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 principal 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-

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.

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The Criticism of Legal Thought

WE HAVE transformed the received critique of formalism and objectivism into two sets of more precise claims that turn out to have a surprising relation. The two groups of critical ideas state the true lesson of the law curriculum—what it has actually come to teach, rather than what the law professors say it teaches, about the nature of law and legal doctrine. The recitation of the lesson carries the criticism of formalist and objectivist ideas to an unprecedented extreme. This very extremism, however, makes it possible to draw from criticism elements of a constructive program.

The Critique of Objectivism

In refining the attack upon objectivism, we have reinterpreted contemporary law and legal doctrine as the ever more advanced dissolution of the project of the classical, nineteenth-century lawyers. Because both the original project and the signs of its progressive breakdown remain misunderstood, the dissolution has not yet been complete and decisive. The nineteenth-century jurists were engaged in a search for the built-in legal structure of democracy and the market. The nation, at the Lycurgan moment of its history, had opted for a particular type of society: a commitment to a democratic republic and to a market system as a necessary part of that republic. The people might have chosen some other type of social organization. But in choosing this one, in choosing it for example over an aristocratic and corporatist polity on the old-European model, they also chose the legally defined institutional structure that went along with it. This structure provided legal science with its topic and generated the purposes, policies, and

principles to which legal argument might legitimately appeal. Two ideas played a central role in this enterprise. One was the distinction between the foundational politics, responsible for choosing the social type, and the ordinary politics, including the ordinary legislation, operating within the framework established at the foundational moment. The other idea was that an inherent and distinct legal structure existed for each type of social organization.

Many may be tempted to dismiss out of hand as wholly implausible and undeserving of criticism this conception of a logic of social types, each type with its intrinsic institutional structure. It should be remembered, however, that in less explicit and coherent form the same idea continues to dominate the terms of modern ideological debate and to inform all but the most rigorous styles of microeconomics and social science. It appears, for example, in the conceit that we must choose between market and command economies or at most combine these two exhaustive and well-defined institutional options into a "mixed economy." The abstract idea of the market as a system in which a plurality of economic agents bargain on their own initiative and for their own account becomes more or less tacitly identified with the particular market institutions that triumphed in modern Western history. Moreover, the abandonment of the objectivist thesis would leave formalism, and the varieties of doctrine that formalism wants to defend, without a basis, a point to which my argument will soon return. The critique of objectivism that we have undertaken challenges the idea of types of social organization with a built-in legal structure, as well as the more subtle but still powerful successors of this idea in current conceptions of substantive law and doctrine. We have conducted this assault on more than one front.

Successive failures to find the universal legal language of democracy and the market suggest that no such language exists. An increasing part of doctrinal analysis and legal theory has been devoted to containing the subversive implications of this discovery.

The general theory of contract and property provided the core domain for the objectivist attempt to disclose the built-in legal content of the market, just as the theory of protected constitutional interests and of the legitimate ends of state action was designed to reveal the intrinsic legal structure of a democratic republic. But the execution kept belying the intention. As the property concept was generalized and decorporealized, it faded into the generic conception of right, which in turn proved to be systematically ambiguous (Hohfeld's in-

sight) if not entirely indeterminate. Contract, the dynamic counterpart to property, could do no better. The generalization of contract theory revealed, alongside the dominant principles of freedom to choose the partner and the terms, the counterprinciples: that freedom to contract would not be allowed to undermine the communal aspects of social life and that grossly unfair bargains would not be enforced. Though the counterprinciples might be pressed to the corner, they could be neither driven out completely nor subjected to a system of metaprinciples that would settle, once and for all, their relation to the dominant principles. In the most contested areas of contract law, two different views of the sources of obligation still contend. One, which sees the counterprinciples as mere ad hoc qualifications to the dominant principles, identifies the fully articulated act of will and the unilateral imposition of a duty by the state as the two exhaustive sources of obligation. The other view, which treats the counterprinciples as possible generative norms of the entire body of law and doctrine, finds the standard source of obligations in the only partly deliberate ties of mutual dependence and redefines the two conventional sources as extreme, limiting cases. Which of these clashing conceptions provides the real theory of contract? Which describes the institutional structure inherent in the very nature of a market?

The development of constitutional law and constitutional theory throughout the late nineteenth and the twentieth centuries tells a similar story of the discovery of indeterminacy through generalization. This discovery was directly connected with its private law analogue. The doctrines of protected constitutional interests and of legitimate ends of state action were the chief devices for defining the intrinsic legal-institutional structure of the scheme of ordered liberty. They could not be made coherent in form and precise in implication without freezing into place, in a way that the real politics of the republic would never tolerate, a particular set of deals between the national government and organized groups. Legitimate ends and protected interests exploded into too many contradictory implications; like contract and property theory, they provided in the end no more than retrospective glosses on decisions that had to be reached on quite different grounds.

The critique of this more specific brand of objectivism can also develop through the interpretation of contemporary law and doctrine. The current content of public and private law fails to present a single, unequivocal version of democracy and the market. On the contrary,

it contains in confused and undeveloped form the elements of different versions. These small-scale variations, manifest in the nuances of contemporary doctrine, suggest larger possible variations.

The convergent result of these two modes of attack upon objectivism—the legal-historical and the legal-doctrinal—is to discredit, once and for all, the conception of a system of social types with a built-in institutional structure. The very attempt to work this conception into technical legal detail ends up showing its falsehood. Thus, a cadre of seemingly harmless and even toadying jurists partly authored the insight required to launch the attack against objectivism—the discovery of the indeterminate content of abstract institutional categories such as democracy or the market—with its far-reaching subversive implications. Those who live in the temple may delight in the thought that the priests occasionally outdo the prophets.

The Critique of Formalism

We have approached the critique of formalism in an equally distinctive way. The starting point of our argument is the idea that every branch of doctrine must rely tacitly if not explicitly upon some picture of the forms of human association that are right and realistic in the areas of social life with which it deals. For example, a constitutional lawyer needs a theory of the democratic republic that describes the proper relation between state and society or the essential features of social organization and individual entitlement that government must protect come what may.

Without such a guiding vision, legal reasoning seems condemned to a game of easy analogies. It will always be possible to find, retrospectively, more or less convincing ways to make a set of distinctions, or failures to distinguish, look credible. A common experience testifies to this possibility; every thoughtful law student or lawyer has had the disquieting sense of being able to argue too well or too easily for too many conflicting solutions. Because everything can be defended, nothing can; the analogy-mongering must be brought to a halt. It must be possible to reject some of the received understandings and decisions as mistaken and to do so by appealing to a background normative theory of the branch of law in question or of the realm of social practice governed by that part of the law.

Suppose you could determine on limited grounds of institutional

propriety how much a style of doctrinal practice may regularly reject as mistaken. With too little rejection, the lawyer fails to avoid the suspect quality of endless analogizing. With too much, he forfeits his claim to be doing doctrine as opposed to ideology, philosophy, or prophecy. For any given level of revisionary power, however, different portions of the received understandings in any extended field of law may be repudiated.

To determine which part of established opinion about the meaning and applicability of legal rules you should reject, you need a background prescriptive theory of the relevant area of social practice, a theory that does for the branch of law in question what a doctrine of the republic or of the political process does for constitutional argument. This is where the trouble starts. No matter what the content of this background theory, it is, if taken seriously and pursued to its ultimate conclusions, unlikely to prove compatible with a broad range of the received understandings. Yet just such a compatibility seems to be required by a doctrinal practice that defines itself by contrast to open-ended ideology. For it would be strange if the results of a coherent, richly developed normative theory were to coincide with a major portion of any extended branch of law. The many conflicts of interest and vision that lawmaking involves, fought out by countless minds and wills working at cross-purposes, would have to be the vehicle of an immanent moral rationality whose message could be articulated by a single cohesive theory. The dominant legal theories in fact undertake this daring and implausible sanctification of the actual, and the unreflective common sense of orthodox lawyers tacitly presupposes it. Most often, the sanctification takes the form of treating the legal order as a repository of intelligible purposes, policies, and principles, in abrupt contrast to the standard, disenchanted view of legislative politics.

This argument against formalism may be criticized on the ground that the claimed contrast between the game of analogy and the appeal to a background conception of right is untenable; from the outset analogy is guided by such a conception, so the criticism would suggest. But for analogy to be guided by such a conception would require the miracle of preestablished harmony between the content of the laws and the teachings of a coherent theory of right. Or, again, it may be objected that in law such background views benefit from a self-limiting principle, introduced by the constraints of institutional context. Such a principle, however, must rely either upon a more or

less tacit professional consensus about the rightful limits of institutional roles or upon an explicit and justifiable theory of institutional roles. Even if a consensus of this sort could claim authority, it simply does not exist. The proper extent of revisionary power—the power to declare some portion of received legal opinion mistaken—remains among the most controversial legal topics, as the American debates about judicial "activism" and "self-restraint" show. An explicit theory of institutional roles can make sense and find support only within a substantive theory of politics and rights. We thus return to the initial implausibility of a widespread convergence of any such theory with the actual content of a major branch of law.

Having recognized this problem with doctrine, modern legal analysis tries to circumvent it in a number of ways. It may, for example, present an entire field of law as the expression of certain underlying theoretical approaches to the subject. According to one suggestion, these implicit models fit into a coherent scheme or, at least, point toward a synthesis. In this way it seems possible to reconcile the recognition that legal analysis requires an appeal to an underlying theory of right and social practice with the inability to show that the actual content of law and doctrine in any given area coincides, over an appreciable area of law, with a particular theory. But this recourse merely pushes the problem to another level. No extended body of law in fact coincides with such a metascheme, just as no broad range of historical experience coincides with the implications of one of the evolutionary views that claim to provide a science of history. (That this counts as more than a faint resemblance is a point to which I shall return.) It is always possible to find in actual legal materials radically inconsistent clues about the range of application of each of the models and indeed about the identity of the models themselves.

Once the lawyer abandons these methods of compensation and containment, he returns to a cruder and more cynical device. He merely imposes upon his background conceptions—his theories of right and social practice—an endless series of ad hoc adjustments. The looseness of the theories and the resulting difficulty of distinguishing the ad hoc from the theoretically required make this escape all the easier. There emerges the characteristic figure of the modern jurist who wants—and needs—to combine the cachet of theoretical refinement, the modernist posture of seeing through everything, with the reliability of the technician whose results remain close to the mainstream of professional and social consensus. Determined not to

miss out on anything, he has chosen to be an outsider and an insider at the same time. To the achievement of this objective he has determined to sacrifice the momentum of his ideas. We have denounced him wherever we have found him, and we have found him everywhere.

One more objection might be made to this attack upon formalism and upon the type of doctrinal practice that formalism justifies. According to this objection, the attack succeeds only against the systematic constructions of the most ambitious academic jurists, not against the specific, problem-oriented arguments of practical lawyers and judges. It is hard, though, to see how such arguments could be valid, how indeed they might differ from rhetorical posturing, unless they could count as tentative fragments of a possible cohesive view of an extended body of law.

The implication of our attack upon formalism is to undermine the attempt to rescue doctrine through these several strategems. It is to demonstrate that a doctrinal practice that puts its hope in the contrast of legal reasoning to ideology, philosophy, and political prophecy ends up as a collection of makeshift apologies.

The Critiques of Objectivism and Formalism Related: Their Significance for Current Legal Theories

Once the arguments against objectivism and formalism have been rendered in these specific ways, their relation to each other gains a new and surprising clarity. As long as the project of the nineteenth-century jurists retained its credibility, the problem of doctrine did not emerge. The miracle required and promised by objectivism could take place: the coincidence of the greater part of substantive law and doctrine with a coherent theory, capable of systematic articulation and relentless application. The only theory capable of performing the miracle would have been one that described the inner conceptual and institutional structure of the type of social and governmental organization to which the nation had committed itself at its foundational moment. Such a theory would not have needed to be imported from outside. It would not have been just somebody's favorite system. It would have translated into legal categories the abiding structure of ordinary political and economic activity. Once the objectivist project underlying the claim to reveal the inherent content of a type of social organization ceased to be believable, doctrine in its received form was

condemned to the self-subversion that our critique of formalism has elucidated. But because the nature and defects of the project appeared only gradually, so did the permanent disequilibrium of doctrine.

This view of the flaws in objectivism and formalism and of the close link between the two sets of ideas and the two critiques explains our approach to the most influential and symptomatic legal theories in America today: the law and economics and the rights and principles schools. Each of these theories is advanced by a group that stands at the margin of high power, despairs of seeing its aims triumph through governmental politics, and appeals to some conceptual mechanism designed to show that the advancement of its program is a practical or moral necessity. The law and economics school has mainly addressed private law; the rights and principles school, public law. The law and economics school has invoked practical requirements (with normative implications) that supposedly underlie the legal system and its history; the rights and principles school, moral imperatives allegedly located within the legal order itself. The law and economics school has chiefly served the political right; the rights and principles school, the liberal center. But both theoretical tendencies can best be understood as efforts to recover the objectivist and formalist position. It is as restatements of objectivism and formalism that we have rejected them.

The chief instrument of the law and economics school is the equivocal use of the market concept. These analysts give free rein to the very mistake that the increasing formalization of microeconomics was largely meant to avoid: the identification of the abstract market idea or the abstract circumstance of maximizing choice with a particular social and institutional complex. As a result, an analytic apparatus intended, when rigorous, to be entirely free of restrictive assumptions about the workings of society and entirely subsidiary to an empirical or normative theory that needs independent justification gets mistaken for a particular empirical and normative vision. More particularly, the abstract market idea is identified with a specific version of the market—the one that has prevailed in most of the modern history of most Western countries—with all its surrounding social assumptions, real or imagined. The formal analytic notion of allocational efficiency is equated with a particular theory of economic growth or, quite simply, with the introduction, the development, or the defense of this particular institutional and social order. Such are the sophistries by which the law and economics school pretends to discover both

the real basis for the overall evolution of the legal order and the relevant standard by which to criticize occasional departures of that order from its alleged vocation. From this source supposedly come the purposes and policies that do and should play the paramount role in legal reasoning.

The rights and principles school achieves similar results through very different means. It claims to discern in the leading ideas of the different branches of law, especially when illuminated by a scrupulous, benevolent, and well-prepared professional elite, the signs of an underlying moral order that can then serve as the basis for a system of more or less natural rights. This time, the objective order that guides the main line of legal evolution and serves to criticize the numerous though marginal aberrations is a harshly simplified version of moral ideas supposedly expressed in authoritative legal materials. No longer able to appeal to the idea of the built-in institutional structure of a type of social organization, this school alternates confusedly between two options, both of which it finds unacceptable as a basis for legal theory. One option is that moral consensus (if only it could actually be identified) carries weight just because it exists. The alternative view is that the dominant legal principles count as the manifestations of a transcendent moral order whose content can be identified quite apart from the history and substance of a particular body of law. The third, mediating position for which the school grasps—that consensus on the received principles somehow signals a moral order resting mysteriously upon more than consensus—requires several connected intellectual maneuvers. One is a drastic minimization of the extent to which the law already incorporates conflict over the desirable forms of human association. Another is the presentation of the dominant legal ideas as expressions of higher moral insight, an insight duly contained and corrected by a fidelity to the proprieties of established institutional roles, a fidelity that must itself be mandated by the moral order. Yet another is the deployment of a specific method to reveal the content and implications of this order: generalize from particular doctrines and intuitions, then hypostasize the generalizations into moral truth, and finally use the hypostasis to justify and correct the original material. The intended result of all this hocus-pocus is far clearer than the means used to achieve it. The result is to generate a system of principles and rights that overlaps to just the appropriate extent with the positive content of the laws. Such a system has the suitable degree of revisionary power, the degree necessary to