

Critical teaching

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CRITICAL TEACHING

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This is a reflection on the engagement of the critical legal studies movement with law school teaching, focused on the teaching of private law, which I know best. I'm putting aside the many other things that were going on in legal education at the time that affected law school teaching in related ways, such as the rise of clinical teaching and social activism, increases in the number of women and people of color in law schools, and the overall surge in enrollments.

Common themes and approaches ran through the state of law teaching prior to the advent of CLS. Legal realism had undermined the concept of a formal rule system but had not entirely abolished it. A key element of the law school experience was teaching students “thinking like a lawyer,” but there was no systematic meaning to that concept. Instead, it was composed of a variety of craft skills, such as generating broad and narrow holdings of cases and applying maxims of interpretations to statutes, and relatively unsystematic policy analysis. The jurisprudence about legal reasoning had not deeply penetrated the doctrinal classroom. Particular subjects had core concepts—the protection of legitimate expectations in contract law, optimal incentives for proper conduct in tort law—which allowed for a degree of armchair empiricism and the construction of arguments about desirable results. The combination of method and substance led students either to a belief that private law broadly supported the existing social and economic order, with room for change at the margins (neoclassical contract law is a good example), or to a skepticism about law based on the malleability of rules. Because the dominant Socratic method in any of its forms was teacher-focused, students learned all of this with varying degrees of success.

CLS criticized and offered alternatives to every element of the existing model of law teaching. Because the teaching project was driven by the broader CLS scholarly project, the

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critique and alternatives were thorough-going, integrated, and explicit in a way that gave them power and heightened the contrast with traditional approaches.

Begin with “thinking like a lawyer.” Some of the CLS literature defined thinking like a lawyer quite specifically, as constituting a defined set of distinctive legal skills, including knowledge of a legal vocabulary; understanding of legal rule systems, including the fit, gaps, and overlaps within systems; the ability to use primary legal sources; and an understanding of the systematic nature of legal argumentation involving recurrent categories of arguments and their use within and across subjects.

One of the advantages of defining thinking like a lawyer in this way was that it rather obviously raised the question of whether anything underlay the rule and argument systems. In the traditional approach of legal liberalism, as I’ve noted, the answers were either the existing social order or nothing at all. CLS offered a different answer that became central to the teaching project. Broad social conceptions or ideologies could be seen within any subject or across subjects. The conceptions were not tightly analytical social theories, but bodies of thought and belief that cohered, in the sense that they more or less hung together. We defined these in various ways and even disputed whether they existed—individualism/altruism, individualism/collectivism, freedom of contract/social control, K1-T1/K2-T2 in contracts and torts, among others. Whatever their theoretical validity, they were very useful classroom tools for focusing students on what could be going on one or two levels down in the doctrine and therefore broadening the students’ perspectives.

The combination of a new approach to thinking like a lawyer and the suggestion of the systematic nature of legal thought had two effects. First, it enabled the delightfully named technique of “trashing” —bringing the indeterminacy critique to the classroom, undermining students’ belief (or desire) that a single rule should be applicable to a set of facts, and that application of the single rule should lead to a determinate result. Second, it made clear to students the necessity of choice on some basis external to the rule system, by courts and by them, as to what legal rules and decisions best advanced their view of the social good and of what is just.

When we were at our best, all of this was pretty explicit in our teaching—the nature of legal reasoning, the content of legal thought, and questions of social ordering. The explicit nature and our progressive principles meant that we wanted students to be empowered by all this, rather than frustrated, disabled, and made cynical. The explicit nature of it all and our desire for empowering students also led in another direction. Critical teaching should have been and sometimes was simply better teaching than traditional teaching. Students should and often did learn better, and we felt responsible for developing techniques to make sure that they did so. At some places—Georgetown and Stanford come to mind—this contributed to discussions about reordering the curriculum or portions of it. In my case, with my late colleague Marc Feldman, it produced *Contorts*—a ten-credit Contracts/Torts/Legal Writing course that integrated CLS and learning theory and upended the grading structure. Unfortunately, as was sometimes the case with CLS controversies at the time, it also resulted in the faculty prohibiting us from teaching the course again and, in part, to Marc being fired.

I would like to think our approaches to legal reasoning, legal theory, and teaching methods as embodied in the CLS teaching project profoundly influenced later teachers, even if they were not CLS adherents. I'm not sure. But without tracing chains of causality too carefully, a few thoughts. First, over the ensuing years and today there is more attention to explicit definition of craft; we may have laid some of the groundwork for that. Second, there is much more innovative teaching and use of learning theory than there was before us; we may have opened up possibilities here, even if the particular paths are different. Third, we may have modeled the possibility of presenting theory and politics as central to the classroom; at the time, only law and economics was doing much of this. Today there seems to be much more use of theory and discussion of politics, although both of them tend to be more narrowly focused and less all-encompassing. Perhaps the conference session on "Aftermath and Legacies" will have more to say about that.

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