNCAN KENNEDY: As you know, I think of CLS as having been but no longer a movement, as having been and still very much being an active school of thought. Also, a media factoid that exists in the minds of an audience outside of the actual practice of legal academia.

If you're thinking about CLS as a movement that flourished between the late seventies and the early nineties, the people participating in the movement meant by "it is a movement" that it was people grouped together allied in a common project of left-wing reform of legal education with the complicated objective of creating what you might call leftism in legal academia, which had not existed before. The goal of CLS as a movement, at least as I saw it, was to create something that was an identifiable political tendency to the left of American liberalism that was institutionalized and that could sustain itself over time. The content of the left agenda, of the movement, was directly derived from the New Left and the civil rights movement and feminism in the 1960s and early and middle seventies.

One thing that people joined the movement enthusiastic to try to accomplish together was reform of the educational practice of the classroom. The ideal was really just progressive educational philosophy finally gets a beachhead in the reactionary domain of the legal academy. The goal was to humanize and democratize student-teacher interactions. It was understood by everybody in the culture that the Socratic classroom alternated between highly respected tough-guy teachers and more liberal soft-guy teachers whom students understood to be less competent. The soft-guy/hard-guy combination was a powerful training ground for their future participation in the internal hierarchy of law firms and the bar more generally. It was profoundly conservatizing or just depoliticizing.

CLSers also wanted to change the curriculum, to make it something that encouraged the understanding of the politics of law and gave left students the tools needed to bring their leftism to bear within their deeper practice and their legal thinking. The fourth thing was a very strong commitment to affirmative action. Appointment fights were the most salient locus of conflict in faculties over the whole period. But a commitment to diversifying meant spending time to locate candidates, help them with résumés and job talks and then with getting tenure.

Finally, CLSers critiqued that a lot of what was repulsive about patriarchy in private life extended into legal education as more training for hierarchy in the law firm. Women got interrupted much more often than men, throughout.

Turning to the internal ideals of the movement, a small group of people were the de facto leaders, but the first principle was no formal organization that does anything—the movement was situated within a larger network without any charter or officers or elections. It didn't take positions; it didn't have a journal; it didn't do anything of an officializing variety except obtaining its tax-exempt status. That was the first principle.

The second principle was although there were leaders, it should be internally as egalitarian as possible. That is, it shouldn't reproduce among the people of the movement distinctions that would be based on, say, age or gender, or race, or sexuality, or incredibly significantly what law school you taught at or graduated from—which would make it really different from life in the law school, where every conceivable insidious distinction played some clear role in the social life of everybody there.

Another was the idea that the only way to prevent what Peter Gabel calls the twin dangers of strangulation by bureaucracy or wrecking by anti-leadership anger and paranoia was . . . there was no formula. The idea was that the leaders would lead, and if they were dicks, "the people" would walk away.

We were the extreme opposite of a party-building group, very self-consciously, and we believed that a tragedy of the New Left had been its descent into sectarianism and that the impulse to centralism, sectarianism, dogmatism, kicking people out, all of those things were not just mistakes, they were ways in which the movement had not managed to free itself and become an emancipatory "prefigurative project," to use the lingo of the time. But we also believed that there are always angry wreckers and that leaders needed fine intuitions about how to incorporate and in a sense "heal" them or subtly but firmly get them to leave.

Last but not least—this is an improvised list—was the syndicalist principle. That is, changing, democratizing, equalizing the internal life of the law school where you worked was a completely valid form of left activity even if it contributed nothing directly or immediately to changing society beyond the workplace. The movement had as many centers as there were law schools and no center of centers and no movement agenda to influence the state. Many CLSers, including me, formulated lots of policy proposals dependent on state action, but it was never the idea that these were CLS positions rather than some CLSers' position. And the idea was to fund everything through faculty travel allowances, free Xeroxing and telephone, and trivial registration fees.

Then the organization of the collective life should be done by faculties, so the law school conferences, twelve conferences, were each organized at a law faculty by two or three or four people at the faculty who dared to identify themselves with Critical Legal Studies in the grammatical mode of organizing a national event. Although, of course, maybe it was a brilliant career move. I think, quite often, at different points, it could work to build a movement by giving a young, tenured professor a basis to establish a national idea, in the eyes of his colleagues, of his, or later, her, importance. Deans often saw it that way and coughed up some shekels. That was syndicalist.

A Generational Project

CB: I was wondering if you could speak to this idea of CLS as embodying a generational anger, because you've at times characterized what bound them together as a generic radicalism, writing that in this particular historical moment, it was "desirable and permissible to operate at a higher level of confrontation with culture" (Krever, Lisberger, and Utzschneider 2015).

DK: I hope you get the idea from what I just said that it was generational in several senses. The set of principles was, according to us, generational; they were the ideas of the New Left before it descended tragically into sectarianism and the cult of violence. There were very few of our elders who shared these ideals—a tiny but often brilliant minority of members of the postwar generation born 1920–1940, the generation just coming fully to power in the 1960s.

But CLS was also a generational phenomenon in the sense of embodying a common anger of a cohort of age mates against their parents and their parents' contemporaries in power everywhere. The people who set CLS up were in their teens or twenties in the late sixties and generational anger was everywhere in the culture, all social classes, ethnicities, and gender orientations.

But within that very widespread (*not* universal) thing, the early critical legal studies scholars had a peculiar generational experience of the academic job market. Tenure track jobs in the humanities and social sciences disappeared in the late seventies and early eighties as baby boomers had filled up the jobs and the university began its long decline. One of the reasons CLSers were able to enter the legal academy is that in law schools there was a massive movement in the opposite direction as the number of tenure track jobs increased by about 40 percent over fifteen years (and then freezes shut after 1990).

The oldies were indiscriminately hiring newbies based on their politically (but not class and race) neutral credentials. Quite a few of the new have "graduate student" consciousness, but grad school was no longer an option.

They were starting their jobs in a quite different institutional context, much more formally hierarchical than grad school. Very based on the idea that the old know better than the young everywhere. Many shared a kind of latent oppositional movement consciousness, even if they'd never participated in a single movement or done anything oppositional.

There was a political critique of the senior faculty, but also there was a critique of their condescending understanding of themselves as masters of the legal universe that was like the critiques of all the other elites, from the government experts running the war in Vietnam to Dow Chemical executives manufacturing the napalm for them.

It's one thing to explain the formation of a rebellious generational consciousness and another to ask whether it was justified in substance, and yet another to question the tactics, the cruelties and mischaracterizations and ill-informed mouthing off of the young self-styled rebels alternating with sullen resistance to faculty community.

My view (no surprise coming): the generational project of political, cultural, emotional educational challenge to the dominant older generation that was in power in law schools from the mid-sixties through the mid-eighties was great. Just great, justified, and desirable to go after them. The tactics were sometimes great and sometimes terrible, but we're talking small potatoes compared to the substantive paradigm-changing work we did politically and academically. (Read George Packer on his father Herbert's reaction to the revolt at Stanford in the late sixties and early seventies and then John Griffith's brilliant seminal critique of his father's ideas about criminal justice in an unequal society.) I'd say, "What did you expect? It was a war."

I think the only situation that's comparable, from my point of view, would be the situation today whereby totally different repressive tactics of the current older generation have produced an equally dead and generally repressive situation in legal academia. The liberals are way further to the left than our old guys were, but they were actually further to the left than they were ever given credit for, and today's left-wingers are a sometimes scary bunch. If you (thinking of no one in particular) wanted to do something against today's equivalent of ours—fifties culture dominating in the mid-sixties—you'd have to be quite . . . provocative, quite confrontational. And by this I mean, provocative in the sense of saying things and writing things deliberately designed to produce strong emotional reactions from the audience. I am not talking about the situation in which earnest scholars unintentionally provoke outrage by laying out what they earnestly believe to be true. We are in J. L. Austin territory here

The big remaining question on everyone's lips as always: But aren't the confrontational tactics of generational rebellion self-defeating?

The results of provocation looked at over the period from 1977 or 1978 to 1991 look striking today: I once heard Dirk Hartog, who, you may know, is the classic mainstream liberal legal historian, declare CLS actually succeeded in an amazing modification of what is taught, how it's taught, how people think about law within legal academia, and the outer spread of it into the general culture. If you compare the discourses of legal elites, meaning the bar, the judiciary, and the legal academia, and the high levels of the federal administration in 2021 with what they were in 1977, everyone would say the major change is politicization. Then you say, "How did that happen?" One person after another pressed, well, when did it begin? What were the early signs? How did this develop? What was going on? And you'll get the answer. It was Critical Legal Studies in the eighties. We politicized the discourses of the legal elites in the United States. Nobody else did it. The provocations were what made it possible to do it.

I hope you recognize that's making the full grandiose claim. What we did was comparable in impact to legal realism. As with the realists we did it by confrontation. And as with the realists many of our ideas have been coopted by the mainstream and used for all kind of moderate and conservative purposes, which is great—a scientific advance. And as with the realists, until we rediscovered them in the 1970s, they deleted us or parodied us once our work was one. Oy vey! Please not another "eternal return narrative"!

The first to formulate this, by the way, was Robert Bork (1990), in his book *The Tempting of America*, which he wrote after he was rejected for the Supreme Court nomination. He identified what was happening, the politicization of law, and strongly identified it with Critical Legal Studies, such a thrill. I'll give you another example, a comic example. In something like 1985, the *American Lawyer* gave a list of the fifty most influential lawyers in the United States. I was on the list as one of the fifty and here's why: "He is exercising a destructive influence at Harvard Law School which is having dire effects throughout the profession." That's what it said literally, in so many words.

Provocation as Tactic

CB: I want to push on this success narrative a little bit because I do think that there are people within the movement who would deny it. In certain ways the effect that CLS had is undeniable. The idea that law and politics are really radically separated is an idea that after CLS is no longer tenable. Mark Tushnet

has put forward this *CLS succeeded and that's why it looks like it disappeared* narrative. I am interested in the degree to which if that's true it feels a bit like a hollow victory, because the class-focused leftist piece appears to have fallen out—that piece didn't come into the legal academy; at best it got relegated to the clinics, and at times completely pushed out. Other crits have made the argument that the biggest mistake CLS made was to be so provocative.

And so, alongside the narrative of triumph is one of failure. There are two dominant versions of why CLS supposedly failed. The first and perhaps more prominent is that *CLS had no agenda*, or put another way, *indeterminacy is nihilism*. Bob Gordon (1995) effectively dismantled the idea that CLS had no affirmative/constructive projects, and ironically, if anything I think much of CLS's optimism came precisely from its belief in radical indeterminacy. The second narrative of failure, and one I have heard from a number of CLSers, is that there was *too much provocation*. The story goes that the ideas themselves were where CLS's success came from, and the provocation was unnecessary blustering that limited that success.

DK: I think you're right to be preoccupied with the question of provocation and tactics; it really is just a massive question for nascent left organizations of any kind. Many people in CLS were exactly of that view. The idea of being provocative was shared largely by the people who participated enthusiastically in *Lizard*, the CLS zine. But the zine begins by saying the views expressed in *Lizard* are the views of the minority, disapproved of as being ridiculous by the vast majority of more sensible and well-meaning members of CLS.

That position is certainly worth taking very seriously, including by me, who loves provocation for its own sake. But what do you understand it to mean? You seem to agree with my grandiose politicization claim. And I think you're right that many thought and think that CLS would have been more successful if it had been less provocative. But what notion of success? If the measure was success in changing the terms of legal academic discourse by politicizing it, it's hard to see how we could have been more successful. And provocation, far from a drag on our success, was its principal tool once we had developed our new anti-mainstream legal theoretical positions. The reason being that the particular political nature of law (quite different from the particular political nature of legislation) was at the time a secret, an open and scandalous secret, that those who thought of themselves as the "illuminati" knew and denied, like a family secret—Uncle George is the product of grandma's secret affair with someone we thought was her worst enemy—just look at him! Earnest political scientists and a tiny number of leftover

legal realists had been earnestly pointing at the emperor's bare bottom for years. No one paid the slightest attention.

This brings us to the second possible meaning of the claim: that without provocation the more complex, original, and important ideas of the movement—let's imagine them skillfully but not controversially presented—would have succeeded more than they did in the traumatized post-confrontation mainstream milieu. To respond in a mean way, in the post-provocation, post-crit epoch the advocates of moderation, freed of the albatross and free to put forward crit ideas unlabeled and "on their merits," have not fared particularly well in the academic marketplace.

Confrontation was part of a second major project whose success may have been hurt, affected by choice of tactics. It was to build, as I mentioned before, an institutionalized legal academic Left capable of sustaining itself over time. The crits disappeared as a presence, relegated to a mistake of the distant past as soon as their heroic labors on behalf of truth in legal science had been accomplished. But today CLS still figures as one, not a particularly important or well-known one, of the schools of American legal thought.

CB: Using your distinction of CLS as a movement from CLS as a school of thought. Did the school of thought have a different trajectory?"

DK: The school of thought never died. When I notoriously and portentously declared the death of the movement I affirmed that the ideas survived and prospered in the successor networks including the labor law network, the queer theoretical network, and the international network, each involving a few dozen scholars producing dozens of articles. A school of thought is different from a movement, so the people in it who are attracted to this school of thought, their activity as participants is to write stuff and to go to meetings and discuss their writing, which is what I think LPE (Law and Political Economy) may be becoming, but isn't yet.

I think it is a legitimate question whether the provocation or confrontational strategies in general impeded the growth of the school of thought. There are several ways that may have been the case. By the mid-eighties, when the strategies were at their height, it was briefly the case that for a number of academic specialties a conference should have a crit along with a law and economics person when the idea was representation of the current tendencies. Provocation and confrontation eventually produced a pretty overt move to keep crits out of the academy, deny them tenure once in, reduce their mobility when tenured, limit their desirability to student editors of law reviews looking for faculty guidance, and no more expected inclusion in "representative" events.

If the mainstream had fought back fairly, or better yet suffered in silence, gnashing teeth and rolling eyes, there would be more self-identified crits in the academy and they would have higher status. In that sense by causing the backlash we limited the possibilities of the school of thought that we were trying hard to set up and institutionalize. I think not a few ex-crits, almost-crits, disgruntled crits of the older generation feel that the casualties and the stunting were not worth it—better not to have poked the bear in his meritocratic cage, because the cage turned out to be an optical illusion rather than a real constraint. People who think of it as something they would have loved to be part of can legitimately say they have been denied that chance because the backlash crushed the movement and scattered the school into self-contained successor networks without an interest in a more general all-inclusive political/intellectual project.

The backlash was bigger and more intense than I, speaking only for myself, anticipated. And once it began it obviously had its own momentum, so it no longer mattered what any of us said or might have said to pull back. We had become a symbolic marker for the truly deep generational conflict, see above. For the old it was a chance to win battles lost twenty years earlier; for our contemporaries, they had a thousand attitudes, but always remember that the "sixties nonsense" we came from was never the thing of a true majority of our contemporaries. And the younger generation of law teachers watched in wide-eyed, slack-jawed horror as we (with our small number of gutsy younger generation allies) created scenes of nasty conflict that threatened to turn life as an untenured junior into living hell.

What made the situation complicated was that there were two kinds of trade-offs going on. One was respectability politics for the school of thought versus effectiveness in the politicization project, which depended on provocation. But . . . at the same time our success in creating the school was at least initially dependent on confrontation. Provocations recruited students into CLS to become professors, and they recruited young professors, hopefully, with tenure at other schools to see that something was going on that was exciting.

Why? Because the provocations were part of the moment in which a dissident group with generational politics stands up. What this meant to me was that there were two questions about provocation, a short term and a long term. In the short term I was all for trying to calculate the impact of provocation on particular aspects of the movement/school. All I would say is that the more moderate CLSers and above all sympathizers and fellow travelers endlessly underestimated or just ignored the past and potential gains from conflict. It was temperamental! On both sides, of course.

But it is much more serious. Mainstreamers in general almost by definition don't understand that for a left oppositional movement trying to institutionalize itself, provocation has another super important function, which is transformation of the audience as potential actors and allies, not persuading them to do something in particular, but to cause them to feel differently about themselves and the situation. Some listeners are surprised, with a frisson of fear, to realize it is what they would like to dare say themselves. Sometimes it's that the provocation's content, pointing to royal bare bottoms and evoking generational values, makes daily student or young professor life seem suddenly empty but full of previously missed opportunity. In other words, in a horribly overused but here technically necessary lingo it is performative—when it works, of course, and *don't try this at home* is a good maxim.

The goal of provocation is psychodynamic, related to people like Paulo Freire (2000)—*Pedagogy of the Oppressed*—the idea is that law professors are basically trapped in their own passivity and that a goal of CLS aside from changing particular legal rules is liberation. Liberation is psychic transformation of being. We believed there were better and worse ways to be, and, with Marcuse, we believed that the capitalist psychosexual economic production system of capitalism, just as Marx also believed, is unbelievably deadening, and it's deadening to everybody at every level.

Changing Legal Education and Changing Society

CB: How do you see CLS's critique of hierarchy and alienation in legal education as tied to or distinct from its critique of political society at large?

DK: I guess I'd say that our idea of a desirable social transformation of the society as a whole was just a large-scale version of what we believed we were actually proposing, with some success, for legal education. We differed as to what that should be, from my infamous *equal pay for janitors* proposal to very practical proposals to make law clinics into centers of neighborhood mobilization around housing, credit, health, employment issues. The critique of the deradicalized American labor movement was central as long as it continued to exist. The reform of private law aimed for equality and solidarity, and in public law it was for an uncompromising assault on the legal structures of white supremacy in the North as well as the South, the program the court formally renounced in the mid-1970s. And we were more into participatory democracy than plain old liberal democracy.

CB: Building on the discussion of provocation, what was CLS's theory of change more generally? Clearly, you all were committed to changing the legal academy both in terms of what the experience was like for the students and what it was like for young faculty, but you had larger political aims outside of the university.

DK: The way you asked the question is the normal way to ask it, which has an ambiguity that I have to resist. It suggests on one level the theory of change in general, or social change, or progressive social change in general from whatever cause, and particularly as a result of agitation for social change by social movements. That's one sense of the question. The other sense would be what was your theory of why what you were doing was going to change something, anything, for the better outside the academy. Maybe I don't understand, but is this another way to ask how you could have thought your provocative tactics, maybe conceding their politicizing effect inside the academy, could conceivably contribute to a larger agenda of progressive legal change, meaning in society at large?

It's obvious to me, but who knows what the comradely consensus would be, that what we thought could bring about change and what we thought about our own conceivable role in it was a function of our *situation* as white, educated self-styled radicals or left-of-liberals in the late seventies. From the mid-fifties through the 1960s, left-of-liberal law professors had a good answer to your question if it meant how are people like you going to change the system? The plausible role for law professors of our ilk was actually great, even spectacular, for the whole period because the Warren Court listened to law profs, and employed their best students—potential law profs—to write their opinions. Radical law profs could and did influence their liberal colleagues and through them the US Supreme Court and through the Court . . . the world.

From the point of view of the politics of legal academia, the crucial moment in the shift of the possibilities as an instrument of reform occurred in 1970 with the appointment of the Minnesota twins (Burger and Blackmun), confirmed by the reelection of Nixon by a landslide in 1972. At that point, the Warren Court agenda, which encompassed every then-imaginable left-liberalism as a project of state power, took a gigantic hit.

As law students in the late sixties, early seventies, we had criticized that agenda from the left, excoriating the Warren Court for moving too slowly on race issues. Passivity on Vietnam. In private law, the lack of consumer protection and landlord tenant agendas. Legal deradicalization of the labor movement. That was nothing! So to speak.

What happened then was a slow but massive turn of the judiciary to defend the interests that are identified with the Republican Party in the forms of capitalist enterprise and white supremacy (not yet "traditional values"), a shift that was the result of electoral victories by the Right, allowing them to recapture the judiciary. In other words, when the Court changed hands the class/race left-of-liberal agenda lost its main change vehicle.

It was truly surprising how little energy or intelligence the liberal intelligentsia and the law prof intelligentsia in particular were able to muster to critique the positions of the surging Right. We had believed in liberal hegemony within the American ruling class and focused a lot of attention and anger at its carriers. As neoliberalism took over the courts, rights-adjudication-obsessed liberals abandoned the class/race part of the agenda to the Right.

At the same time that this was happening, the pre-Nixon alliance on the Court between social-issue liberal Republicans and mainstream liberal Democrats around women's rights, LGBTQ rights, and environmental rights survived. It was still possible to be a liberal legalist believer because in these areas law profs were still exerting a stunning amount of real-world influence through the intermediary of the Court. These left liberals understood the obvious fact that their success depended on their definitely not sounding like 1960s radicals.

CB: I take it you mean by liberal legalism, the claim or hope, or in your view the fantasy, that correct legal argument to the Court meant liberal argument, liberalism being immanent in the Constitution, so that if the Court accepted the correct legal argument, it would change the world in a liberal direction.

DK: Yes, exactly. In 1976, Carter is elected. Carter is a neoliberal and he isn't going to do anything about race/class issues, but he begins the juridification of international human rights, creating another non-radical left liberal vocation along with feminism, sexual identity, and environmentalism. In 1980, Reagan is elected. He doubles down hard right on race/class issues and is reelected in a landslide, but the liberal Republican–liberal Democrat alliance on the Court on social issues holds in spite of his efforts.

The first crit conference was in 1978. By then two disparate things had happened to the emerging *us* who would become first generation crits. Together they led to the strategy of the left-of-liberal institutionalized legal academic *school*, distinct from our various individual activist endeavors and dreams of state power. The first was the declining political plausibility of race/class change through the courts pursued through "liberal legalism." The second was the emergence of a brand new legal academic body of critical

theory combining revived elements of legal realism with the "reception" of Continental critical theory. In the light of this complex new critical "thing," to be a crit was to have lost faith in the internal coherence of liberal legalism, as well in its plausibility as a strategy for change.

Suppose you asked the typical first-generation crit, with radical race and class commitments and also more left feminist and gay commitments rather than typical liberal ones, What is your theory of how your activities as a law professor can bring about social change, meaning to the left in society at large?

In 1978 that question seemed absurd, at least to me. It looked as though the only way it would come about would be by some kind of big popular mobilization or by serious violence in poor Black neighborhoods, not by decimated labor and civil rights movements and obviously not by radical law professors influencing the Burger Court. If you're not going to be saved by Lyndon Johnson or Earl Warren for the predictable future, it's time to reflect on why none of that worked. Whereas the impulse of the true liberal legalists who are doing often amazing work of many different types is, so to speak, to put Humpty Dumpty back together again.

I think you are absolutely correct: the key to understanding CLS as a school of thought is the critique of liberal legalism as it arose in that period. The critique arrives in the mid- and late seventies, not as a bombshell but as a process of collective study at CLS summer camps and in exchanges in law reviews. The end product was the "critique of rights in CLS." The first "something" that "happened" was the revival or rediscovery of the legal realist critique of legal conceptualism (Holmes, Hohfeld) and the legal realist critique of the public-private distinction (Hale, Cohen).

At the same time, Catharine MacKinnon's "Feminism, Marxism, Method, and the State" and the other *Signs* pieces had a big impact. I remember teaching a draft I'd gotten hold of somehow in a class of law students working in the Harvard Law School legal aid clinic—we knew this was big! But some of us already had been reading Shulamith Firestone, *Dialectic of Sex*, and Robin Morgan, the pieces that appeared in *Going Too Far*.

Law and Critical Theory

DK: What happened was the en masse reception (no less pretentious word fits) of Continental critical theory. I can't figure out how to divide them into categories, so here is a long list. Marx, *On the Jewish Question*; Weber, *Politics as a Vocation*; Lukacs, *Reification and the Consciousness of the Proletariat*; Gramsci, *Prison Notebooks*; Sartre, *Being and Nothingness* and *Search for a Method*;

Habermas, *Knowledge and Human Interests*; Levi-Strauss, *The Savage Mind*. I keep Foucault for special mention, "Two Lectures," in *Power/Knowledge*, because he spoke probably to more of us than any other one author. Note that this was the first reception. The second was of postmodern theories of various kinds, especially Derrida, and also Saussurian semiotics, but didn't happen until well into the eighties.

A couple of dozen law profs read together and separately pieces from this hodgepodge of texts. The texts arrived often separated from the authors' other works and from interpretations and critiques they had generated at home. There was no local tradition of reading and interpreting them—we were inventing one as we went along. This opened them to wild patterns of productive and often fanciful misreading in what Lopez Medina (2004) calls in another context an "impoverished hermeneutic environment."

That noted, we did produce a genuine new thing—the first critique of law anywhere to fuse high critical theory with legal realism, making something strikingly superior to realist pragmatism and European legal formalism. It's still going strong four decades later. You have the object, which is law, and you approach it with every theoretical tool possible because your investment and the thing you are trying to understand and transform is law, not any one of the theories that you cannibalize along the way, though you hope some very fancy theorist will wake up one day and say, "Hey, those law guys are on to something." The cathexis, as Freud would say, is to the law, and everything else is instrumental to the cathexis.

In our little closets in legal academia what role could we play? That's not the question that we are going to resolve by applying a correct theory of change to induce or deduce the right answer for us. It's not like that at all. At this point, as I'm reconstructing the story, CLSers share disillusionment with the idea that the future good of humanity in America is in the Constitution, its historical evolution, the scholarship that now elaborates it, and its sophisticated theorization. We are situated as a result of the waves of the sixties washing us up on the beach. There are a hundred of us. We have great jobs. The professional corps we're part of: compared to other academics, we have more access to political consciousness by far. We're much less marginal than English professors, and, anyway, English professors are being extinguished. What should we be doing?

At least as I saw it there were three immediately plausible projects and the already mentioned long-term project of institutionalizing the school of thought as a thing valuable in itself as part of the project of enlightenment and with hope that it would be useful in a future needing our type of radi-

cal-change theorizing. The three projects were the politicization of legal academia through scandalous utterances, developing our new critical legal theory that culminated in the critique of rights, and paradoxically to many the firm support of liberal legalist reform.

For the politicization project: The hopelessness of structural transformation through reform plus generational animus authorizes acting out. If you (we would say "still") believe in the liberal reform project, screwing around provoking and acting out are only going to make it harder and a longer time to get us to re-understand and reformulate the positions in ways that can move us forward as a hegemonic liberal bloc. But what if you don't believe that that's going to happen and that things are really, really bad?

The seventies is the absolute ground zero, worst time for the poor, minorities, and emerging women's movements—women are gaining tons but at enormous short-term price. Most spectacularly Black urban neighborhoods are downward-spiraling as a result of white flight, redlining, Black middle-class flight, and the consistent pervasive racism of national, state, and federal institutions and officials. Basically, the seventies is a terrible time, and if you can't look to the state or to another form of adjudication or legislative reform, or administrative reform, nor the states either, then, basically, what you're going to deal with is the following question: Why shouldn't you throw a bucket of paint at the wall of the welfare office?

The symbolic academic equivalent of that was to denounce the complicity of the hegemonic liberals in the bad results, by their failure to acknowledge the rule of power in the actual legal outcomes they designed or acquiesced in and the role of ideology and politics in their enthusiasm for flimsy liberal reconstructions. Flat out insulting people who had emotional, hierarchical traditionalist generational commitments to the liberal project as it evolved over time and—we felt—deserved to be insulted. We were not in power, weren't going to be in power; we were actually temperamentally hostile to the whole idea of state power in the contemporary liberal mode. There was no reason not to be provocative.

Look at the results; the results were and are astonishing.

After 1980, we . . . among the leaders of CLS, I think we were as surprised as everyone else by how quickly the election of Reagan led to the explosion of right-wing neoliberalism and the collapse of the liberals' support of their own race/class policies (integration, housing, employment, infrastructure). Instead of criticizing liberal "Band-Aids," we needed to do left liberal legalist and sophisticated liberal policy work in support of tenants' rights, for example, . . . consumer protection.

The liberal Republican–liberal Democratic coalition on gender issues of all kind held against Reagan's attempt to make the Court a fully reactionary institution. It was doing enough abortion, environment, gay rights, and then refusing to do them the next day, so that large numbers of people were still exceptionally enthusiastic about constitutional law, particularly feminists and gay rights activists. International human rights boomed into post-communism. So liberal legalism was very strong on the left all the way through the eighties and nineties, and it's still alive like a chicken with its head . . . block that metaphor. Here again our crittish role was to cheer the legal victories, with amazement at the extent to which they somehow convinced the advocates that they won because they had legally correct answers rather than just cultural/class correctness.

It made an enormous difference to CLS as a scene that at the end of the seventies, early eighties there was a rapid increase in the number of white women and Black men getting tenure-track law-school jobs. While most were firmly liberal legalist, a very important small subset were more radical than that, left-of-liberal feminists or Black men who wanted race consciousness in the scholarly debate.

This was the beginning of complicated race and gender politics that were also theory politics, very exciting and a story not yet told in any convincing detail by anyone that I know of. This includes the birth of Critical Race Theory and the "fem crit" network, and eventually the emergence of queer theory as a dominant mode of gender theory/politics in the dispersed network/school of today. Identity and the critique of identity became a place where European critical theory, legal realism, and the varieties of American feminist and Black nationalist impulses could swirl together.

The legal theory debate exploded in the 1980s, subsided in the 1990s, and disappeared in the 2000s. It was the most dependent on the setting up of an institutionalized academic school and suffered the most from the backlash. And yet, the school survived and, if anything, has got more people going on than at any point in decades, partly I think due to the enthusiasm around LPE.

The background continuous activity was the project to create the objective conditions for a left-of-liberal legal academic intelligentsia with radicalism, however awkwardly embracing race, gender, class, but also cultural revolution. I thought of it as anarcho-syndicalist, though the phrase never caught, the anarcho, meaning renouncing the goal of state power, and the syndicalist, the aforementioned idea, that the workplace is the chosen site for political reconstruction.

An important condition for our organizing activities was we shouldn't try to organize lawyers but only law professors and potential law professors. We should organize with students as a mode of recruitment (and for the sheer fun of it). And the BIG RENUNCIATION: op-eds in the *Washington Post*, appearances on NPR, mentions in the *New Yorker* or the *Atlantic* were "on your own time," weak-willed distractions from the real business. Even more painful, the prospects of crossing over and becoming a real public intellectual with access to the educated left mass audience turned out to be close to zero if you wanted to stick to the agenda of making law more mysterious rather than more accessible to a non-law-trained audience. Robert Unger was truly an outlier.

Institutionalization had requirements and the requirements required a lot of work. There had to be at least a trickle of critish candidates coming onto the market, basically from Harvard. Some number of critish profs with tenure at a range of law schools had to acquire at least semipermanent access to a share of the spoils in the appointment process. Once hired, the crittish had to have support in writing the stuff required for tenure.

It was at least conceivable that *we* could actually establish those conditions and then with luck the school could/would reproduce itself over time. But if you want a share of the booty, the first principle is that you have to be willing to get organized and fight for it. And we did, with middling success—just middling but not nothing either.

CLS and LPE: Networks, Movements, or Schools of Thought

CB: The most common question I get asked is, What is the relationship between CLS and LPE and other critical scholarship being written today? There are of course many answers to this question, and I imagine some rather strong disagreements, but your answer is one I am sure everyone would love to hear.

DK: I think it's fun to use the typology of left networks, left movements, and left schools of thought on LPE. The idea of *the place* is the network idea. The criteria of inclusion and exclusion are deliberately obscure. There's neither voice nor loyalty. There's exit. There's only exit as the basic way in which you can influence—not participate in—governance, unless you choose to go through and into the network looking for its core, because the network also, although it's just a network, it's not just a network, it's also the projection of ideas in the power of the people who set it up and maintain it. Maintaining a network is different from being an organizer in a movement and different from being a thought leader in a school.

The network is open: come and go anytime, doing your stuff. A movement by contrast has people who are part of it. The concept of being part of it is very different from the concepts of having observed, participated, or contributed—those are network ideas. A network is a project only of its managers. A movement is also a project but of a much broader, looser collective. The project movement means that the different people all have different conceptions of what it is, but they are autocoordinating. Basically, they're thinking about what they're choosing to do in order to contribute to the project, and if it works, it helps the project.

The movement has a relationship, which is on some level agonistic, vis-à-vis the outside world. Network organizers may have something like that in mind, but their current network-organizing project is to create the space and bound it. The movement's boundary obviously is defined in terms of willingness to participate in the project of changing something outside the movement. Within a left movement there is likely to be a sharp and uncomfortable distinction between those who are and those who are not willing—not to get arrested; it's not that model at all—but willing to get into a fight as part of the movement's struggle against its others.

For us CLSers in the seventies and early eighties, the repression hadn't started yet, because they didn't believe that we would conceivably ever succeed as a movement, even if we got some readers, so to speak. But by the mid-1980s a lot was about willingness to take at least some risk. What made CLS at that time (not anymore) a movement was it was both cooperative internally and also a battle as well as a search for allies and recruits externally, with the idea that the group, if it worked, could change the situation. And the group had the experience that we *were* changing the situation up to a moment when that stopped being true.

I see LPE as a network with growing autocoordination, which might become a movement. The development of the LPE network, meaning the blog, a gigantic reading list, chapters, webinars, both ones that are relatively local and ones that have a wider audience, ones that are very specifically doctrinally focused and ones that have a more general political or theoretical focus or sociological focus across a range of political analytics, ranging from the Marxist to the very firmly liberal, in a very sort of straightforward, old fashioned liberal sense . . . That's the most exciting thing that's happened in legal academia since the nineties. I think it's an unequivocally fantastically great development.

I don't think anyone would yet say that LPE is a left school of thought. You say CLS was heterogenous, but what appears on the blog and what people say in the webinars is *much more diverse* than Critical Legal Studies as it existed

as an organized school of thought/network producing academic events. The academic events of Critical Legal Studies, the conferences, and the literature are much more, so to speak, school-like than the LPE blog or the webinars.

Now, that's not bad *at all*. I mean that's not a criticism; it's just a very big contrast. I would say my own attitude as a crit toward this is, I am anxious to propose ideas of ours that might be of interest to all these wildly divergent people who are participating. I see LPE as having created a place the way Mark Tushnet once defined CLS as a locale for particular debates about law on the left.

For CLSers in the seventies there was a theory-dawn: people who hadn't had the resources to produce out of their own meager college or grad school seminar assignments—work that was programmatically leftist and also left theoretical—found for a short period a million different ways to do just that.

In the eighties there was politicization and infusion of theory, but also strong claims of truth in practice. People with different theory orientations had different and conflicting interpretations of the "situation" in the eighties, very different feminist and post-feminist theories, race conscious versus more conventionally liberal antidiscrimination lines, postmodernists versus post-Marxists versus post-liberals. The tendencies claimed you needed their theory to see reality and that you needed their version of reality to justify theory. The groups argued and provoked each other within the network/movement, as well as in relation to our various others: enemies or potential allies or slumbering masses.

The question about the emerging Law and Political Economy scholarship would be, and I have no idea of the correct answer, Should we understand it as a place where conflicts are brewing between LPE, understood as at least a school of thought, maybe a movement, meeting opponents of some kind and clarifying internal disagreements? It's hard to tell from the outside; we're not yet reading about clashes between LPE-identified people with some kind of an agenda, but maybe they're working quietly behind the scenes, maybe they're taking over, maybe they're becoming deans. Maybe simmering internal splits will burst into flames visible to the outside. It was (at first) scary and fun when all those things happened in the eighties, and worth it even when it became scary, but not fun.

CB: And finally, at the Princeton Critical Legal Studies Conference, in your opening remarks, you said that a lot of what was valuable in Critical Legal Studies lived on in LPE but that the LPE scholars have "read CLS out of the story." What did you mean?

DK: It's the problem of the father combined with respectability politics. There's the Harold Bloom anxiety of influence. And the critique of provocation. The name CLS means in the legal academic imaginary provocation for the sake of provocation. Any association with it threatens the project of changing the system without outraging it.

At the same time, inside the broader LPE network of people who are contributing, many of them have long been part of one CLS network or another or are discovering CLS within the LPE; they're producing work, which clearly appropriates CLS for doing something new.

Further Reading

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