

Critical Legal Studies vs. Law & Political Economy: Critique & Utopia vs. Social Democracy

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Where does LPE sit historically in relation to Critical Legal Studies (CLS)? And what, if anything, can LPE learn from CLS? Here are a few preliminary and telegraphic thoughts.

In the 1970s-'80s, Law & Economics defeated CLS in the battle of position on the legal academic scene. CLS had aimed to carry on the Legal Realists' project of politically engaged distributional analysis of legal arrangements; and it aimed to wed that project to a neo-Marxist critique of law-as-ideology. This project died with a whimper in the '90s. The CLS critique of the public/private distinction and its understanding of law as constitutive of social life and law-as-ideology lived on, in the fields of critical race and gender theory. But not with respect to political economy.

That is where LPE has stepped in. LPE, it seems to me, has picked up the CLS thread of distributional analysis and the CLS insight that law constitutes – legal rules supply the building blocks of - economic life, in ways that are always shot through with distributional consequences. Likewise, it has picked up on the CLS account of law-as-ideology.

There were actually two CLS accounts of law-as-ideology. One was law-as-reification, which aimed to explode the alienated and mystifying categories of legal discourse and make space for a more concrete and particular, authentic language of human cooperation. The other was law-as-legal-liberalism, which aimed to tease out the recessive, radical democratic and egalitarian veins of liberal legal discourse from the dominant falsehoods of formalism and objectivism, and to push legal liberalism in the direction of radical democracy or what Roberto Unger called "super liberalism," finding strategic, institutional spaces for democratic reconstruction of dominant arrangements. This second Unger-ian variation was a more daunting and seemingly less "radical" kind of work; and it didn't get far. But LPE has picked it up, along with the distributional analysis of legal rules. LPE has also wedded these critical strains to a discourse that was largely absent from CLS.

That is democracy. Not democracy conceived as authentic communal self-determination at every level of social life — the utopian kind of politics to which CLS aspired. But democracy in the more traditional sense of a democratic constitution and political economy, and the uneasy relationship between democracy and capitalism, which Joey Fishkin and I aim to capture in our work - and which David Grewal and Jed Purdy invoke, when they cast democracy as a system of popular accountability and speak of the clash between capitalist imperatives and democratic demands, noting that "[d]emocratic citizens tend to hold a set of expectations about economic and political life that may go beyond or even contradict market logic:...a reasonable level of economic opportunity, distributive fairness, workplace security, community and solidarity, and civic equality."

Back in the '70s and '80s, many in CLS and in the broader New Left thought this was social democracy, and it was part of the problem. It is social democracy,¹ and in some ways, it was part of the problem – its large- and small-scale bureaucratic hierarchies; its accommodations with capitalist imperatives; its production-ism; and so on. But after the onslaught of neoliberalism, we have come to see, social democracy as a legacy to reinvent and recuperate, rather than reject wholesale: Putting democratic demands on our economic life ahead of market imperatives, and doing so, partly, by building democratic forms of representation and accountability – or voice – into market institutions (The latter idea – what early/mid-20th century reformers called economic democracy – was, in some ways, a distinctly U.S. spin on social democracy.)

That seems to me the task LPE has set for itself: reinventing social and economic democracy. And LPE seems to be pursuing it by doing what law pros often do best: Connecting the cosmos with the plumbing. Detail work. Showing how the central institutions of 21st century capitalism – capital markets, labor markets, intellectual property, banking, corporations, unions, insurance, pension funds – all of them, are constructed by constellations of legal rules that distribute power, risk and reward. *And then:* via historical and comparative and counterfactual routes, showing how they could be constructed differently – with vastly more democratic decision-making and more egalitarian outcomes. *And then:* via interdisciplinary toolkits and collaborations, showing how these alternative constructions of market institutions could do the job of running our 21st century economy just as well as, or better than, the institutions we have got.

If I have it right, this is roughly the LPE game-plan. It is a good one. It carries on some of the best strands of CLS. And it is plenty daunting. Still, consider what a CLS-style rejoinder might be: I'll grant you that there were ways that CLS blundered into a kind of post-modern conceit that everything is discourse, and once we show that legal discourse is indeterminate and incoherent, we've laid bare the contingency of all the social hierarchies and institutions that law "constructs," and opened the road to radical change. That was to overlook the ways in which legal discourse may be wildly indeterminate but what happens in any given corner of the socio-legal-institutional world is often not so indeterminate, but rather over-determined by constellations of social and political power and the inertial force of institutional arrangements, to say nothing of plain old state violence.

True enough, to really understand and assail law's part in the reproduction of social hierarchies, one needs to do more than deconstruct its internal logic and dogmas. True enough, there are resources within liberal legal discourse for reimagining the prevailing forms of ownership and control of social wealth and the tools of production, and imaginatively rearranging the legal-institutional terms of social life to redistribute power, resources, and risks and burdens in everything from child-rearing to the ways people make their livelihoods. There was more to the seemingly, un-radical project of pushing legal liberalism in the direction of radical democracy than the law-is-reification/ "trash legal liberalism" wing of CLS allowed.

But there was also truth in CLS's trashing of "rights talk," in its deep skepticism about what Audre Lorde called using "the master's tools...[to] dismantle the master's house," in its interrogation of the ways that left-liberal lawyers exercised forms of power that were complicit in managing the discontent of subordinate groups – and in its suspicion that patriarchy, racial domination, class hierarchy and

¹ "Although we do not recommend any particular social-democratic arrangement as the obvious solution to problems today, we think it is important not to lose sight of the fact that alternatives to the neoliberal normalization of market relations have been historically realized in a wide range of societies." (Grewal & Purdy)

instrumental rationality were inscribed in liberalism's fundamental categories in ways that even radical reforms of liberal legal institutions would not dislodge.

As far as political economy is concerned, CLS may have been right to start with Marx (along with the Legal Realists). Not because the "orthodox" Marxism of the mid-century had the answers, as mired as it was in a kind of naturalistic, iron-laws-of-capitalist-development approach. But because historical materialism, broadly construed, asked many of the right questions. It encouraged us to dig deep into the ways that the production and reproduction of social life is organized with a critical eye for false necessities and hierarchies.

Thus, as Jeremy Kessler has suggested, LPE and related constructivist projects risk overlooking what Marxism started out with.² Not "Political Economy" in the sense that LPE is using the notion, but a "*Critique of Political Economy*." The epistemic jolt produced by Marx sprang from questioning the assumed relations between, and identities of, the political and economic – and then carrying on as if these assumed identities and relations were *wrong*.

From that perspective, the "Realist" or "Critical" move, which LPE takes up – revealing that the classical or neoclassical categories of economic thought embedded in legal discourse (and law and economics) are not natural but constructed by legal and political choices – is no substitute for a critique of political economy. The move that says that the central institutions of 21st century capitalism are constructed by constellations of legal rules with inevitable distributional consequences is a move *within* our received categories of political economy. And the problem with that is it keeps us confined in a liberal discourse that is stacked (and in many ways deliberately stacked) against deep egalitarian reform.

There is a LPE rejoinder to this CLS/neo-Marxist rejoinder, of course. First, it seems to me, that the LPE frame rests on the plausible assumption that some kinds of legal reforms can open up genuinely radical transformations of the distribution of power and resources; it all depends. Even an emancipated U.S. or world will need legal institutions to govern itself and legal imagination to invent them. And legal theory and practice can be egalitarian and collaborative. And second, as far as digging deeply and systematically into the material organization of production and reproduction goes: Insofar as I understand that injunction, it seems to me that building the intellectual frameworks it calls for is not our comparative advantage. So, LPE works in a pragmatic vein, inventing a democratic political economy from the bottom up. It proceeds with an awareness that it is bracketing many thorny epistemic issues. Law profs are good at starting with particulars and working up, and there are, good pragmatist epistemic grounds for this approach. But this is an interdisciplinary enterprise and an experimental one; and it always needs to remain open to more radical and "utopian" paths.

² What follows in this and the following paragraph is indebted to conversations and exchanges with Jeremy Kessler.