

Intell and the Transformation of Critical Labor Law

It was Fall 1976, a thrilling time to be a lefty at Harvard Law. We came for the liberals but stayed for something else altogether. There were these professors whose classes were just . . . *different*. First sign: They assembled their own course materials, often including readings from extra-legal sources and invariably rejecting the settled understandings that organized the mainstream texts. For another thing, in and out of class they treated their students decently, generously even, a welcome surprise for those of us who'd seen the recently released "Paper Chase" and arrived expecting crabby imperiousness and ritual humiliation, varying degrees of which were still on display in other classes.

But mostly the difference was a studied *distance* from the legal materials, a focus on critique rather than apologetics or "just doin' my job, ma'am" doctrine-crunching. Thus it was with Kennedy for Contracts (where the rhetoric of legal justification was taken seriously but not literally, and the secrets of the realists – deeply repressed or snidely dismissed in other quarters – were revealed via original text, much to our amazement and delight); Horwitz for legal history (offering a powerful counter-punch to the "steady liberal progress" narrative served up in other courses); Bell for Race, Racism, and American Law (taught out of his eponymous and just-published casebook, the first page of which featured a shot of the famous Black Power salute at the 1968 Olympics – so much for civil, and wait till you see what he thought about rights); Unger for jurisprudence (where the smallest unit of analysis was "advanced western capitalist democracies" and where at any moment we were expecting a Divine reply). Critical Legal Studies wasn't a thing yet, let alone had it been thingified. But a relentlessly critical and decidedly unapologetic study of law was infiltrating the citadel, and both school of thought and social movement were rapidly coalescing even as we researched our third-year papers and prepped for yet another set of exams.

And then came the buzz about a paper presented by a recent grad at a faculty workshop that had energized the soon-to-be-crits and driven other faculty into a tizzy. Prof. Bell was so impressed he set aside his course plan to enthuse about it at length, and research and teaching assistants working with the usual suspects quickly heard tell about the event as well. The paper was "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness." The recent graduate was Karl Klare. And for those of us who study and teach the subject, labor law hasn't been the same since.

In a nutshell, Karl pulled the curtain back on the “normal science” of labor law, revealing patterns of ideological conflict and contestation behind the judicial declarations of doctrinal constraint and fidelity to congressional purpose. Judicial Deradicalization – like other first-gen cls work – posed a deep and daunting challenge to the received tradition of largely technical studies sprinkled with well-meaning policy talk, inspiring those of us who entered the academy in its wake to search every nook and cranny of our subject for the hidden (and often not-so-hidden) politics of law.

As innovative and invigorating as the new work was – indeed, it dramatically shifted the preoccupations of left as well as mainstream labor law scholarship for a decade and then some – the revelations of one generation inevitably “take for granted” understandings and assumptions ripe for interrogation by the next, and it turned out that even the best labor scholarship of the 1980s and early 1990s was operating largely within frames that were problematic from the get-go and were in any event already under assault by economic, cultural, and political developments soon collectively to be known as “globalization.” In the usual case, the newly established “old guard” ignores or spansks the upstarts to defend the newly established canon, but it was Karl who energetically organized the challenge to the very work he had inspired.

Thus it was that some seventy scholars specializing in labor and related fields and hailing from around the globe gathered in the fall of 1994 at Karl’s invitation “in a fine old Edwardian house, set in delightful grounds in Andover, Massachusetts” to rethink labor law once again. The gathering gave birth to INTELL – the International Network on Transformative Employment and Labor Law – and spawned a series of extraordinary conferences during the ensuing decade in Canterbury, Coral Gables, Cape Town, Toronto, Catania, Kyoto, and Cuernavaca; a pair of groundbreaking edited collections published by OUP (*Labour Law in an Era of Globalization: Transformative Practices and Possibilities* and *Labour Law, Work, and Family*); and a host of cross-pollinating collaborations, mini-conferences, group e-mail threads, academic visits, friendships, and conversations.

The scholarship that emerged called into question some of the most fundamental concepts in the labor field, arguing that “work,” “worker,” and “employment” had become contested categories – that radical changes in the organization of labor and production, as well as in the understanding of work, cast doubt on regulatory provisions premised on sharp distinctions between paid and unpaid work; between employed and self-employed workers; between employment and unemployment; and between work and other essential life

activities referred to as leisure only at one's peril. Other INTELL work explored the connection between the steep rise in the participation of women in paid employment and the emergence of an economy in which temporary, contingent, and other forms of precarious work play an increasingly central role; the pressures on developing and developed nations alike to join the "race to the bottom" by treating labor (de)regulation as a vehicle for gaining comparative advantage; the persistence of old forms of exploitation in what were then emerging as "new forms of work" and the challenges of developing forms of regulation suitable to the task; the promise and peril of human capital-based strategies in the context high-velocity labor markets; efforts to foreground the social dimension of work in order to reconceive both the employment contract and the corporation; the challenge posed to traditional labor market regulation strategies – and to notions of human and corporate citizenship – by the capacity of internationally mobile capital to "exit" or threaten same in order to shop elsewhere for cheaper labor and the corresponding dramatic rise in the regional migration of humans; the challenges to – and opportunities for – labor solidarity posed by economic integration and identity politics; and finally the promise and perils of "alternative" regulatory strategies including third-way domestic reforms (like "family friendly" workplace policies), corporate codes of conduct, transnational legal institutions, and transformative constitutionalism.

That much of this will seem familiar to most readers – and banal to many contemporary labor scholars – is a tribute to the prescience of the INTELL effort, where participating scholars were energetically debating each of these points and beginning to write about them over two decades ago. Yet the world did not stay still, and there is an echo of the early 1990s in the continued foregrounding of developments associated with globalization despite (just to name a few recent developments) Brexit, tariff wars, hyper-nationalism, and Donald Trump. That the party of humanity has repeatedly found itself in opposition to working people in these struggles offers a glimpse of the work to be done in the next generation of critical labor scholarship.