

ARE LAWYERS REALLY NECESSARY?

*Barrister Interview
with Duncan Kennedy*

In this dialogue with a founder of the Critical Legal Studies movement, the key issue is addressed: What do lawyers do for society?

Critical Legal Studies was born during the late 1960s among a group of student activists and younger faculty at Yale Law School who believe that using legal reasoning to justify the rules of society can make outcomes that are oppressive appear to be inevitable, logical and inherently fair. Among its founders was a student named Duncan Kennedy.

By 1977, CLS adherents had formed a network with Harvard Law School as its center. Kennedy, 45 and now a Harvard law professor, is the movement's unofficial spokesman and cheerleader. Kennedy calls much of

what is taught in Harvard and other law schools "nonsense" and little more than brainwashing to prepare future corporate lawyers for roles in society that are "alternately evil and inconsequential."

Here is Kennedy's definition of corporate lawyers: They "are in alliance with selfish business interests. They lobby against regulatory legislation and try to pick it to pieces in the courts; they do their best to bust unions, or to preserve 'union-free environments,' and by tax practice they mean tax minimization. In exchange for all of this antisocial activity, they receive grotesque monetary rewards, which they take without apparent trace of shame."

At times, Critical Legal Studies seems like an exercise in legal self-hatred. It has its roots in "legal realism," whose supporters earlier this century began to argue that legal precedents could be found to support either side of most cases, and that the personal dispositions, beliefs and prejudices of judges, rather than the abstract "science" of law, had more to do with judicial decisions.

"Crits"—as those affiliated with Critical Legal Studies are called—challenge students to bring their own moral and political values to bear on what they study. As lawyers, those same students might bring their moral and political values to bear on what they practice.

This past summer, a bitter tenure dispute erupted on the campus at Harvard Law School, and led many to question whether two professors were denied tenure and a third denied a job because they were members of the Critical Legal Studies movement.

Crits believe in grassroots activism to change the legal system. Those beliefs do not threaten to revolutionize the American legal system anytime soon, but do provide an intriguing question about how law is not only taught, and practiced, but how it has molded American society.

What Kennedy and other CLS adherents seem to want is for lawyers to think about what the profession actually accomplishes for society, and whether what the legal system does is worth doing.

This interview, recorded in Cambridge, Massachusetts, was conducted by BARRISTER Associate Editor Vicki Quade.

Explain your manifesto to the man on the street. What does Critical Legal Studies really mean?

Critical Legal Studies is a move-

ment or an organization, not an ideology or manifesto.

It's a network, a group of people who are in touch with each other a lot, and share a certain willingness to read each other's work and criticize it, and share some attitudes. It is not like a manifesto. It is more like a set of attitudes.

Most of the people in Critical Legal Studies are law professors. There are a relatively small number of practicing lawyers and social scientists. It is not a political movement in the usual sense or a grass roots organ-

"Some young lawyers seem intensely turned off by the way large law firms treat them. Others make their peace."

ization. It is basically a loose association of law teachers.

Critical Legal Studies is a left-wing network. Just about everybody in it is to the left of center, a liberal or a radical. But it is not politically exclusive, because there are always some people associated with it who are conservatives, who are just interested in the intellectual aspect.

There is also an educational reform perspective toward legal education. A critical attitude toward the way legal education works, a humanistic critique of legal education.

The emphasis is on the extent to which legal reasoning presents legal rules as more necessary, more inevitable, and more intrinsically just than they are.

A second focus would be on the much higher level of play or choice that judges and lawyers have than they claim they have.

The third level would be the argument that the rules have a major impact on the distribution of wealth and power in the society. So that if you believe that the distribution of wealth and power is unjust, between women and men, between rich and poor, between people of different races, and if the rules have a big impact on that, then the people who make the rules are responsible for that injustice. That would be the in-

tellectual, political attitude that I would say was most widely shared.

What is your definition of the law?

I almost never write anything or say anything to which it makes much difference how you define law.

I don't tend to think that you can do much with definitions. When I talk about law, I usually just mean what the rules enforced are, the arguments that people use and the reasoning processes they use to generate the rules enforced.

You've often said legal doctrine is not objective, it is the basis of corporate capitalism, and its outcome is radically unjust. Are those the three basic CLS propositions?

There isn't some correct number of propositions. People ask me all the time, "What is Critical Legal Studies?" I have given many answers ranging from one proposition to eight propositions, depending on what seems clear on any given day.

What I said before was that the people who do legal reasoning present the rules of the legal system as natural, and necessary, and just when often they aren't. There is a lot more play in the system than lawyers and judges pretend there is.

There is a lot more discretion and free choice than they pretend, though it is not total discretion, or total free choice. The rules they choose have a major impact on the distribution of wealth and power in the society. So, if you think that the distribution of wealth and power is unjust, you should hold the people who make the laws responsible for it.

That's four propositions.

Aren't you placing too much blame on makers of the law, for the financial, political, and cultural privileges of the people at the top, and for the existence of an underclass?

I'm not aware that I put a quantitative measure on how much responsibility we should give the people who make laws.

The real question is whether the way in which lawyers and judges and legislators present what they do, leads people to minimize their responsibilities.

They ought to have a lot more responsibility placed on them. How much is not something I really have a view on.

Why should there be equal distribution of wealth and power in society?

The idea of a completely equal distribution of wealth and power is probably a meaningless one.

Even if you set out to achieve it and were willing to sacrifice everything else for equality, you couldn't achieve absolute equality. People are just too different from each other.

The question is whether there should be a much more equal distribution of wealth and power than we now have.

Many of the inequalities that we have entail great suffering for the people at the short end, and needless luxury for the people at the rich end.

The suffering of the people at the poor end could be dramatically alleviated by taking some of the stuff away from the people at the rich end.

Are you the Robin Hood of the legal community?

Robin Hood was an outlaw.

Some would call you that.

I'm a tenured professor simply talking, teaching, and agitating completely inside the system.

There is a second reason why there should be dramatically less inequality. Sometimes inequality should serve as a useful incentive to increase production, but a large part of the inequality that we have in our society is totally and completely useless.

It reflects simply that "We the People" have allowed a small privileged group of big property holders to go on getting a completely unearned and larger than proportional share of the wealth of the country.

I don't think we would lose anything in terms of productivity or efficiency, if those people were simply taxed at a much higher rate. A sufficiently higher rate to reduce to a tiny fraction of what their wealth is now.

Do you think all people are capable of handling wealth and power?

No. There are some people who really don't have the capacity to handle wealth and power. But I don't think that the current distribution of wealth and power is set up in such a way as to keep it out of those people's hands and put it into the hands of the people who can use it.

A large number of the people who now have wealth and power are practically unable to handle it, and the large numbers of people who don't have it could easily handle it.

There are really three kinds of arguments against our current level of

inequality. It entails a lot of suffering for people at the bottom. In a society as unequal as ours, with the amount of wealth that we have, the people at the bottom are going to be really screwed.

It is wasteful and unjustified, in economic terms, to hand out enormous quantities of goodies to a basically large, parasitic class of wealth holders.

Even if the society was much richer so that people at the bottom were a lot better off, the unequal distribution of wealth and power between races,

"Law students get a sense of just how political law really is. It puts them in good stead in their careers."

between men and women, between economically defined social classes based on birth—that kind of a system is intrinsically repulsive to our sense of fairness.

If we are going to have inequality, at least it shouldn't be based on the accidents of race, gender, and birth into a particular social class.

You've been pushing inside legal institutions, law schools, and sometimes within law firms, for a kind of internal democratization and reduction of internal hierarchy. What success have you had?

I don't think law schools are significantly less hierarchical today than they were ten years ago. I would certainly say that Critical Legal Studies has had no impact whatever on law firms.

That Critical Legal Studies has made any difference is by giving law teachers, and a lot of law students, the sense that it is possible to advocate less hierarchy and not be crazy.

Ten years ago the feeling was that legal education was a profoundly status quo-oriented, deeply conservative institution. It still is, but that view is a lot more contested than it used to be.

Once young lawyers get into the working world, does the doctrine of Critical Legal Studies have much meaning? Do young lawyers care

about reducing hierarchy as a political goal? Are they concerned about the distribution of wealth in society?

Critical Legal Studies does not have a doctrine.

I must admit that I'm honestly not sure what you mean by "any meaning." The idea that there is a lot of leeway in the law, that legal rules have a big impact on wealth and power, that the distribution of wealth and power is unjust and that the law-makers are responsible for it—those ideals seem to have meaning for a lot of lawyers.

A lot of lawyers react to it as being completely right. Other lawyers react to it as being subversive commie nonsense.

The Crit ideas are controversial and produce strong reactions among lawyers who are concerned with it.

How frustrated are young lawyers in their work?

Every year I have a number of conversations with young lawyers in their first, or second, or third year of working with large corporate law firms.

Some of them seem to be really happy in their work. Some of them seem to be just intensely turned off by the way the large law firm treats them in the first year or two of their professional life.

Some of the ones who are very discontented seem to leave. Others seem to be converted. They make their peace.

You've urged new associates in big firms to use "sly, collective tactics" to "confront, outflank, sabotage or manipulate" senior partners. That sounds so underhanded. Is that practical advice?

Let's talk about the underhandedness dimension first. What I meant by that was that associates are like anybody else. In a rigidly hierarchical bureaucratic organization they have to learn to play office politics.

Often when they arrive they are so naive that they don't even understand that office politics exists. They get hurt and make mistakes.

Office politics as a practical matter does not involve walking into the boss' office and saying that he should stop abusing the secretary. If you do that, you are going to get fired.

If it is well-known that he is just a jerk to support staff, and you want to do something about it, you have to use tactics that are indirect, that are sly, that are collusive.

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What ever happened to filing a complaint with EEOC?

The EEOC might conceivably offer a remedy for some kinds of internal office abuse for the secretary. There is no law against most of the petty tyrannies that arise from the inequality of power in office situations.

Where there is a legal remedy the cost of pursuing it for the employee is often too large and too terrifying.

It is not true that the EEOC takes care of petty tyranny.

Shouldn't lawyers be using the law, instead of learning how to get around it?

I can assure you, the support staff in many bureaucratic organizations are so intimidated or dominated that they would never think of filing an official complaint.

You say that the idea of using sly, collusive tactics to outwit the abusive boss strikes you as underhanded. I am indeed talking about tactics that are nonconfrontational. When confrontation doesn't work, you shouldn't use it.

I don't think there is anything wrong with creating a kind of office conspiracy against a boss who abuses support staff to get him or her to stop doing it.

Are such tactics realistic? That depends on the situation. It's hard to make a general statement.

How would you restructure the typical law firm?

I don't know enough about law firms to offer an intelligent, general proposal for formal restructure.

The one thing that seems clear from talking to young lawyers is that they have lots of ideas about that, but no audience for their ideas.

You often hear criticized the exploitation of associates by partners, the rigid patterns of internal deference to partners, abusive supervisory style.

How would you restructure a firm to eliminate all that?

The abuses associated with hierarchy can't be eliminated by any formal restructuring. To some extent, what it means to me to be a radical is to believe that a lot of the changes that are desirable are changes that only come when people's consciousness changes. And you can't coerce consciousness change, or even legislate it.

An abusive supervisory style changes when people feel powerful enough to fight back.

What type of law have your students gone into?

I teach a random cross section of Harvard law students. Most of them go into large corporate law firms. Some go into teaching. A small number go into public interest law.

What are the main contributions of the CLS movement?

The main contribution to date has

"If you think the distribution of wealth and power is unjust, you should help people who make the law responsible."

been to give some law teachers and students the sense that there really is no orthodox, conservative, established wisdom about law.

The question of what the role of law is, in relationship to social justice, is one about which people are passionately divided and one about which there is a progressive or a radical position that some people take.

Instead of laws seeming monolithic, a field in which all the sage or authority figures have basically the same conservative view, it now seems like there is a left and a right view.

Is your standoff with conventional legal educators also a war of the generations?

Generational conflict has been a very important part of the conflict in legal education. One of the things that aroused a lot of antagonism or anger against Critical Legal Studies is that some Crits, including me, had not been perceived as adequately deferential to their elders and betters.

In much the same way, people our age in the '60s who were involved in radical politics were seen as repulsively disrespectful by the establishment.

How did you get involved in this?

I could give you a list of the people who introduced me to Critical Legal Studies. They would be David Trubek and Richard Abel, both of them assistant professors at the Yale Law School when I was a student there.

Morton Horwitz and Roberto Unger, who were colleagues of mine when I joined the Harvard faculty, Peter Gabel, who was then a young law professor at the New College of California School of Law, and Al Katz, who was teaching at the SUNY Buffalo Law School. Those were the people who introduced me to Critical Legal Studies.

Why did you become involved?

The work these people were doing in law seemed to be the same kind of basic political project that I had. They were basically people with a strong egalitarian and communitarian ethos who were trying to figure out what you could do inside legal education to realize ideals of that kind.

Their work seemed to me to be the most intellectually advanced. They seemed to have a better understanding than most law professors of developments in philosophy and social theory in the last hundred years. Most law professors at the time were operating in a kind of antiquated intellectual environment.

These people seemed intellectually advanced as well as politically attractive. Also I liked them as people a lot. I was very drawn to them as people.

Tell me about your childhood. Are you an only child?

No. I am the eldest of three brothers. My father was an architect. My mother is a poet.

I come from basically an upper-middle class, intelligentsia family. I was raised to be a part of the liberal ruling elite.

I went to private schools. As a child I supported Adlai Stevenson.

Were you an aggressive child?

I would describe myself as a somewhat bratty, fairly aggressive, question-type kid. I had a mouth on me as a kid.

Where did you grow up?

I come from Cambridge, Massachusetts.

You've never left home?

I have left home for fairly long periods of time, but I have been back home for the last 15 years.

Did you serve in the military?

No. I got out of the military through student deferments, through being married and being a father.

How would you rate the legal education you received at Yale compared to the kind of education you're imparting at Harvard? How would your former professors relate to your style of teaching?

Yale Law School when I went there, between 1967 and 1970, was an incredibly exciting place. Whether you were a conservative, a moderate or a leftist, it was very exciting. There was lots of controversy. There were intense student-teacher relationships that were conflictual, but also cooperative.

As a result, the recent views of the Yale Law School have described the period as "the Dark Ages."

What they see as the Dark Ages, I think, will be regarded as probably the best period of the Yale Law School since the 1930s. The school now is not at all like that.

I would rate my legal education very high. I only regret that the Yale Law School is no longer the kind of institution that gives people that kind of education.

Have you ever practiced law? Is that something you would like to do?

I worked for a law firm one summer. Also, I spent six months as a paralegal in a Legal Services office.

I could imagine being a full-time practitioner. It doesn't seem likely that that's going to happen to me in the near future.

How many CLS professors are there?

It is impossible to say. So much depends on how you define a Crit. I would say at a generous estimate there might be 120 law teachers in the country who have a strong identification with the Crit network. That would be a high estimate.

Aren't they mostly concentrated at elite or prestigious law schools?

Not at all. Most of them went to elite or prestigious law schools, but that is true of most law professors.

A disproportionately large number of all law professors went to the elite or prestigious law schools, and teachers are recruited from those schools, but the Crits are not concentrated in elite schools.

Though you often read that in the press, it is just inaccurate.

How many practicing lawyers do you count among your advocates?

Not more than a dozen practicing lawyers regularly participate in Crit events.

Isn't the movement at a turning point right now? Haven't you gone about as far as you can go ideologically?

The movement is at a turning point right now, but I don't think it has to do with how far we can go ideologically.

The movement is at a turning point because in the last two or three years there has been a concerted, conservative attempt to stop the growth

"Young lawyers have lots of ideas about restructuring law firms, but no audience for their ideas."

of Critical Legal Studies, of the network, by refusing to hire Crits as assistant professors even when they are more qualified than the other candidates, and by denying them tenure when their qualifications for tenure are better or superior to those people who are being given tenure.

There is a fairly concerted, devel-

oped ideological power play going on to kick Crits out of legal academia.

You contend that conservatives at Harvard blocked the tenure bids of two CLS adherents—Claire Dalton and Daniel Tarullo—because of their views, and forced David Trubek to seek employment elsewhere.

What happened to Trubek was that the faculty approved by much more than a two-thirds vote the offer of a job to Trubek. At the behest of a small minority of conservatives who opposed Trubek, Derek Bok, Harvard's president, vetoed the appointment.

In the cases of Tarullo and Dalton, the conservatives on the faculty mustered more than a third of the votes. It took two-thirds to grant tenure and Tarullo and Dalton didn't get it.

Why is this happening now? Other CLS adherents have been given tenure.

In fact, Harvard granted tenure during this time to a couple of other people associated with Critical Legal Studies.

And, of course, Harvard granted tenure to those of us who were part of the original group of Critical Legal Studies people ten years ago.

The reason these conservatives are acting now is that in the last cou-

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ple of years the attitudes and ideas associated with Critical Legal Studies have gotten enough of a hearing, and begun to get enough advocates, that the establishment in legal education has begun to feel seriously threatened.

They don't need to fire all the Crits. They just have to create enough of an atmosphere so that young law professors will think twice before even reading our stuff, for fear that some casual remark in the faculty lounge will get the vice squad after them and cause them to be purged.

You don't have to do in many people to produce that effect. It's even an advantage to do it somewhat arbitrarily because it gives everyone the feeling that if you are a good boy or a good girl, your colleagues will pat you on the head. But if you misbehave, even a little bit, you have no way of knowing whether you'll be taken out at dawn and shot.

Trubek has left Harvard, and now refers to the law school as "the Beirut of legal education." Hasn't this debate turned more into a sideshow?

A sideshow to what principal show?

To the show of legal education.

The debate about Critical Legal Studies is very important to the future of legal education. It's as important as the debates about legal realism were to legal education and to American law in the 1930s. And that is very important.

Are law students learning anything from the debate?

First of all, most law students in the United States have no exposure to Critical Legal Studies because there are very few Crits. So, most law students are certainly not learning anything about it except from the newspapers.

At schools where there is a substantial Crit presence, I think there has been some impact on legal education. Law students at those schools have a sense that things that once seemed uncontroversial are now contested—like the idea that the private law system of property contracts and torts is essentially a benevolent common sense arrangement that just reflects basic fairness.

The business of legal education goes on at Harvard very much as it went on last year and the year before

that, and the year before that. Because of the government structure of Harvard, students are virtually excluded from any participation in the actual decision-making process. So, they read about this debate in the newspaper or in the Harvard Law Record, or they hear about it from their professors.

Mainly they are preoccupied with their own legal education. Some students tend to get aligned with one side or another. That is basically a good thing. Those students get a sense of just how political law really is. That will serve them in good stead in their careers.

Is the public learning anything about the law from all of this?

Controversies surrounding Critical Legal Studies are presented to the public by the media. Unfortunately, the media tends to have a shallow understanding of what is going on.

In fact, I would summarize the media interest in Critical Legal Studies as, "It's a great story if you can show that weirdo '60s radicals continue, are alive in the home of 'The Paper Chase.'" That is about the level of the media interest.

So the public has not learned very much from it because the media has been pathetic in reporting it. I hope you will put that in the interview.

Derrick Bell, one of your fellow law professors, refused to attend the last commencement ceremony at Harvard, and urged other faculty members to join him in an 80-hour vigil to protest the school's denial of tenure to Dalton and Tarullo. How many faculty members supported that?

I was in Albuquerque at an ALS law teaching clinic. But I think a solid percentage, somewhere between 15 and 20 members of the faculty, would have supported Derrick Bell's gesture.

Paul Carrington, the dean of Duke University Law School, questions whether those who do not believe the law exists in a conventional sense can be committed to teaching it. What response do you have to that?

If Carrington thought he was talking about Critical Legal Studies, then his statement misses the mark. It is just not true that Crits believe law does not exist in the conventional sense. It is somewhat puzzling what he had in mind.

In general, I would describe Carrington's intervention as an odd combination of '50s red-baiting and Philistinism. And I think he should be ashamed of himself, as the dean of an important law school, for making statements like the ones that he did, which will obviously chill the academic freedom of his own junior faculty.

For him to make the statements that he made, given the vagueness and political bias that affects law school tenure decisions, amounts to muzzling anyone in his own faculty who does not already have tenure, who could have any interest in Critical Legal Studies. It is irresponsible on his part to have done it.

You call yourself a leveler. What do you mean by that?

I mean I am a radical egalitarian. I think we should reorganize things so there is far less income inequality, and far less inequality of job opportunity and of power in our society.

I don't mean a rigid formula of absolute equality because I don't think any such goal could ever be achieved or that it is even a meaningful goal.

What I mean is that compared to what we have now, we should have fewer inequalities. We should have more even distribution of the shit work in our society, and a more even distribution of the rewarding work.

We ought to have a dramatic redistribution of power in households between the people who do housework and the people who don't, and a dramatic distribution of power in workplaces between people who do support tasks and people who do managerial jobs.

What is the goal of Critical Legal Studies?

Critical Legal Studies does not have a goal, or a program, or a manifesto. There is no set of propositions that sum up Critical Legal Studies doctrine. What I just said is my own personal view.

So, what is your personal goal for it?

That it should function as a support network for progressive people and law teachers.

Where would legal education be today if there never was a CLS movement?

It has only been around for 10 years. The only real impact that Crit-

ical Legal Studies has had on legal education is to give many law teachers, and a much smaller percentage of law students, the sense that there really is a responsible and intelligent counter-vision to the idea that law is and ought to be a natural and necessary pillar of the status quo, and that the status quo is a very good thing.

Critical Legal Studies has made it possible for a person who doesn't believe that to find some institutional support inside legal education.

Legal education is no longer a form of conservative indoctrination which is unopposed.

How fulfilling can Critical Legal Studies be for you if you don't see much concrete effect?

This is the question people often ask me. I find it a little puzzling.

Making people feel that there is a real battle and a real disagreement about the justice of the American legal system is a big effect that we have had. Big enough to make up for the fact that we haven't had a big effect on legislation, that we haven't had a massive effect on classroom techniques, that we haven't had a massive effect on what judges do.

It would be nice to have those kinds of effects, but it would also be asking a lot. Or it would be a somewhat exaggerated optimism to believe that we could have such an effect in the short time that we have been in existence.

That we have managed to con-

vince a lot of people that there is a meaningful debate over whether the legal system should be regarded as essentially benign, is enough to make me feel that it has been very worthwhile.

I see a real danger that conservative establishment in legal education is going to decide that what we have done so far is sufficiently threatening, so they have to chill us by randomly firing a substantial number of young people associated with Critical Legal Studies as they come up for tenure. And by denying them teaching jobs no matter how good their qualifications.

That wouldn't be happening if we were as ineffective as you suggest.

Why do conservatives fear the movement?

There are a whole bunch of different reasons. It is a feeling by older professors that Crits are infected with the rebellious spirit of the '60s, and that if they hire them, they won't get the kind of deference and respect they want.

Crits are associated with political radicalism, and political radicalism in the United States is often regarded as a kind of disease. Something that is just evil and dangerous and if you get scratched by it, who knows, it'll infect your bloodstream.

A lot of conservatives have a contempt for radical ideas, but believe they are dangerously seductive. In their minds, it is therefore justifiable to stamp them out as though they

were microbes.

A lot of law professors have the feeling that they own legal education. It is their thing. It has belonged to them for generations. It is basically a ruling class institution.

If you want to be against it, critical of American social life and American institutions, you should go somewhere else and not soil their nest. It is a kind of proprietary feeling that they have.

Then there is the problem that Critical Legal Studies is associated with smart, difficult, complicated, fancy foreign ideas. For which I don't mean Marxism. I mean European fancy theoretical ideas. Those are very threatening. People who were not trained that way feel devalued and belittled by them. It is a natural, though sad, reaction.

There is one last reason. The basic idea of Critical Legal Studies is that lawyers, judges, and law professors have acted in ways that reinforce an unjust status quo, and therefore are among the substantially responsible parties for social injustice in America. That idea is insulting, threatening and frightening.

If you say that to the establishment of legal education, they are going to get mad at you—no matter how often they say they are committed to academic freedom. It turns out that it infuriates them to have their righteousness challenged. Especially by a challenge that they have thus far been unable to answer.

—Interviewed by Vicki Quade.