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Conversations After Class: 'Becoming Critical,' or the Steps Necessary to Achieve Critical Thought for Law Students

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CONVERSATIONS AFTER CLASS: 'BECOMING CRITICAL,' OR THE STEPS NECESSARY TO ACHIEVE CRITICAL THOUGHT FOR LAW STUDENTS

DANIEL J. SEQUEIRA*

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When Gregor Samsa awoke from troubled dreams one morning, he found that he had been transformed in his bed into an enormous bug.²

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1. I choose this example because this is one of the clearest areas where early Critical Legal Studies critiques are drawn. There are certainly critics who teach these classes in different ways, but doctrine in property must still be taught for other accounts of property. See Jerry L. Anderson, *Law School Enters the Matrix: Teaching Critical Legal Studies*, 54 J. LEGAL EDUC. 201, 206–10 (2004); see also Richard Bauman, CRITICAL LEGAL STUDIES: A GUIDE TO THE LITERATURE 113–19 (1996).

2. FRANZ KAFKA, THE METAMORPHOSIS AND OTHER STORIES 11 (Stanley Applebaum ed., Dover Publ'ns 1996) (1915).

INTRODUCTION

The first wave of Critical Legal Studies (CLS) folks saw legal education in a state of crisis. On the one hand, the potential was clearly there: law school was something animating—something that could construct and move new generations of critical lawyers toward upending the social and legal hierarchies that plagued both legal education and the law writ large. On the other, there were too many things working against them: legal education was embedded in a particularly conservative structure—a language that would only allow certain outcomes in line with the overarching methodology.

It appears that legal education has only become more of what they feared. Today, law school is more homogenizing, more limited in its outlook, more reductive, less “critical.” If we are to tackle the various and egregious faults of modern neoliberalism, it seems as though critical legal thought (“CLT”)³ cannot be served only by the conventional legal pedagogy of the contemporary. Critique, it seems, requires something more.⁴ Chantal Thomas opens this Symposium Issue with an apt discussion of legal pedagogy.⁵ I aim to close it with this very discussion—albeit from the perspective of a student in the moment of immersion.

While the “death” of the CLS movement⁶ left modern critical legal thought in a state of disarray, it appears that the tradition of which CLS was a part is decidedly *not* dead; somehow, somewhere, people are still becoming critical, still learning the tools of the trade, still theorizing and practicing some kind of legal critique.⁷ Death, it seems, gave way to new life.

This new life for CLT exists in order to diagnose and prescribe the problems of the present: a novel form of late-stage capitalism, neoliberalism and its associated problems, an ongoing

3. I use CLT here, but I do mean to imply that CLT is a comprehensive or unified movement.

4. I use “critique” and “critical legal theory” interchangeably with “critical legal thought,” though there is some suggestion that these could all, in fact, be different things. See generally Elizabeth Anker & Rita Felski, *Introduction to CRITIQUE AND POSTCRITIQUE* (Elizabeth Anker & Rita Felski eds., 2017).

5. See Chantal Thomas, *Reloading the Canon: Thoughts on Critical Legal Pedagogy*, 92 U. COLO. L. REV. 955 (2021).

6. Mark Tushnet, *Survey Article: Critical Legal Theory (Without Modifiers) in the United States*, 13 J. POL. PHIL. 99, 99 (2005) [hereinafter Tushnet, *Critical Legal Theory (Without Modifiers)*].

7. See *supra* note 4.

pandemic, mass peoples' movements taking up fights against oppression, climate change, and man-made environmental collapse . . . the wave of new and enduring problems faced by modern CLT is startling. While it is unclear exactly where or what the scope of modern CLT is,⁸ and whether or not it may provide solutions for us in this moment, its very existence is evidence that there is undoubtedly a value to CLT.

What CLT may do for us is a pressing question. But before we can even come close to answering such an important question, there is a preliminary inquiry that those interested in CLT have failed to properly address. Namely, we must discern *how* we come to be critical in the first place. Where, in our present legal academy, do students gain exposure to CLT?⁹

In this Article, I suggest that students are becoming critical, even in spite of rigorous institutional and practical controls on the legal classroom, and point toward a particular, dissociated locus for critical transformation. Students today become most engaged with the tradition of CLT by way of critical engagement outside of the typical law school classroom and materials. The classroom and its associated array of characters, materials, and conventional wisdom is—by design—actively hostile toward critical thought. Because these places generally stifle most meaningful critical thought or exposure to these traditions,¹⁰ students instead turn toward a less formal mechanism for addressing questions that open the door for further critical inquiry. Students pose questions that prompt demystification of the conventional legal narrative to other students and professors in conversations after class—they break down cases in the commons. If this instinct is properly nudged, students begin to realize that the conventional account of law is nothing more than one way in which the story of law can be told. This negative realization is a powerful tool toward realizing a broader critical attitude toward the law and the world. A critical legal pedagogy—one that recognizes the possibilities for change embedded in the law and

8. For a recent work in this vein, see James Gilchrist Stewart, *Demystifying CLS: A Critical Legal Studies Family Tree*, 41 ADEL. L. REV. 121 (2020) (providing a genealogy of CLS).

9. Tor Krever, Carl Lisberger & Max Utzschneider, *Law on the Left: A Conversation with Duncan Kennedy*, 10 UNBOUND: HARV. J. LEGAL LEFT 1 (2015) (showing the downfall of CLS and the ostracization of CLS observants).

10. This is not to say there is no room for it or that there is no value to the critical professor. For an excellent example of teaching a class in a critical way, see Anderson, *supra* note 1, at 206–11.

legal education—begins with the vehicle through which that change is meant to occur. If students cannot be made receptive to legal critique, they cannot wield the tradition toward more meaningful social ends.

This is not to say there are no critical professors. Indeed, it is by virtue of the few critical professors that the tradition has survived at all. But survival comes at a cost: even as the tradition has survived, it has been gobbled up by the legal academy. The pessimism that Kennedy experienced later in his career takes over the whole legal academy; it is more apparent to the crits today that the “grand praxis” of critical legal thought cannot be achieved in the radicalization of curriculum. There are too many restraints, too many obstacles to overcome, and too much of the background and foreground of legal practice hindering the possibility of law.

Part I shows why there is a need for CLT today and why legal education is a good place to start. Part II demonstrates the sort of CLT we’re talking about. Part III introduces the concept of “the critical metamorphosis” and explains the ways in which legal education plays a pivotal role in opening the door for a meaningful critical awakening. Part IV describes the issues with CLT in the classroom, showing that the classroom itself has a sort of anti-critical nature, whereas conversations with professors and other students are more receptive to a critical attitude. Part V illustrates critical legal metamorphosis in action. The Article then offers a brief conclusion.

The transformation of Kafka’s Gregor Samsa—his sudden, brutal reformation out of the everyday mundanity of life—provides a roadmap for those interested in critical legal spaces. Gregor awoke uncomfortable and decidedly different than the Gregor he knew before. The sudden metamorphosis that unexpectedly moved through Gregor is precisely the phenomenology of the law student. As the law student associates with the particular style of legal education, they simultaneously dissociate from the world they knew before. In the struggle through law and law school, we undergo our own sort of metamorphosis. We awake at the end of it all with a different understanding of the law and a different relationship to those whom it governs.

I. WHY CRITICAL LEGAL THEORY, WHY NOW?

Praxis, the pellucid lover of theory, merits a brief discussion here. Why do we think legal education actually matters? The many different ideas of CLT correspond to an equally broad set of ideas about what constitutes “praxis.”

To explain why this is so pressing, I turn briefly to Frankfurt School scholar Jürgen Habermas’ concept of “Communicative Rationality.”¹¹ There are preconditions to expressive thoughts embedded in communication itself. To express oneself, one needs a structure of communication that bends otherwise incoherent thoughts and sentences to reception. If I am to explain myself, it must be that I am able to be understood. The structure of legal argument is no exception; it too contains preconditional contexts that render it cognizable to the speaker, receiver, and viewer. Otherwise, legal discourse is inoperable to the actors who are tasked with conducting that discourse.

Regardless of what is changeable in our immediacy, through direct action (increasingly abstract in hyper-simulated modernity), crisis doesn’t simply disappear. We are always struggling through a world that is prone to crisis. The nature of these crises is ascertainable through the study and use of critical theory. The alternative leaves us all too willing to make compromises with life. And victory in battle is no victory of war; the problems remain, no matter the face who wears them. It is undeniably more desirable to address the nature of these crises rather than constantly playing cleanup in their aftermath.

It is here that the greatest praxis of this piece lies: critique is a tool necessary to alleviate the *nature* of the human suffering we so blissfully avoid here in the United States. Education, for all the external and internal controls forced upon it, is a powerful tool toward cognitive liberation. It is a way to undo the complacency, to redesign our minds, and to gain access to the nature of our suffering and (hopefully, here’s the optimism) address it. If we are to move beyond the traditional pedagogy of the law school, we must understand that students are similarly burdened by the constraints of our world. We must figure out how best to speak with them if we are to reimagine legal education.

11. See generally JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* (Thomas McCarthy trans., 1984).

The question of “what to do” is broad, interdisciplinary, and requires more of a focused question than I am able to provide here. I can only speak to the problems with law school and legal education from the perspective of one who is still in the muck of it all, so to speak. This is a question that is not reserved exclusively to any one academic grouping. For the older crits: the value in creating new generations of critical law students is obvious (recognition is indeed the first step toward emancipation). For progressives who either believe in change-from-the-inside, or are otherwise too pessimistic to not maintain the faith: isn’t some base critical attitude necessary to achieve reorganization, even within the system? And even those truly bought in to institutions—the conservationists concerned with maintaining the system and institutions of law—view the ontology of law school as a production factory for good, systematized lawyers. It would be a bit ironic if that interest didn’t extend to making *smart* lawyers, lawyers who could really take cases apart and restructure them as they see fit.¹²

II. WHAT IS CRITICAL LEGAL THOUGHT? A BRIEF VIEW OF CLT IN CONTEXT

Understandably, there is much confusion in modern legal thought as to what qualifies as “critical legal theory.”¹³ Because the goal here is only to call attention to some initial steps necessary to realize a critical attitude, this overview will be brief. For these purposes, consider CLT in the U.S. legal academy as a diasporic set of traditions emanating from the “death” of the CLS movements of the 1990s.¹⁴ Resting on the foundations of legal

12. There is the obvious counterargument: law schools do not want really *critical* lawyers because critical lawyers are not good lawyers; they refuse to apply the law mechanically, finding nothing of value in a law that is divorced from perspective, and view the law itself as an institution the product of power and reproducing those very systems. Law schools and law offices do not want people *undoing* the law—they want them applying it.

13. Bernard Harcourt, *Counter-Critical Theory: An Intervention in Contemporary Critical Thought and Practice*, 1 *CRITICAL TIMES: INTERVENTIONS GLOB. CRITICAL THEORY* 5, 6–7 (2018).

14. See JUSTIN DESAUTELS-STEIN, *THE JURISPRUDENCE OF STYLE: A STRUCTURALIST HISTORY OF AMERICAN PRAGMATISM AND LIBERAL LEGAL THOUGHT* 290 (2018); Stewart, *supra* note 8, at 128–29, 131–37 (providing a brief historiography of the death of CLS).

realism,¹⁵ the CLS movement was roughly concerned with the demystification of law and legal thought,¹⁶ had some concern about legal education,¹⁷ some connection to the critical theory of the west,¹⁸ and some basic prescriptions, such as legal indeterminacy and law as a political enterprise.¹⁹ Regardless of how broad or divorced the modern scope of CLT seems to be from that movement, the influence that CLS has had on contemporary CLT cannot be understated. There is always some explicit or implicit engagement with the predecessors.²⁰ Indeed, it was through a series of CLS-focused conferences that modern CLT first gained a localized foothold in U.S. legal thought.²¹ But the death of CLS also opened up space for many other radical critiques of law to emerge, either with explicit or implicit antagonism or symbiosis with the CLS movement.²²

In addition to the historical quality, CLT also finds itself working as a contemporary tool made for the present.²³ It addresses problems that are fixed in our time and place, our world, and our context. The past world had to dream up theory and praxis that could deal with its own unique problems. That is not to say the tools of the past have no use to us today; indeed, many

15. See DESAUTELS-STEIN, *supra* note 14, at 198–99; see also James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 UNIV. PENN. L. REV. 691, 691–702 (1985) (comparing realism and CLS).

16. Johnathan Turley, *Hitchhiker's Guide to CLS, Unger, and Deep Thought*, 81 NW. U. L. REV. 593, 605 (1987).

17. See generally DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY—A POLEMIC AGAINST THE SYSTEM* (1983).

18. See generally Duncan Kennedy, *The Globalisation of Critical Discourses on Law: Thoughts on David Trubek's Contribution*, in *CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE: LIBER AMICORUM DAVID M. TRUBEK* 3 (Gráinne de Búrca, Claire Kilpatrick & Joanne Scott eds., 2014).

19. Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1518 (1991) [hereinafter Tushnet, *Critical Legal Studies*].

20. Even the emergent fields that reject CLS—namely Critical Race Theory and Critical Feminist Theory—position themselves in some way to CLS. Tushnet, *Critical Legal Theory (Without Modifiers)*, *supra* note 6, at 1–3.

21. Stewart, *supra* note 8, at 137. While this is not to say that CLS represented the only manifestation of CLT, it certainly provided the space for the vast amount of critique levied in law (and sometimes levied at the CLS movement itself). See Tushnet, *Critical Legal Studies*, *supra* note 19, at 1515.

22. Christopher Tomlins, *What Is Left of the Law and Society Paradigm After Critique? Revisiting Gordon's "Critical Legal Histories"*, 37 L. & SOC. INQUIRY 155, 156–57 (2012).

23. For a view of the necessity of a “critical thought of the now” writ large, see Wendy Brown, *Neoliberalism's Frankenstein: Authoritarian Freedom in Twenty-First Century "Democracies"*, 1 CRITICAL TIMES: INTERVENTIONS GLOB. CRITICAL THEORY 60, 68 (2018).

of the problems faced by our world mirror those of the past or fit within the same defined continuum. CLT grows out of this tradition; yet, it is decidedly contemporary in its embrace of the moment in which we find ourselves.²⁴

CLT acts as a mediator between the past and present iterations of critical thought and can therefore assist the move from an uncritical to a critical attitude about law. It enables a process that allows fulfilment of critical theory's base purpose: to demystify, deconstruct, dismantle, or destroy our concept of what is. In this case, "what is" is a conventional account of law and its movements.

III. CRITICAL LEGAL THOUGHT AS UNSETTLING: NEGATION AND THE BEGINNING OF A CRITICAL METAMORPHOSIS

While it is clear that accessing critical thought requires a great deal of work (indeed, a full critical metamorphosis requires something more than this initial step: a greater commitment), there is first a basic, prescient move that is necessary to actualize a critical awakening. While I cannot fully describe here what such a metaphysical process is and what it looks like,²⁵ I can articulate a basic mechanism by which one passes through the gates, out of a standard narrative of law and into something decidedly different.²⁶ What follows is an articulation of the first step required for such a shift—a mechanism I call an "unsettling" from law.²⁷

24. "Critical movements are necessarily products of their time, and their targets will change as different elements of law become newly salient." Carys J. Craig, *Critical Copyright Law and the Politics of 'IP'*, in RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY 301, 304 (Emilio Christodoulidis et al. eds, 2019).

25. And indeed, even such an account might be against the very grain of a critical legal theory. The point here is to keep this term itself indeterminate and thus to leave plenty of space for the evolution of the idea of the critical metamorphosis.

26. I mean to explicitly reject a view of critical thinking as reactionary or implicitly conservative. "Passing through" implies some kind of movement *out of* something—conservative thinking conserves a picture of the present, while reactionary thinking is a call to move backwards.

27. The use of this term corresponds strongly with the classical concepts of negation and rejection. I choose this term in lieu of the others available because it provides a certain sense that the law student is made uncomfortable by this realization, which I think is important for the narrative we are building. It is a particularly jolting experience for the student to learn that the world is indeed different than the one we are taught. It also allows us to connect these ideas up with a view of decolonizing law (one of the more prominent recent strands of CLT that I do not explore in this U.S.-centric framework).

The first step toward a critical metamorphosis begins with the negative. To move into any positivistic critique, first one negates the façade of truth with which they are presented. Unsettling pulls the reader outside of the text, story, or idea being told about the law. The term “unsettling” is meant to show a kind of synthesis in CLT between a material (unsettling is a physical act, pulling the law student out of the classroom) and structural (unsettling is also a metaphysical act, pulling us out of the story) vision of law. Put simply, unsettling is a rejection of the standard narratives of law and legal thought. This is not an explicit categorization, but a sort of meta-move in which the law student recognizes that there is something incomplete about her understanding of the legal world.

Before any would-be critic may levy a positivistic critique that would overcome the conventional narrative, they must first move themselves out of that conventional story.²⁸ Here, the conventional story may be summed up as the present structure of law: the logic, justifications, applications, and ideology of law; how we think about and apply laws and to what ends. It is the comprehensive body of doctrine and thought that makes up any particular field of law and the imposition thereof. So, in a very basic sense, modern criminal law is concerned with crime and punishment, within particular boundaries. The concern of criminal law (crime and punishment) and the boundaries (which crimes, what punishment) are delimited by a framework similar to the framework adopted by those working in preceding moments.²⁹ But the structure of modern criminal law is also deeply influenced (if not outright controlled) by the modern organizational and legal infrastructure of neoliberalism (neoliberalism’s protection of wealth, etc.).³⁰ The same can be said of any other field of law (constitutional law and the concern with liberty and security, and what liberty and what security, etc.).³¹

28. While these two (critique and negation) often occur in tandem, they are not necessarily one and the same.

29. One can note the power of the law to determine itself as good and that sort of grafts onto our logic and can be freely used by neoliberalism. So, for example: law is good, therefore criminal law is good, therefore this law is presumptively good.

30. I do not elaborate on this point here as it is only tangential. For fuller accounts of the relationship between law and neoliberalism, see generally Brown, *supra* note 23; David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1 (2014).

31. Anderson, *supra* note 1, at 205.

This unsettling is also a move from law in the *micro* to law in the *macro*.³² Law does not, cannot, occur in a vacuum.³³ These moves vary in size, direction, and energy: we see it in the sequestering of doctrine from doctrine (i.e., considering one property doctrine without consideration of another); of law from law (property law without criminal law; law's pervasive public/private split); or of law from various other social modes (law from economics). The various macros can fluctuate in size and overlap in numerous ways.³⁴ The idea that law is, or can be, completely sequestered to distinct categories unaffected by any other intra- or extra-legal category is hostile to critical thought. Law does not exist in a vacuum. It affects and is affected by. This shift from micro to macro allows the law student to step outside of the story of law as partitioned and see law in its broader context.

The account of unsettling here draws on several concepts that are key to both critical legal theory and critical theory writ large. Namely, emancipation (from the various overlapping structures of oppression),³⁵ the power of consciousness,³⁶ negation,³⁷ self-reflexivity,³⁸ diagnosis,³⁹ and an articulation of knowledge as power.⁴⁰ From CLS more explicitly, we move through ideas like an understanding of law as indeterminate,⁴¹

32. Pierre Schlag's discussion of the micro-macro problem in law was influential here. See Pierre Schlag, *The Knowledge Bubble: Something Amiss in Expertopia*, in SEARCHING FOR CONTEMPORARY LEGAL THOUGHT 428, 434–40 (Justin Desautels-Stein & Christopher Tomlins eds., 2017).

33. This assertion of broader context is important in CLT. See KENNEDY, *supra* note 17, at 55.

34. See Schlag, *supra* note 32, at 436–38.

35. This also provides some kind of connection between CLS and the emergent Critical Race and Critical Feminist scholarship—the core of each of these movements is *emancipation* from conventional law and structures of legal thought. Today, this category is only broader as we become aware of different structures of domination. See Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 ASIAN L.J. 65, 68 (2003).

36. See Boyle, *supra* note 15, at 765 (discussing the role of a legal consciousness in molding and giving form to the legal profession).

37. Negation is a particularly powerful move in critical thought. See Emilios Christodoulidis, *Critical Theory and the Law: Reflections on Origins, Trajectories, and Conjunctures*, in RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY, *supra* note 24, at 10.

38. See Anker & Felski, *supra* note 4, at 8.

39. *Id.* at 4.

40. See Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327, 327 (1991); Valdes, *supra* note 35, at 65–69.

41. See Tushnet, *Critical Legal Studies*, *supra* note 19.

law-in-contexts,⁴² and a skepticism about modes and methods of learning law and the reasoning thereof,⁴³ as well as demystification⁴⁴ and delegitimization.⁴⁵

The unsettling narrative accomplishes these things by showing that the justifications or doctrines on which we rely are malleable and thus *can* be rejected in the first place. It takes us out of law alone and shows it as various macros, is skeptical about delimitations on legal reason, and both demystifies and delegitimizes the conventional narrative by pulling back the façade of power it holds over the law student. Thus, the student is emancipated from the power-grip that law and legal education wields over her experience with law.

While it is clear that the mere act of negation—moving out of the conventional narratives—isn't the only thing required to become critical, it is nonetheless an integral move toward accessing the critical. This move can be understood as an attempt to undo a particular positivistic, overly prescriptive mode of CLT. Here, we pull back CLT to an initial negative movement.⁴⁶ No critical moves may follow unless the law student is first unsettled. Unsettling is not meant to categorize or reduce CLT to a singular metaphysical or ontological process. Indeed, I have purposefully left the term vague because the process can occur in any number of ways, not necessarily confined to any particular ends beyond critical revelation. It is not meant to be an exclusive or restrictive category.⁴⁷ Once effectively pushed out of the normal way law is done and taught, a grander metaphysics of critical metamorphosis may open up. In other words, there is no positive endeavor into a critical legal space unless the student first makes a powerful negative move toward undoing the conventional structure of legal discourse.

42. See Turley, *supra* note 16, at 605–06; Tushnet, *Critical Legal Studies*, *supra* note 19.

43. See generally Nicholas F. Stump, *Following New Lights: Critical Research Strategies as a Spark for Law Reform in Appalachia*, 23 AM. U.J. GENDER, SOC. POL'Y & L. 573 (2015).

44. See generally Stewart, *supra* note 8.

45. See Jack M. Balkin, *Critical Legal Theory Today*, in ON PHILOSOPHY IN AMERICAN LAW 64, 64–68 (Francis J. Mootz III ed., 2009) (discussing the importance of CLT in de-legitimation).

46. Bernard Harcourt's works over the past several years have emphasized the power of Adorno-style negation and negative dialectics. See generally Harcourt, *supra* note 13, at 14–15.

47. Indeed, this would be antithetical to a concept of critical theory as liberatory from such restrictions.

Where does this initial meta-move occur? By what mechanisms, and in what spaces? I aim to show below that it occurs not in the conventional legal classroom but rather in the unconventional commons.

IV. WHERE THE LAW STUDENT UNSETTLES: CRITICAL CONVERSATIONS

The question of where this initial move occurs has not been altogether answered. It may be reductive to even ask—it is, definitionally, a move that is indescribable. It is necessary, however, to explore where unsettling occurs if we are to better understand how to reach and move students toward critical legal thinking. Generally, the classroom does not seem to have fulfilled that role or has made it increasingly difficult to do so within its bounds.

There are a number of “critical gaps” that one can use as a vehicle to move toward critical legal thinking. The conventional classroom offers critical gaps, but it also works to actively close them even as they appear. Recall that the scope of this piece is about law students’ introduction to law. As such, this piece centers around the first-year experience.

A. *The Limits of the Law School Classroom*

Although the CLS crits saw the classroom and curriculum as capable of the transformative power needed to become critical,⁴⁸ in our day and age it seems as though the classroom alone cannot achieve the sort of liberation advocated for by the predecessors. Are there more “radical” curriculums,⁴⁹ with more “critical” professors? Are there more stirring, critically engaging law review pieces?⁵⁰ Are these more accessible to the average law student? Perhaps. Even if this was the case, the classroom is largely a settled place. This was no fault of the crits—law school,

48. See Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School”*, 38 J. LEGAL EDUC. 61, 67 (1988) (CLS was not thought of as “merely an elegant academic exercise, it is theory about how to restructure the way we live”).

49. See, e.g., Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 614 (1982) (providing an example of a radical curriculum).

50. This is not to say that these are unimportant, or that students do not look to find these sources. Merely that they are far less accessible to the average student.

by design, is stuck in a particularly invasive style of conservatism. Critical gaps, where a student is capable of unsettling law's narrative, emerge throughout the classroom experience. But even as they are opened, the classroom closes them. When the student enters the classroom (much like Duncan Kennedy himself noted many years ago), she is bound by certain institutional, structural, and practical limitations on both teacher and student.⁵¹ She is stuck in a particular way of talking about, learning, doing, and knowing the law at the expense of critical engagement. Law school and contemporary legal thought are most concerned with creating an archetypal lawyer who can engage with the legal world as it is and speak the language of law.⁵² All of law school, including the classroom, works to create this type of lawyer.

While the breadth of such controls on being may be overwhelming, the focus is only the talking about and learning of law. This occurs primarily in the law school classroom. The classroom is a character that is not open to critical dialogue.⁵³ By design, legal education is stationary, homogenizing, and reductive.⁵⁴ Many of these flaws are simply the product of the functional world. The legal infrastructure is vast, powerful, and demanding. It needs a continuous and relatively efficient stream of lawyers. Lawyers need to (1) know a lot about the law on the books and the law in action and (2) be good at working within the parameters of the conventional style of legal reasoning. This is all to be expected. Law school muddles somewhere between vocation and education.⁵⁵ Good lawyers need to know the system, and they need to know it well.⁵⁶ They do not have to know why or how or to what ends it moves; they only need to

51. For a formative CLS critique of 1L education, see Kennedy, *supra* note 49.

52. See generally DESAUTELS-STEIN, *supra* note 14 (showing the structure of legal language and the limits imposed by said structure).

53. Reification could be a useful term here; the classroom takes on these specific qualities it is endowed with. For a discussion of reification, see Turley, *supra* note 16, at 606.

54. See generally Pierre Schlag, *The Anxiety of the Law Student at the Socratic Impasse—An Essay on Reductionism in Legal Education*, 31 N.Y.U. REV. L. & SOC. CHANGE 575 (2007) (articulating the processes by which the law student becomes homogenized).

55. See Carrie Menkel-Meadow, *Too Little Theory, Too Little Practice? Stevens's Law School*, 10 AM. BAR FOUND. RSCH. J. 675, 676 (1985) (providing an articulation of law school as a sort of quasi-vocational program).

56. Kennedy, *supra* note 49, at 591–92.

understand and apply the physics.⁵⁷ If law schools were not training lawyers in this way, they would not receive funding. If law professors were not training lawyers this way, they would be fired.

Thus, in one short year, professors have to rewire those first-year students to understand the ways of the law. It is no doubt a difficult task. The professor transforms the law from an abstract thing and renders it in short form so that the law student may process it. It must appear as stable, coherent, and organized enough so that the student can learn it in that short time and be ready to at least loosely apply it. Class time is limited, so professors must provide boundaries for what questions (and answers) are unacceptable during class due to time or relevance. As she exerts herself over the classroom, the role of the professor is to create an image of the law. This image is itself a mediation of the law in the books and in the world. The law professor, bound to the limitations of the law school, thus has some power to discern and dictate that outside law into the image she presents to the student, rendering it a gestalt capture of law that the professor herself has come to understand.

For new students, the classroom is bound by other limitations of our world. There are only a few very short months before their undeniably essential first-semester grades. Students largely come from a particular class and racial background and thus interpret law in ways coinciding with that understanding of the world.⁵⁸ Students are also limited in their own time investment and resources. In our contemporary moment, the COVID-19 pandemic has changed the way students interact with a now-virtual education in ways that we have not studied yet.

Institutionally, the very form of our legal education, hiring and admittance practices, a conservative motor of learning, and the various requirements to exist as a law program further set parameters on the criticality. In terms of the structure of legal reasoning, law school has a particular language of conservation, with requisite modes of reasoning that are antithetical themselves to critical engagement.⁵⁹ This mode of legal reasoning is

57. Duncan Kennedy describes it as “part technician, part judo expert.” *Id.* at 592.

58. *Id.* at 591–92.

59. See generally *supra* notes 52 and 49 (showing a structuralist account of legal thought).

reductive: the student first learns a few basic justifications for the area of law that she then applies to doctrine in that area of law to achieve one of two outcomes.⁶⁰ The student is exposed to these in the form of binary arguments, read in hefty legal texts that exude all the weight of the law.⁶¹ When it comes to application of those chains of logic, conversations in the classroom are structured by an unnerving, hostile, Socratic exercise. This is not exactly the ideal place for a real critical conversation. The student comes to understand the stringent limits on what can and cannot be expressed and the appropriate ways in which she may express them. Even the most critically attuned student is unable to make critical moves in such a restricted, fast-paced environment.

All of this is to show that the classroom provides little room for either professor or student to critically explore the law. We learn how to really buy in.⁶² No matter how critical or progressive a professor may be, there is simply little to no room for meaningful critical dialogue.⁶³ This is not to say there are no critical professors—as this series shows, there are indeed a number of professors very clearly working within the critical tradition and attempting to teach students in light of that mode of thought. But while there may be a few brief digressions into more critical spaces, even the truly critical professors cannot provide the sort of critical education that can give access to more than a glimpse of critique. Why? Because professors and students are given one, maybe two, days to concentrate on this material. Because, even if you could, critical theories wind up just serving doctrine. Because the test is all about doctrine and the use thereof.⁶⁴

60. See Schlag, *supra* note 54, at 576–77 (characterizing this phenomenon as a dialectic tension).

61. Menkel-Meadow, *supra* note 48, at 66–69.

62. See Pierre Schlag, *This Could be Your Culture—Junk Speech in a Time of Decadence*, 109 HARV. L. REV. 1801, 1814 (1996) (explaining that the process of acquiring a legal mind is not without its “psychic costs”).

63. You may think “but I had a progressive criminal law professor!” This is certainly a critical boon—but even those courses are nothing more than the ghosts of critique.

64. See generally Schlag, *supra* note 34. I do not aim to insinuate that there are no effective critical educators. Merely that it is profoundly difficult to achieve a radical critical attitude in the conventional law school classroom.

B. Critical Conversations as a Critically Engaging Environment

The student cannot in the classroom alone become a critical being. So where does the student go? Law students engage more directly with other students or their professors after class. It is here—in this less formal, more dynamic space—where the critical attitude can manifest. One might think of this as a sort of *true* Socratic space. The true Socratic space allows some destruction of the conventional narrative through repeated hard work in conversation.

In these after-class conversations, critical gaps can be seized. Students and professors can begin to pick apart legal narrative, and law as a discipline—they can start to understand law as more than one image, more than one set of conventions, more than this or that doctrine. Professors interested in developing a critical attitude in their students can begin the journey by articulating critical concepts to their students outside of the classroom.

Here there is opportunity for a critical interjection. Once the questions are posed to these students, it is easy enough for the professor to help the student realize an unsettling movement. A professor can render the prior justifications moot (“the Coasean Theorem can be criticized on these grounds, or . . .”). She can unseat the prominence of a set of legal materials or a doctrine (“the use of felony-murder does not make sense in this context, what about another one?”). One can see how, if given the space and time to ask questions or to pull on any of these threads, the student can suddenly view law differently than she did before. If the student poses a question at any point along this chain of inferences, she can begin to unsettle herself.⁶⁵ If given the time and space to pick at these threads, these critical gaps, the student may indeed work herself out of the conventional narrative. Likewise, the professor is afforded the opportunity to critically interject in ways unavailable in the classroom.

Take, for example, a holistic account of the law student. Let us say student X is from a racial or class background that is

65. There is perhaps another, related metaphysics to be studied in the style of asking questions that is available to the law student. The method of Socratic questioning that is particular to law school has a certain edge to it and a certain way that it is routinely done. Perhaps it is not as easy to simply ask questions when the barriers are that stringent.

distinct from your average law student. And let us say that, when discussing, for example, the concept of “necessity” in criminal jurisprudence, she has some nugget of wisdom from her own experience that renders this doctrine odd. Would Student X feel comfortable raising this point in class? In my own experience, the answer is usually “no.” Remember the sort of aggressive, hostile energy the classroom exudes. But outside of this context, in a more dynamic space with other students or professors? Suddenly, Student X may translate the outsider experience to others.

Each time there is a critical gap—each time there is a moment in a 1L course to open those gaps and expose something, some flaw, some error in, say, the Doctrine of Discovery—it is filled instantaneously, in a number of ways. The curriculum, the exam, the content of the doctrine, the nature of an actively hostile classroom, the legitimacy of the court all move in service of closure. As these gaps are filled in with an anti-critical cement, students lose the chances to grow and change or actualize our critical potential.

To illustrate this phenomenon, what follows is an example of the modern law school classroom in the context of property law. Following this brief description, I attempt to show where the spaces for critical thinking should manifest and why they do not.

V. A CLASSROOM EXAMPLE: PROPERTY LAW⁶⁶

Remember what our objective is: we are to see the nature of the law classroom, particularly as it appears to a student situated in their second semester (and thus one who has been exposed to legal education but has not yet developed the full set of legal analysis skills). Why doesn't this space produce much room for critical legal thought? Recall that the classroom is restrictive in its outlook. It is only meant to produce lawyers who work in particular ways, using the logic of legal justifications in the rigorous theatre of law toward particular ends. The classroom could perhaps expose the fatal contradictions and antinomies in legal thought. It could work to unseat the student and expose the fact

66. I choose this example because this is one of the clearest areas where early CLS critiques are drawn. There are certainly crits who teach these classes in different ways, but doctrine in property must still be taught for other accounts of property. See Anderson, *supra* note 1; see also BAUMAN, *supra* note 1.

that the binding decisions by legal actors are themselves bound to certain conventions, stylistic and functional, that delimit the exercise and understanding of that field. But neither student nor professor may generally make use of these critical gaps. Thus, the student doesn't come to understand the decisions in light of their broader connection to the system of logic and justifications that gird the entire practice of law—she only knows them as aberrations, little mistakes in the otherwise rather reasonable and good system of legal logic.

In conversations less inhibited by the classical restraints, we have a chance to reach this understanding. Out there, in the unrestricted world, the law student can look at the logic as a piece of the bigger puzzle. Did the decision in one case seem familiar to another? And for what reason? The possibilities open up—readings of logic begin to break down when confronted directly. The student may have confronted *some* of the problems inherent to the Doctrine of Discovery as doctrine. But in the classroom, she does not face it as the logic of the court itself because that would be taboo—there would be nothing to teach other than critique. Exposing the flaws in the logic of the justifications that gird a field of law is rigorous and difficult work. And recall the classroom does not, and cannot, naturally achieve this. A professor must teach the law how it is meant to be taught and guide students toward the established view of what law is and does.

I started the second semester of law school in a confused state. I had come to understand the law and the power that it wields, but I was no longer a mere novice. I knew what doctrines to focus on, how to read these cases the right way, and how to properly take the end-of-semester exam. The classroom, too, began to reveal the subtleties of the various characters trapped inside: slowly I gained reconnaissance of peers and professors, what was and wasn't acceptable in class.

Of course, in my property class, the first step was understanding what justified law in the context of this vague conceptual framework called "property" generally. The basic concept of property rests on the idea that society is overall better off when we enforce exclusionary rights over certain things. We read cases in light of the basic law-and-economics-type justifications, coming to understand trespass and nuisance as particular doctrinal expressions of our vague right over our bodies in light of the well understood ideological apparatus of modern liberal

Utilitarianism. The justifications, read in light of the doctrine, reversed what otherwise would be an important critical move: we were taken from the macro (theoretical justifications) into the micro (doctrine). We were made to believe that not only do these justifications have some kind of logical cohesion in the abstract but that they have meaning in the real. Therefore, the justifications must also be real: at the end of the day, it is true that some people are made better off. People cannot simply take things that do not belong to them; the home is relatively insulated from outside interference; the land should be used “efficiently” such that it “benefits the most people”—minus, of course, the exceptions. We saw this account of law corroborated in argument after argument masterfully crafted by fallible but brilliant jurists. We learned to emulate those very arguments in our own reading of cases and application of doctrine. No matter what stance the jurist takes, which side of the adversarial binary the jurist falls on, we came to understand those decisions and disagreements as vital and responsible emblems of the very justifications that we’d learned. So long as both sides adhered to the norms of conduct, each side represented a perfectly reasonable extension of legal thought.⁶⁷ We had to learn to argue within that structure. Otherwise, we’d be making logically incoherent statements.

At some point, the justifications, which worked so well before and provided so many perceived benefits, produced doctrine that was, is, simply awful and ostensibly contradicted the typical logic and justifications. Take, for example, the decision in *Johnson v. M’Intosh*.⁶⁸ Here, Marshall authored, and the Court still upholds, the Doctrine of Discovery. The monstrosity of the Doctrine of Discovery was clear. In my class, we even noted the anachronism and racist overtones. But the justifications that enabled that decision? The reasoning of the judge? It was anachronistic, sure, but it wasn’t *bad*. Even to a progressive professor, the *reasoning* was rock solid—so solid that we still abstractly justify and apply the Doctrine of Discovery today. We could criticize Marshall all we would like, but the logic of “utility maximization” and the doctrine it produced remain good law. The idea

67. Lest you consider this to be a statement of contemporary “American Politics,” understand that it is the false dichotomy that is the issue. There is “radical” law because the law itself presupposes a system of capture—one that precludes access to critical thoughts. This is in part due to the binary structure of argument.

68. 21 U.S. 543 (1823).

that this opinion was a clear expression of utilitarian jurisprudence, that the non-Christian Native Americans couldn't make the same use of the land as the white man, was quickly lost in the commotion of the decision and the rule that we made sure to jot down. Even if we approached it from a critical standpoint, the justifications stand and reproduce themselves in other law that we've decided "works." How is it that the logic of this decision be justified, let alone justifiable?

Before we could get around to answering any of these questions or begin to point out the flaws in these justifications, the moment passed, and we moved on to whatever doctrine was next. We may have pontificated on the horrors of the decision, but at the end of the day, this decision bares the legitimacy of the court and the classroom. These are both sacred places; debate can occur, but only within the scope of prescribed justifications. So, what to take away from *M'Intosh*? Justice Marshall was wrong; his decision was flawed; perhaps he did in fact "reason" incorrectly. But this is the classroom—and there is little room left for such conversations. Time moves remarkably fast, and the ontology of the course is reserved to a single exam. If we were to do well, we were required to ignore analysis of the justification as the problem. The decision produced good law. The Doctrine of Discovery was little more than the rule that we were given. Eventually, we were expected to apply it matter-of-factly as an abstract concept toward whatever fact pattern appeared on the three-hour exam. All that was left of *M'Intosh* was some vague sense of wrong and a nice clean rule for my outline. It was as if the case, the reasoning, the decisions, meant little in relation to the doctrine. All of this in spite of the fact that it was clearly a product of the very structure of reasoning we'd be applying again and again, to ends that appear far better than these volatile decisions. But all of these decisions wound up either failing to properly apply the doctrine or the logic, or they were examples of judicial ineptitude or otherwise permissible infringements of the law. The gaps in the reasoning, in the justifications, were readily closed even as they were exposed.

Similar moments arose throughout property. And like *M'Intosh*, they were fleeting. It wasn't until I stepped outside of the classroom that I became aware of the true nature of those cases. I, alongside some of my classmates, hadn't had the same experiences with "property" as the other students. I had experienced eviction and homelessness. I had often wondered to myself: How

does one justify these sorts of decisions? Many students, like myself, had a far different relationship with property. And the students who, unlike myself, were raised with Native tradition had an experience with *M'Intosh* that more profoundly affected their world view. Indigenous Americans still experience the ramifications of that decision today. And yet, we spent little more than a half class on the subject—a half class that could not reveal the breadth of that impact. A half class where the logic was upheld. But, when I dug into the decision and its logic—when I looked into the decision as more than an aberration and instead saw it as, say, a project of nation building—I began to see *all* of property as a part of that same project. After drawing these comparisons with groups of my peers, after we had more than a moment to piece things together, I began to see the logic of the Doctrine of Discovery reflected in areas throughout the course, like the doctrine of Adverse Possession. Suddenly the questions “why?” and “how could this happen?” began to expose the flaws in not only the logic of these decisions, but also the flaws in the very logic of the justifications that bolstered the reasoning process of judges like Justice Marshall.

This is but one conversation. Still, we can see how the logic becomes perverse and unacceptable. We can see how a system of law that enabled such a decision can no longer be settled in the conventional account with which the student has grown familiar. Once a student takes the time to understand the doctrine as pieces of logic manifesting throughout the course, she can unsettle from the story that has been told. There are obviously other places where unsettling can occur, and there are numerous different ways to look at and understand property law, let alone the law in its totality. There are numerous different “logics” we can dream up to try and capture the various decisions conceived by the system of law. This singular act of realization about the flaws embedded in a judge’s reasoning in this singular instance opens up the door for critiquing every other law, or field of laws.

If I were to rewrite this story as an example of where critical thought *can* in fact occur, what would change? Could there suddenly be an entire introductory property course on the fatal logics of these justifications? Could the justifications be explained in an abstract but indeterminate way? It is not the professor that bogs down the classroom; it is the classroom that bogs down the professor. There is only so much space for our engagement; there is only so much room for so many moves to be made.

The room for the exposure only happens when students confront other students or professors beyond those limits—beyond the classroom, beyond the doctrine that binds.

CONCLUSION

Access to legal thought is fundamentally restricted by the nature of the law school classroom. Instead, the law student must attempt to access her critical faculties (here characterized by an idea of unsettling from law) in more conversational areas with other students and professors. It is, I think, a bit worrying that suddenly these critical spaces are closed off to us. Amidst the rise of the “Zoom Law School,” where will the space for conversations after class manifest? We are engaged with an increasingly abrogated experience of the social; one that unfortunately delimits the power of conventional conversation to unlock latent critical potential.

I open with the Kafka quote because it is apparent that we too have awoken like Gregor Samsa—*changed*. This fact is readily apparent in a world riven by COVID-19, where students and professors alike are now trapped at home. And yet this is a familiar experience for us—anyone who has been on this journey toward “becoming critical” has some sense of what it is like to wake up a changed thing. This must be doubly true for the law student: Do you remember waking up your first year and going to your first class? The feeling of awe, of enchantment, and slow disenchantment? Of learning a new language, to be applied in a new way, toward ends that have always been familiar? We would do well to recall that discomfort.

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