Reflections on My CLS Practice – Scholarship and Pedagogy

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January, 2020

My Background in CLS

I was part of the first wave of CLS, joining the 'club' in 1977, while I was still in law school. I started law school at Harvard in the fall of 1976, and Duncan Kennedy was my Torts teacher. I had already been introduced to Duncan by Karl Klare, whom I knew through Cambridge left-wing political circles in which I had been active. So when I was assigned to Duncan's first year Torts class, he reached out to me and offered me friendship, guidance, and mentorship. In the second semester, after the Torts class ended, Duncan asked me to join a study group that he and Karl had formed on Marxism and the Law. Others in the group included Mort Horwitz, Gary Bellow, Jeanne Charn, Nancy Gertner, and one other law student, Peter Herman. I gladly accepted.

Prior to law school, I had been a labor activist in Greater Boston, and considered myself a Marxist. I had also worked for a labor union and edited a labor newspaper. And I had been a member of Cambridge labor history circles, having published a highly regarded article in the field. The CLS study group gave me the opportunity to put my new life in dialogue with my former life. In the group, we read not only Marx, but also other social theorists, and talked about what they had to do with law. These discussions were animated and exciting, and they led me to decide to become a law professor.

The study group formed the nucleus of the first Critical Legal Studies Conference in the spring, 1977, which I could not attend because it conflicted with my first year Contracts exam. I attended all the other CLS conferences in the early years, as well as all the summer camps, starting with the first one, in Santa Cruz, in the summer of 1980. At these events, there were lively debates about what is a critical legal theory. We debated the methodologies of legal realism, structuralism, post-structuralism, deconstructionism, and many other 'isms'. And we had many debates about how best to understand the role of law in perpetuating oppression, inequality, racism, and other social evils. We also debated how to make law transformative – whether law itself (at least in a capitalist democracy) was always an instrument of oppression or whether it could be emancipatory, or at least used for emancipatory ends. There were also debates about whether critical legal theory could be joined with a critical form of law practice. We also considered what would constitute a progressive agenda for critical theory and practice. I participated in these debates not only at conferences, workshops, and summer camps, but also over numerous dinners and glasses of wine with my CLS friends.

Although I was deeply involved in the early CLS events and contributed to the early, foundational works of CLS labor law scholarship, I did not go directly from law school into law teaching. Rather, I went into practice in a union-side labor law firm in New York City. I had a terrific experience in practice, where I not only did labor cases, but also some high-profile civil liberties cases and one notorious criminal case – the felony murder case against former Weather Underground leader, Kathy Boudin. However, as exciting as my practice was, when my firm

offered me a partnership in the fall of 1983, I realized that my heart was set on joining the scholarly world and that it was time to return to that goal.

CLS and My Scholarship

Once in law teaching, I developed a scholarly approach that drew on my experiences in the intellectual world of CLS. Of the many strands and viewpoints that came under the CLS umbrella, the one that informed my scholarship and made sense to my experience in the 'real' world grew out of the study group and our discussions of Marx's "On the Jewish Question". In that essay, Marx explains how, in a liberal capitalism society, law provides separate rules and legitimation mechanisms for the public and the private realm, and law also maintains the boundary between the two. Moreover, the boundary between the public and private sphere is political, and contested. Without setting out to do so explicitly, that idea informed much of my future scholarly work.

My first law review article was "The Post-War Paradigm in American Labor Law," published in the Yale Law Journal. I began it while I was in law school and completed it while I was in practice. In that piece, I examine the interpretative history of the National Labor Relations Act to show how it had reprivatized the labor relationship. The interpretative paradigm that the Supreme Court adopted, which I called "industrial pluralism," was actually a widely-used metaphor in which the unionized workplace was characterized as a functioning mini-democracy in the private sphere. That metaphor became embedded in labor law case law, and its programmatic consequence was that the unionized workplace was treated as a bubble, cordoned off from public intervention and shielded from public scrutiny. By assuming parity, if not equality, between labor and management, state actors invoked the metaphor in order to justify their refusal to intervene to promote genuine equality or worker empowerment. Moreover, the very class conflict that had generated pressure for the enactment of the labor law in the first place was removed from the public arena and relegated to the invisible venue of private arbitration. In addition, the metaphor – that the workplace was its own internal democratic institution – served to isolate labor from other social groups and contributed to a public perception of unions as simply another pressure group, no more legitimate and just as self-serving as the Small Business Bureau, the Grain Growers' Association, or any other voluntary association of economic interest groups. In my first two decades of legal scholarship, I developed this theme in a series of articles in which I critiqued specific areas of the labor law that were based on the assumption expressed in this narrowing vision.

I also applied my interest in the shifting and contested boundary between the public and the private domains to the field of arbitration. In 1991, the Supreme Court decided the case of *Gilmer v. Interstate Lane*, in which it held that an individual employee who alleged he had been fired out of age discrimination could not go to the EEOC but had to take his claim to private arbitration. At that point, I realized that the problem of legal interpretation operating to move class issues out of the public domain was not confined to unionized workplaces, but was occurring in the non-union workplace as well. I began to collect and track cases interpreting the Federal Arbitration Act, a statute that was undergoing a little noticed but monumental upheaval that threatened to undermine all protections for labor rights, consumer rights, and other rights that had been achieved in the 1960s and 70s. Starting in the early 1990s, I developed a course on the subject, wrote a casebook, and a series of law review articles in which I showed how the Supreme Court was re-interpreting an obscure 1925 statute in a way that kept ordinary people out of court – both federal and state court –

when they complained about wage theft, or overcharges by lenders, or medical malpractice by hospitals, or being cheated by stock-brokers, or any of the numerous other ways in which ordinary folks are exploited by the powerful. Now, as the law has continued to develop, the ability for consumers or workers to bring consumer or employment class actions has been virtually eliminated by the Court's expanding interpretation of the FAA. These developments involve the same dynamic I had had noted and critiqued in labor law – the dynamic in which legal doctrine operates to move class conflict into individual and invisible fora where pre-existing power imbalances make it impossible for individuals to protect their rights. I continue to follow these developments, write about them in both law reviews and popular media, teach Arbitration Law, advise plaintiffs and their attorneys, and write amici briefs in major cases that implicate the numerous ways that the courts' FAA jurisprudence is upending the civil justice system and depriving ordinary people of the ability to protect their rights.

The Influence of CLS on my Teaching

CLS has informed my teaching in several ways. CLS, as a successor to legal realism, emphases the role of law in the distribution of power and wealth. In the writings of Hale and others, we learned that legal rules have powerful distributive consequences. In CLS conferences and study groups, we developed this insight further. We critiqued law and economics and legal libertarianism for the assumption that there was a pre-legal universe, a legal state of nature, that should set a baseline against which all legal rules and intervention could be compared. In that view, employment protective laws such as minimum wage and child labor laws, and mandatory consumer protective laws distort otherwise 'efficient' market outcomes and thus generate unemployment and raise the price of goods, thereby hurting the very people that they purport to protect. In CLS, we discussed in detail how there was no such state of nature – that all markets are comprised of legal rules and that those rules shape what is often termed 'market' outcomes.

I took this insight into my Contracts and Labor Law classes, both fields in which there is an assumption that bargaining power does, and should, shape the outcomes of deals, and that the law should not intervene so as to disrupt the outcomes that the parties freely choose. In both courses, I show, in many doctrinal areas, that this is a myth, that there is no such thing as pre-legal 'bargaining power,' and that bargaining power is itself a product of the legal rules themselves.

In Contracts, Dawson's article on duress provides a ready framework for discussing how the duress doctrine is a central determinant of bargaining outcomes in contracts between private parties. Unconscionability is another area where legal intervention, or the lack of it, determines whether bargains between unequal parties are enforced. In many other areas of Contract law, I point out how the technicality of the rules – offer and acceptance rules, the law of conditions, and so on -- can be a trap for ordinary individuals who lack legal sophistication or resources to pay high priced lawyers.

In teaching Labor Law, I point out repeatedly how the minutiae of doctrine shapes each sides' bargaining power. For example, the rules that define what constitutes 'protected' and 'concerted' activity determine what kinds of bargaining pressure workers can put on employer. One issue that comes up frequently is whether it is 'protected' when a group of employees publicly criticize the

company for making an unsafe or defective product. This kind of tactic would be extremely powerful in a labor dispute, but the Board and courts have generally treated disparagement of the employers' product as a tactic that is beyond the bounds of acceptable legal weaponry. Similarly, the rules that define the lawfulness of lock-outs and the use of strike replacements shape employers' bargaining power. Thus, to portray collective bargaining as an exercise in which parties' utilize their bargaining power without legal intervention is a total myth, but one that profoundly underlies the justification for the law's refusal to judge or intervene in the outcomes of collective bargaining.

Concluding Thoughts

These are just a few of the ways in which my engagement with Critical Legal Studies has shaped my career in law teaching and scholarship. However, CLS was not the only influence on my teaching. My years in practice gave me a sense of what issues are worth writing about and provided me with the concrete experiences and the confidence to give my students a feel for the realities of law practice. My years in practice also provided me with material out of which I could devise the hypotheticals that enliven class discussions. But my long-standing involvement with CLS has given me a community in which to try out ideas and learn from others. More importantly, it has provided an over-arching conceptual understanding that has served as the compass that enables me to focus both my scholarship and teaching on my own True North.