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17

Critical legal studies

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Critical legal studies is a movement in legal scholarship associated with the Conference on Critical Legal Studies, an organization inaugurated by a small conference at the University of Wisconsin in 1977 (Schlegel, 1984). By the early 1990s the *movement* had come to influence the work of an enormous number of legal scholars, particularly in the fields of legal and constitutional theory, while the *organization* had diffused into new non-existence.

As an intellectual movement, critical legal studies combined the concerns of legal realism, critical Marxism, and structuralist or post-structuralist literary theory. Many of its members identified with the leftist politics of the student movements of the 1960s.

Critical legal studies as analytic jurisprudence: the critique of liberal rights theory

A few critical legal scholars have shown interest in the traditional concerns of analytic jurisprudence. These scholars have largely followed in the footsteps of legal realists Wesley Hohfeld, Walter Wheeler Cook, Robert Hale, and Morris Cohen, criticizing liberal rights theory by stressing the economic and social interdependence of legal persons (Hofeld, 1913; Cook, 1981; Hale, 1943; Cohen, 1927). This perspective reinterprets rights as:

> [R]elations among persons regarding control of valued resources . . . Legal rights are correlative; every legal entitlement in an individual implies a correlative vulnerability in someone else, and every entitlement is limited by the competing rights of others . . . Property rights are interpreted as delegations of sovereign power to individuals by the state; these rights should therefore be defined to accommodate the conflicting interests of social actors. (*Singer. 1993. p. 20*)

If property rights are understood to confer power it similarly follows that contractual bargaining is never truly equal and all contractual consent is coerced through the exercise of superior bargaining power.

Because they identify entitlements with power over others, critical legal scholars argue that the liberal ideals of freedom to act without harming others, and freedom to transact with consenting others, are self-defeating. Accordingly, these ideals cannot be realized in a legal regime and efforts to realize them will yield doctrinal systems that are structured by recurrent, irresolvable debates. Doctrinal systems that are "liberal" in this sense will include rules, but the rules will generally confront, or even contain, counter-rules that contradict them. Accordingly, in such a system, the rules do not determine results and cannot explain whatever ability legal practitioners have to predict results (Kennedy, 1991; Balkin, 1986). Liberal rights theory, then, is not formally realizable. Judicial application of a liberal rights regime involves political discretion; it can never be the mere formality demanded by the liberal ideal of the rule of law.

This "indeterminacy thesis," as it has come to be called, is a claim about classical liberalism and its aspiration to secure liberty through a rule of law. The claim is that no determinate rule system can secure liberty, a claim that is more true than new.

Yet observers have mistakenly ascribed to critical legal scholars a categorical claim that all legal rules are necessarily indeterminate. Confusion has arisen on this point because critical legal scholars have identified additional sources of indeterminacy in American legal doctrine beyond its embodiment of liberal rights theory. Critical legal scholars also argue that doctrinal standards requiring identification of the interests of legal actors are indeterminate. This second claim takes critical legal scholars beyond their legal realist predecessors; indeed it implies a critique of the instrumentalist approach to legal decision making embraced by many legal realists. This second "indeterminacy thesis" is the more original and interesting contribution of critical legal studies.

Taken together, critical legal scholars' indeterminacy critiques of liberal rights theory and of the jurisprudence of interests attribute indeterminacy to a good deal of American legal doctrine. Yet they do not amount to a categorical claim that no rule or rule system can yield determinate results.

Critical legal studies as social theory

The indeterminacy critique of interests developed by critical legal scholars is best seen as a contribution to social and political theory rather than analytic jurisprudence. It is essentially a claim that society and politics are legally constructed. Thus it is an original and philosophically important claim about the relationship between law and society. Critical scholars don't see legal language as indeterminate *relative to* the social context to which it refers. Rather, they see legal language as indeterminate *because of* the indeterminacy of the social context to which it refers (Kennedy, 1973). The indeterminacy of the social world frustrates instrumentalist efforts to explain or prescribe legal rules on the basis of their service to certain interests.

The remainder of this article will explicate this critique of instrumentalism by

reviewing the work of several critical legal scholars. As we shall see, critical legal scholars have deployed this critique not only against existing legal institutions, but also against instrumentally driven proposals to reform or overthrow them.

The critique of instrumentalism

Legal realists tended to see legal doctrine as an empty shell, covertly determined by social context; they sought only, by means of policy analysis, to make that contextual determination overt and self-conscious. Critical scholars, like most modern legal scholars, have so internalized the realist characterization of doctrine that they equate legal doctrine with the policy analysis that the realists advocated. Unlike the realists, critical legal scholars do not treat legal doctrine as a special or even a distinct case among forms of social knowledge, uniquely lacking in truth or determinacy. Instead, they treat it as a typical instance of the use of social science methods to promote policy ends; so that its indeterminacy simply exemplifies the indeterminacy and value-laden quality of the social knowledge on which it is based.

Accordingly, much influential critical legal scholarship is properly seen as a critique of legal realism rather than a recapitulation of it. In "The metaphysics of American law," Gary Peller made this rejection of realism explicit, while making clear that it by no means entailed a return to the formalism of liberal rights theory (Peller, 1985). Instead, he argued that realism perpetuated the basic flaw of formalism: its commitment to determinacy. Instead of seeing the social world as determined by law, realism insisted that legal decisions are and should be determined by their social context. Instead of subordinating facts to rules, Peller argued, legal realism subordinated rules to facts. Each involved the same structure and the same faith in the ability of experts to know and control the social world. In the "deconstructive" cultural criticism of Foucalt and Derrida, Peller finds an elegant device for equating the legal analysis embraced by liberal formalists with the policy analysis embraced by legal realists; both are simply "discourses" or "disciplines" – practices of observation, classification, argument, and judgment which do not simply describe human beings, but also shape them. Accordingly, these concepts seemed to encompass both the formal legal analysis and instrumental policy analysis that critical legal scholars link.

One of the key arenas in which this link was forged was in the critics' transformation of legal history. This revision began with Morton Horwitz's *The Transformation of American Law* (Horwitz, 1977). This study of antebellum jurisprudence demonstrated that by the middle of the nineteenth century the jurisprudence of natural law had been replaced by the sort of instrumentalist jurisprudence that the realist scholars favored. By arguing that this instrumentalist regime served the interests of a merchant and industrial elite, Horwitz challenged the assumptions of realists that this style of jurisprudence was necessarily more democratic than a jurisprudence of natural rights. Other critical scholars, most prominently Duncan Kennedy and Robert Gordon, have extended the attack on realism implicit in Horwitz's work by questioning some of the instrumentalist premisses implicit in

his method. Thus, Gordon has questioned the possibility of explaining doctrinal change in terms of elite interests, when legal doctrine and legal thought are partly constitutive of those interests (Gordon, 1984). Kennedy, in the meantime, has severely complicated our notion of doctrinal change by presenting liberal legal doctrine as a contradictory framework embracing positivism and natural rights, instrumentalism and formalism. In this context, the selection of one or another pole by a legal decision maker deploys, but does not alter, the doctrinal framework (Kennedy, 1976, 1979). Because doctrinal frameworks are so malleable, Kennedy and Gordon are inclined to say that doctrine expresses, articulates, even constitutes conflicting interests, but does not serve them.

Other critical scholars have stressed the malleability of the notion of interest itself as a barrier to doctrinal determinacy. Writing about decision criteria that call for the balancing or representing of interests, Al Katz has argued that the concept of interest disguises but does not resolve the tension between "natural rights" and "popular sovereignty" in liberal jurisprudence. Moreover, the interests balanced or represented are products of the techniques by which they are measured or observed. Accordingly, the modern decision maker's practices of balancing and representing may be characterized as disciplines that constrain the identities of individuals and groups in the process of recognizing their "interests." The realists' incorporation of these social scientific techniques into legal doctrine insured that doctrine could remain no more determinate than policy analysis (Katz, 1979, 1987, 1983).

Several critical scholars have used the indeterminacy of interests as a basis for attacking the policy analysis that dominates post-realist legal scholarship. Most such scholarship explores three models of social choice: the adversary process, the electoral process, and the market. These models all involve attempts to reconstruct the normative certainty on which classical liberalism rested without adopting its naive assumption that social actors can exercise freedom without infringing the freedom of others. Each of them rests on an image of society as a competition among antagonists. Nevertheless, each of these models identifies normative truth as the fairly compiled aggregate of the subjective preferences of "interests" of these antagonists. Thus, even though adjudication, efficiency, and majority rule might reach different results, each rests on the same assumptions and each makes a similar claim to truth. Post-realist legal scholarship focusses on three issues: (1) which of these models should be employed for the resolution of a particular controversy; (2) how these models can be reconciled; and (3) how the decision-making process modeled by each can be made more fair. Critical legal scholars, by contrast, reject the notion that the interests of individuals and groups develop independently of the processes which aggregate them. Accordingly, they are convinced that no mere combination of the adversary process, the electoral process, and the market can automatically produce legitimate social choice.

William Simon's work on the adversary process undermines the notion of interests in the context of representing individuals and groups. In *The Ideology of Advocacy*, he argued that lawyers cannot represent their clients without attributing to them "interests" that are recognized by the legal system as legitimate and realizable

(Simon, 1978). In this way lawyers – poverty lawyers especially – can socialize and co-opt their clients in the very process of zealous representation. They learn to live with this because the "ideology of advocacy" reassures them that truth is the outcome of the adversary process. At the same time, this conception of truth allows their opponents to abdicate moral responsibility for the reprehensible causes they advance. The adversarial ethic allows lawyers for both the poor and the rich to act on the basis of "interests" manufactured by the legal system itself, rather than their own values.

Critical legal scholars have similarly attacked economic analysis of law, on the grounds that it mistakenly treats individual economic preferences as independent of legal rules. Thus, their objection is not so much to the substitution of efficiency for justice as a criterion of adjudication, but to the belief that the two criteria can be separated at all. Where economic analysts of law have urged that courts should allocate resources to those who value them more in order to escape transaction costs, Edwin Baker, Mark Kelman, and Duncan Kennedy have argued that how much each party to a dispute values a resource depends heavily on whether or not she already possesses it and may depend even more on what else she possesses. Thus, resources cannot be distributed on the basis of calculations of allocative efficiency because such calculations always depend on prior assumptions about the distribution of resources. Accordingly, the critics argue, questions of allocative efficiency can never be separated from questions of distributive justice (Baker, 1975; Kelman, 1979; Kennedy, 1981).

Critical scholars have similarly objected to scholarship that invokes political science in an effort to reconcile adjudication with majoritarian decision making. By treating voter preferences as given, such scholarship is able to treat the problem of democratic decision making as a matter of aggregating those preferences, without exploring how they are arrived at. By contrast, critic Richard Parker has argued that even a judicially supervised electoral process cannot represent the "interests" of the poor because poverty precludes people from formulating and pursuing their own political goals (Parker, 1981).

The critique of instrumental reformism

There is little point in improving the ability of the market, the electoral process, and the adversary system to represent interests if those interests are constituted in the very process of representation. Accordingly, the critical scholars' anti-instrumentalism is aimed not only against these institutions, but also against liberal reforms designed to improve them.

Such criticism of liberal reform movements appears to follow one of two paths. One such path is exemplified by Alan Freeman's "Legitimizing racial discrimination through antidiscrimination law" (Freeman, 1978) and Karl Klare's "Judicial deradicalization of the Wagner Act" (Klare, 1978). These pieces criticize decisional law (anti-discrimination law since *Brown*) and legislation (the National Labour Relations Act) that are commonly thought to be major achievements of progressive politics. They criticize these products of progressive politics as ineffectual

because, while they made minor adjustments to provide the appearance of protection for persons of color and working people, these legal changes have, in practice, left the decision-making institution of the market intact. Many readers have understood these articles to imply that it is the market that chiefly oppresses the poor, whose ranks include substantial numbers of workers and persons of color. Many readers go on to assume that such Marxist scholarship takes the institution of a market as a given, and that until capitalism is overthrown, struggles for civil or labor rights are futile and misdirected.

In fact, however, these pieces celebrate the political struggles that brought about these liberal reforms. What they lament is the exhaustion of such political movements as a result of their embodiment in institutions, specifically in adjustments to the ground rules for bargaining within a market. According to Klare and Freeman, these movements did not fail because they accepted the institution of the market; to the contrary, they challenged the institution of the market by embodying a form of association and decision-making inconsistent with it. These movements were contained by the market, however, when their struggles were embodied in legal institutions. The labor movement was the setting for collective participation in political decision making about the meaning and shape of work; labor law reduced it to a common economic interest. The civil rights movement was a forum for passion, participation, interracial understanding, solidarity and sacrifice; civil rights law eventually reduced it to a right to governmental indifference. In short, these articles do not urge contempt for the labor and civil rights movements as irrelevant because they did not pursue world revolution against capitalism. They celebrate these movements as forms of association and decision making that were, in and of themselves, good and sufficient alternatives to instrumentalism.

This perspective is perhaps a little clearer in a second pattern of critique of liberal reformism. This pattern, exemplified by William Simon's "Legality, bureaucracy and class in the welfare system" (Simon, 1983) and Derrick Bell's "Serving two masters" (Bell, 1976), directs critical attention at the strategic decisions made by liberal reformist lawyers on the basis of distorting assumptions about their client groups' "interests." In each case the lawyers are criticized not so much for interfering with a situation better left alone but for allowing abstract conceptions of their clients' interests to blind them to their clients' potential to contribute to the process of social change.

Accordingly, Derrick Bell has argued that integrationist lawyers failed to recognize one black community's desire for quality neighborhood schools over which they could exert some control and which could serve as vehicles of opportunity for black educators. The result was that these lawyers were so busy pursuing their clients' interests that they ignored their desires. They also failed to learn from their clients to the detriment of the lawyers' own political vision. Finally, they squandered an opportunity to mobilize an aroused community to define its own goals, not only in the litigation process, but also in the administration of its own schools.

William Simon has revealed a related problem encountered by poverty lawyers endeavoring to render welfare bureaucracies more generous and less degrading by formalizing their decision-making procedures. It could hardly have surprised

anyone that the result was to make the welfare bureaucracy more bureaucratic. But what lawyers had failed to consider was the impact of bureaucratization on welfare workers and on the future possibilities for welfare recipients to influence those workers. Removing the discretion of welfare workers degraded their work and destroyed opportunities for them to pursue civil vocations, even as it destroyed opportunities for arbitrariness, condescension, and discrimination. It dehumanized welfare recipients' contact with the welfare bureaucracy, which perpetuated the dehumanization of welfare recipients in a new, more impersonal form. It sometimes created new forms of personal degradation as well, substituting inflexible skepticism for invasive curiosity. While recipients "received" new rights to constrain agency behavior, they found that they could not avail themselves of these rights without the indulgence of other poverty professionals – lawyers. Thus poverty lawyers solved the problem of welfare worker abuse of welfare recipients by disempowering welfare workers instead of by empowering welfare recipients. As a result, they foreclosed the possibility that welfare recipients would have found in such a transformed relationship with welfare workers a political resource rather than a liability. By assuming that the interests of recipients and workers were opposed, poverty lawyers ignored the possibility that those interests could evolve and converge as a result of political activity. And by taking for granted that the recipients' interests could be pursued without the recipients' participation, poverty lawyers ignored the possibility that welfare recipients might have a non-economic interest in political participation and control over their circumstances.

These four critical assessments of legal strategies for liberal reform suggest serious misgivings about the desirability of social reforms planned, directed, and institutionalized by experts. Thus, the problem with the civil rights movement, the welfare reform movement, and the labor movement was not their failure to attack capitalism. There is no such central cause or single accurate description of oppression in the world. The problem with these reform movements was that they made too many assumptions about the problem to be solved and involved too few people in the decision-making process. In short, they were not sufficiently democratic. Critical legal scholars' attack on instrumentalism is inspired by their commitment to participatory democracy.

The critique of revolutionary instrumentalism

Critical legal scholars have the same misgivings about ambitiously radical programs for social change that they have about liberal reformist programs. If they are planned and conducted by experts based on fixed assumptions about the "interests" of the oppressed, they are as undemocratic and misguided as the movements for liberal reform.

This caveat is made explicit in Edwin Baker's "The process of change and the liberty theory of the First Amendment" (Baker, 1981). Here Baker identifies instrumentalism as the separation of means and ends. Arguing that the distinction is artificial and cannot be maintained, he attacks the notion that the end of progressive social change justifies violent or coercive means. Baker's chief purpose

is to argue that even the radical change to a collectivist or communal society is compatible with, even requires, strict protection of individual freedom of opinion.

Critical legal scholar Roberto Unger has argued that the Marxist theory of revolution is undermined by its reliance on the same kind of instrumental reasoning that informs mainstream policy analysis.

Marx identifies revolution as the change from one mode of production to another. But how does Marx define the concept of capitalism, the paradigm for all modes of production? At least three factors are crucial for the identification of a "capitalist" economy: (1) a predominance of "free labor," understood as the condition in which a laborer owns all of her own labor and none of the means of production; (2) commodity production for private accumulation of wealth; and (3) sufficient accumulation of wealth to enable industrialization. But Unger points out that there is no necessary connection between commodity production and the development of a labor market, or between a labor market and industrialization, or between industrialization and private accumulation. Any criterion for recognizing capitalist societies based on these criteria will be both under- and over-inclusive (Unger, 1987).

The crucial assumption underlying Marx's conception of capitalism is that "free labor" is economically necessary to industrialization. This assumption is undermined by the irreparable ambiguity of the concepts of free labor and economic necessity. Each of these concepts is analytically related to the concept of desire, a variant of the concept of interest. To say that the "free laborer" has property in her labor, is to say that her labor can only be utilized with her consent. To say that a "free labor" market makes possible industrialization by utilizing labor more efficiently is to say that it better fulfills desires. Because Marx's theory of revolution is a variant of economic determinism, it shares the tendency of liberal economics to treat individual desire as an independent variable. A market is a means of aggregating desires. If one claims that the introduction of a free labor market better fulfills desires, one wrongly assumes that desires are independent of the means by which they are aggregated into social choice.

The instability of desire over time renders the concept of free labor indeterminate. Are specifically enforceable contracts for personal service expressions of "free labor" or involuntary servitude? In respecting the laborer's freedom at the time of contracting, we must sacrifice her freedom at the time she wishes to leave service, thereby designating her former self custodian of her later self's interests. In recognizing the laborer's freedom at the time of leaving service, we reduce her freedom at the time of contracting, effectively designating her later self custodian of her former self's interests. The instability of desire precludes us from simply respecting the preferences of the laborer. Because we cannot uncontroversially identify individual preferences, we can give no determinate meaning to the concept of free labor that underlies Marx's concept of capitalism.

The instability of desire also undermines the determinacy of concepts like economic efficiency that aggregate individual desires. Thus even if Marx could define free labor, he would have difficulty demonstrating that free labor was economically necessary to industrialization. And this claim is crucial to Marx's conception

of capitalism as both a system and a necessary stage in the development of the "productive forces."

Marx would have denied that his conception of economic necessity was based on any notion of desire. For Marx, economic life consisted in production rather than consumption, and the value of products was a function of labor rather than consumer demand. Thus "economic necessity" would have meant "necessary to production," not "necessary to the satisfaction of consumer demand." "Free labor" then, was "necessary" in the sense of necessary to the development of industrial production.

Yet the "necessity" of "free labor" to industrialization depends on culturally contingent "consumer" preferences. In characterizing bondage as a "fetter" on the development of the productive forces, Marx meant that it inhibited production by misallocating labor: bound laborers have no incentive to seek more productive tasks. And less production means less social surplus to invest in the development of industry.

But unless we specify the "consumer" preferences of laborers and employers for different labor relations, we cannot conclude that a market in free labor will allocate work more efficiently than a market in bound labor. This follows from the familiar Coase theorem that, absent transaction costs, allocative efficiency does not depend on the distribution of entitlements (Coase, 1960). From the standpoint of efficiency, the choice of remedy for personal service contracts is as irrelevant as the choice of remedy for any contract.

The choice between free and bound labor is simply a choice between a damage remedy and a specific performance remedy for contracts for personal service. It follows that the distribution to employers of a property right in their laborer's services doesn't prevent the efficient allocation of those resources. A worker learning of a more productive position can buy her employer out, leaving both better off. Similarly, an employer discovering a more productive use for an employee can lease her services to another employer, or to the employee herself.

We can only conclude that bondage allocated labor inefficiently by viewing labor as a consumer good rather than a factor of production. Many masters refused to manumit their slaves at market price, or to permit them to hire their time. Few masters invested in the education and skilling of their slaves, or permitted their slaves to so invest. Many masters felt that it demeaned their authority to bargain with their slaves. And masters correctly feared that slaves allowed to wander in search of productive employment would run away. But this means that the slave system failed to allocate labor efficiently because neither the master nor the slave regarded the slave merely as a factor of production, to be valued according to the income she might yield. Masters owned slaves partly for the consumption value of the attendant honor, just as slaves were often willing, though not always able, to pay more than their own market value to consume the honor of self-ownership. Thus Marx's concern with the efficient allocation of labor for production cannot be separated from the question of its efficient allocation for consumption.

We have seen that critical legal scholars argue that the concept of efficiency is

thoroughly indeterminate when applied to the allocation of resources for consumption. Because we often incorporate our possessions into our sense of self, how much we value a good often depends on whether we already have it. This point applies to property in labor. Employers whose identities are already invested in master status are more likely to pay a premium for slave labor; penniless slaves could offer little for their freedom, while we would be surprised to learn of freed slaves selling themselves back into slavery at any monetary price. Thus the efficient allocation of the entitlement to dispose of labor depends in part on how the law distributes it.

The contingency of allocative efficiency on legal and cultural norms means that legal and cultural changes can make an efficient allocation inefficient and vice versa. Robert Steinfeld has shown that indentured servitude ceased to be a profitable way to employ labor when workers would no longer stand for it, and courts became less willing to enforce it (Steinfeld, 1991). Rather than economic rationality ending bound labor, the cultural rejection of bound labor made it economically inefficient.

What made bondage a "fetter" on the productive forces was the fact that the productive forces included laborers who saw it as demeaning. What binds "free" wage labor to the service of industrialization and accumulation to form "capitalism" is culture. This means that capitalism can never be separated from the "superstructure" it is supposed to explain. It also means that there is no necessary connection among any of the defining elements of a mode of production, and no necessary incompatibility between what are supposed to be elements of different modes of production. The indeterminacy of interests renders the Marxist conception of revolution incoherent.

The indeterminacy of interests, as developed by critical legal studies, undermines the instrumental conception of society that informs policy analysis across the political spectrum. Although the indeterminacy critique of liberal rights theory is better known, the indeterminacy critique of instrumentalism is critical legal studies' most important philosophical claim.

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