

The Critical Legal Studies Movement

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Introduction

The Tradition of Leftist Movements in Legal Thought and Practice

THE CRITICAL legal studies movement has undermined the central ideas of modern legal thought and put another conception of law in their place. This conception implies a view of society and informs a practice of politics.

What I offer here is more a proposal than a description. But it is a proposal that advances along one of the paths opened up by a movement of ideas that has defied in exemplary ways perplexing, widely felt constraints upon theoretical insight and transformative effort. (See the Bibliographical Note.)

The antecedents were unpromising. Critical legal studies arose from the leftist tradition in modern legal thought and practice. Two overriding concerns have marked this tradition.

The first concern has been the critique of formalism and objectivism. By formalism I do not mean what the term is usually taken to describe: belief in the availability of a deductive or quasi-deductive method capable of giving determinate solutions to particular problems of legal choice. Formalism in this context is a commitment to, and therefore also a belief in the possibility of, a method of legal justification that contrasts with open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary. Such conflicts fall far short of the closely guarded canon of inference and argument that the formalist claims for legal analysis. This formalism holds impersonal purposes, policies, and principles to be indispensable components of legal reasoning. Formalism in the conventional sense—the search for a method of deduction from a gapless system of rules—is merely the anomalous, limiting case of this jurisprudence.

A second distinctive formalist thesis is that only through such a

restrained, relatively apolitical method of analysis is legal doctrine possible. Legal doctrine or legal analysis is a conceptual practice that combines two characteristics: the willingness to work from the institutionally defined materials of a given collective tradition and the claim to speak authoritatively within this tradition, to elaborate it from within in a way that is meant, at least ultimately, to affect the application of state power. Doctrine can exist, according to the formalist view, because of a contrast between the more determinate rationality of legal analysis and the less determinate rationality of ideological contests.

This thesis can be restated as the belief that lawmaking, guided only by the looser and more inconclusive arguments suited to ideological disputes, differs fundamentally from law application. Lawmaking and law application diverge in both how they work and how their results may properly be justified. To be sure, law application may have an important creative element. But in the politics of lawmaking the appeal to principle and policy, when it exists at all, is supposed to be both more controversial in its foundations and more indeterminate in its implications than the corresponding features of legal analysis. Other modes of justification allegedly compensate for the diminished force and precision of the ideal element in lawmaking. Thus, legislative decisions may be validated as results of procedures that are themselves legitimate because they allow all interest groups to be represented and to compete for influence or, more ambitiously, because they enable the wills of citizens to count equally in choosing the laws that will govern them.

Objectivism is the belief that the authoritative legal materials—the system of statutes, cases, and accepted legal ideas—embody and sustain a defensible scheme of human association. They display, though always imperfectly, an intelligible moral order. Alternatively they show the results of practical constraints upon social life—constraints such as those of economic efficiency—that, taken together with constant human desires, have a normative force. The laws are not merely the outcome of contingent power struggles or of practical pressures lacking in rightful authority.

The modern lawyer may wish to keep his formalism while avoiding objectivist assumptions. He may feel happy to switch from talk about interest group politics in a legislative setting to invocations of impersonal purpose, policy, and principle in an adjudicative or professional one. He is plainly mistaken; formalism presupposes at least a

qualified objectivism. For if the impersonal purposes, policies, and principles on which all but the most mechanical versions of the formalist thesis must rely do not come, as objectivism suggests, from a moral or practical order exhibited, however partially and ambiguously, by the legal materials themselves, where could they come from? They would have to be supplied by some normative theory extrinsic to the law. Even if such a theory could be convincingly established on its own ground, it would be miraculous if its implications coincided with any large portion of the received doctrinal understandings. At least it would be miraculous unless you had already assumed the truth of objectivism. But if the results of this alien theory failed to overlap with the greater part of received understandings of the law, you would need to reject broad areas of established law and legal doctrine as “mistaken.” You would then have trouble maintaining the contrast of doctrine to ideology and political prophecy that represents an essential part of the formalist creed: you would have become a practitioner of the free-wheeling criticism of established arrangements and received ideas. No wonder theorists committed to formalism and the conventional view of doctrine have always fought to retain a remnant of the objectivist thesis. They have done so even at a heavy cost to their reputation among the orthodox, narrow-minded lawyers who otherwise provide their main constituency.

Another, more heroic way to dispense with objectivism would be to abrogate the exception to disillusioned, interest group views of politics that is implicit in objectivist ideas. This abrogation would require carrying over to the interpretation of rights the same shameless talk about interest groups that is thought permissible in a legislative setting. Thus, if a particular statute represented a victory of sheepherders over cattlemen, it would be applied, strategically, to advance the sheepherders’ aims and to confirm the cattlemen’s defeat. To the objection that the correlation of forces underlying a statute is too hard to measure, the answer may be that this measurement is no harder to come by than the identification and weighting of purposes, policies, and principles that lack secure footholds in legislative politics. This “solution,” however, would escape objectivism only by discrediting the case for doctrine and formalism. Legal reasoning would turn into a mere extension of the strategic element in the discourse of legislative jostling. The security of rights, so important to the ideal of legality, would fall hostage to context-specific calculations of effect.

If the criticism of formalism and objectivism is the first character-

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istic theme of leftist movements in modern legal thought, the purely instrumental use of legal practice and legal doctrine to advance leftist aims is the second. The connection between skeptical criticism and strategic militancy seems both negative and sporadic. It is negative because it remains almost entirely limited to the claim that nothing in the nature of law or in the conceptual structure of legal thought—neither objectivist nor formalist assumptions—constitutes a true obstacle to the advancement of leftist aims. It is sporadic because short-run leftist goals might occasionally be served by the transmutation of political commitments into delusive conceptual necessities.

These themes of leftist legal thought and practice have now been reformulated while being drawn into a larger body of ideas. The results offer new insight into the struggle over power and right, within and beyond the law, and they redefine the meaning of radicalism.