

# First Year Law Teaching as Political Action\*

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To suggest, as the title does, that teaching first year law students is a form of political action may seem like a joke; perhaps, if one is sufficiently hostile to the law/academic milieu, an obscene joke. Reading the title, I think of Milovan Djilas, who wondered whether it was legitimate to emphasize as greatly as he did the way in which political activists in pre-War Yugoslavia withstood police torture.<sup>1</sup> My thoughts turn also to political struggles in Chile and Argentina. Obviously, teaching first year law students bears only an oblique relationship, if any, to political action of that dimension and intensity.

It is also true, however, that our situation as members of the American academic intelligentsia bears little relation to that of the intellectual community in those countries. I persist, therefore, in exploring the possibility that what we do—teaching law—is or could be a form of political action.

My comments are intended as a proposal to law school teachers who have tenure. Untenured teachers should consider my views as a set of suggestions about what to do if tenure is ever acquired.

I propose that we develop our first year courses into systematic embodiments of our views about the present and future organization of social life. In particular, we should teach our students that bourgeois or liberal legal thought is a form of mystification. We should teach our students to understand the contradictions of that thought, and we should make utopian proposals to them about how to overcome those contradictions.

I have encountered two quite different lines of objection to my proposal. I will call them the Green Critique and the Blue Critique.

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\* Speech presented at the Second National Conference on Critical Legal Studies, Madison, Wisconsin, November 10, 1978.

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1. M. DJILAS, *MEMOIR OF A REVOLUTIONARY* (1973).

The Green Critique is not friendly. It asserts that my program is not only hypocritical but is at best a cop-out and at worst a liberal deviation. That I am doing this activity at Harvard proves that it is either no good or if it *is* good, it cannot be done elsewhere. There is some truth to this argument. The hierarchical structure of the teaching profession is so corrupt that anything associated with Harvard (or Yale or Stanford or . . .) is censurable per se; nevertheless I persist.

First, according to the Green Critique, first-year law students are committed to career patterns and "personal life styles" that are incompatible with any form of genuine leftism. Either they have already been bought off by wealth and power within the system, or they long to be bought off by that wealth and power. It is therefore hopeless to look for converts among law students. Indeed, to pretend that working with them is political activism is a farce. At best it is an empty show, preaching to infidels who are wearing earplugs.

Second, the Green Critique argues, even if the students were not committed to the status quo, activism implies an engagement with mass strata of the population capable of action that would transform the system. For example, virtually any contact with factory workers is activism because factory workers are an imaginable revolutionary class. Other potential targets are vaguer, but two general criteria exist. The target should be (1) a mass stratum and (2) deprived. Thus, welfare recipients, "the poor," or even "voters" qualify. Interaction with these groups probably will not spark revolutionary action, but at least we are concerning ourselves with the system's losers, those at whose expense it runs. To focus on law students, therefore, is a double betrayal. Nothing law students do could change the system, and no benefits that accrue to them from political action could be deserved. Political work with these students is the equivalent of legislative lobbying for economic reforms that, while wrapped in bogus leftist rhetoric, benefit only the middle class.

Third, states the Green Critique, even if political activism does not imply a mass, deprived stratum as its target, it implies something more strenuous than mouthing off in front of a captive audience that is paying royally for the privilege of hearing you. The moral qualities of the activist are simply incompatible

with the armchair nature of university teaching. Even if activism is futile, it is at least exhausting. To claim that the daily routine I deeply enjoy is activism is a sophisticated excuse for doing nothing.

I find this indictment overwhelming. When it is delivered in deadly earnest by a person who is working full time organizing poor tenants or farm workers, or by a person who has raised thousands of dollars for a far left electoral candidate, I have no answer at all. I can only hang my head and put on a sheepish grin.

That, however, is not what usually happens. Before I can begin feeling really terrible about my work, I typically am subjected to the Blue Critique. The reason that the attacks come in such quick succession will become evident once the content of the second onslaught is examined.

Although the Green Critique has an unpleasant, hostile tone, the Blue is modest, mild, self-doubting, and generally humanly attractive.

First, my critical friend asks whether I have a systematic set of views about the present and future organization of society. "Your proposal," he says, "sounds a little pompous. I'm short on certainties. I agree with you that the existing order is philistine and unjust, but I subscribe to no absolutes. Moreover, I'm a little repelled by the true believer tone."

"Second," my friend wonders, "even if I do have views about societal organization, how can I make a first year law school course embody them? I have to teach a lot of dreck. I don't want to, but I have to. I doubt that I could make that material more expressive of the fundamental evils of capitalism than a head-on view of my behind. I would not know where to start if I were to try. I use a casebook; I would have to scrap it and start from scratch."

"Third," my friend declares, "even if I did all that. I wonder whether my students would buy it. They are interested in passing the bar and learning how to practice law. True, if they really understood, they might cherish my social theoretical gems more highly than the warmed-over *Gilbert's* that my colleagues serve up. The fact is, however, they don't really understand. The idea of myself as the Castro of Contracts and the Trotsky of Torts appeals to me; but can you guarantee that I won't just discredit

my beliefs in their eyes?"

"Fourth," my friend continues, "let's suppose that I've managed your program to the point where the students are actually buying it. I wonder whether it is consistent with my idea of a university for me to spend my time quite cold-bloodedly developing ways to convert my students to my personal political ideology. With your tough guy radical stance, Duncan, it's easy for you to make fun of all the liberal virtues; and I admit I don't have a very coherent defense of my feelings. I'm not sure, though, that I want myself and my colleagues to redirect our energies to cramming our views down the students' throats. Some of my beliefs are fairly far-out. People should not believe them unless they really believe them. Some of my colleagues' beliefs are positively fascistic. I don't want anyone to believe them. Moreover, in the back of my mind is the idea that I'm a teacher, and that implies a certain responsibility."

"Fifth," my friend concludes, "even if I surpass all these hurdles, it's a little naive to believe that I can heap contumely on everything that my colleagues, the Board of Trustees of the university, and the state legislature hold most dear and expect them to turn around and throw roses at me. Come on."

As I stated, these attacks are either intermixed or presented one right after the other. When taken together, they cancel each other out. The Green Critique asserts that first year law teaching as activism is too easy, a cop-out, and an abdication of responsibility. The Blue Critique, however, argues that this same activity is impossibly difficult and even dangerous. There is danger, not in the sense of police torture, but in the more realistic sense of declining student ratings and sanctions from colleagues and other bosses.

Ironically, the two attacks typically come from the same person. Let's face it. I do not have this conversation with either a full time organizer of poor tenants or Barry Goldwater. Instead, I have it with an ambivalent, leftist, American law teacher. My interlocutor is not Djilas, but a colleague who is whipsawing me back and forth just like my law school teachers of yore. My colleague cannot imagine himself as a participant in a transcendent revolutionary activity and cannot be persuaded to do the work necessary to turn teaching into meaningful political activity on a less than transcendent revolutionary scale.

Now I want to counterattack. My ambivalent colleague's vice is grandiosity. It is not the Napoleonic grandiosity of old time law professors, of James Barr Ames or Oliver Wendell Holmes. It is instead a paralyzing, Kantian, modernist grandiosity that says that the only real question is whether we are doing the one thing that the abstract universal leftist in our historical moment can validly do; anything else is worthless. Not surprisingly, the answer to that question is always "No." No matter what we might do, the answer has been predetermined since the split of the socialist movement into a reformist social democracy and a totalitarian communist movement.

That event was a kind of Fall, a watershed directly reinforcing the other major developments in modernist consciousness, like Freud's revelation of an id ineradicably in conflict with a superego, or the shattering of the meliorist, affirming-while-criticizing form of the bourgeois novel.

Theoretically, the situation after the Fall is desperate. No theory of the self can convince us that we are not crazy or about to go crazy. No theory of love or the family can persuade us that it is worthwhile to continue. Every theory of the revolutionary elite is either monstrous Leninism or cooptation. The nation is a joke and "mankind" is not much better. That, however, is all just theory.

It is not true that the only meaningful opposition is underground. Meaningful and organized opposition can occur within the institutions of the bureaucratic, capitalist, welfare state. Law schools are such institutions; we can resist within them.

To create such opposition, however, we must abandon grandiosity. That means, as a beginning, two painful renunciations. First a law teacher must recognize that he or she has chosen a career, a field of struggle, and intends to stick to it. I am not going to become a Supreme Court Justice, counsel to a congressional committee, or the deputy assistant in charge of housing subsidies in an obscure corner of the Department of Housing and Urban Development. I am not going to become one of the premier *sensitivos* of my time. I am not only not going to be an artist, I am not even going to be a critic. I just hope the Teachers Insurance and Annuity Association/College Retirement Equities Fund keeps plugging along until I am ready to retire.

The question for me is not what I should do with my life,

but in what kind of political activity I can engage given my decision to be a law teacher. What I might have done had I chosen another profession is a good question but is one that I will not seriously entertain until my kids finish college.

I want to be able to take that position, for all its selfishness, and not be so overwhelmed by guilt that I become paralyzed. I am willing to do some work to further a Utopian, radical vision of how things might be changed to eliminate the corrupt, immoral, and unjust hierarchy around us. That is something, even if I do not go underground, join the Peace Corps, or contribute to the United Way. Why can I not confess the limitations of my commitment without devaluing my willingness to work to overturn the system?

The first step in actualizing my commitment is to list the alternatives to trying to transform the first-year experience into an intense form of political education. Because I have lived in Cambridge, Massachusetts, all my life, one alternative is to become involved in local politics, support school committee candidates, and try to break the liberal/conservative deadlock on the city council. Another alternative is to further public interest law reform. A third possibility is to become involved with the various movements to improve the delivery of legal services to the working class and the underclass. A fourth and very real alternative would be to spend all my time doing "theoretical" work, making a virtue of necessity and admitting finally that no one but a few pointy-headed, super-radical weirdos care about anything I say. Against this background, changing the political content of first year law school teaching looks better and better.

A second renunciation of grandiosity points in the same direction. Abandoning grandiosity means admitting to ourselves that despite years of study, our politics is theoretically impoverished. Indeed, my politics consists entirely of four points: (1) a partial but dogmatic critique of liberal, bourgeois theories of law, economy and society; (2) a large measure of consistent and unpleasant revulsion at the way things work and the role I play in the working of things; (3) utopian fragments, very egalitarian, somewhat erotic and aesthetic, but imprecise even as fragments; and (4) a measure of steadily flowing hope about particular moments of political practice, situations of breakthrough when the encrustations of the shit-hierarchy dissolve . . . *and nothing*

*more.*

If—a big if—one takes seriously the "and nothing more," the responses to both the Green and the Blue Critiques become quite clear. To the Blue Critique, one says: First, we do have beliefs. We believe in a critique of liberal, bourgeois legalism that has considerable systematic quality. That critique can be summed up as follows: (1) no legal rule has to be what it is; (2) the ensemble of legal rules constitutes our capitalism; and (3) our capitalism is awful. Even if my utopian notions are too diffuse to teach, this triad of propositions is not. Because no one is now teaching these propositions, there is something to teach.

Second, creating materials is difficult, but not because first year courses contain irrelevant dreck. The crucial lie of liberalism is that the mass of private law rules that define the capitalist system represent the normal, the free, the natural, or the boring, so that there is nothing to think or do about them. There is nothing in the Contracts, Torts, or Property courses that cannot be turned to advantage in the attack on this system of thought.

Third, because the critique of liberalism holds the key to doing well and ripping off the system, it can be turned into something of crucial interest, even fascination, to first year students anywhere. The problem is to get beyond the students' initial gleeful reaction to the revelation that the Emperor of Liberalism has no clothes.

Fourth, the critique of liberal legalism is *true*, and to suppress it is immoral, a violation of the teacher's responsibility to his or her students. Truth is the ally of radicalism in legal education. One who takes seriously the ideal of the university has no excuse for not devoting all of his or her time to developing a means by which the reality of current legal thought can be conveyed to people who have every interest in persisting in error about it.

Fifth, no one is going to purge someone with tenure who espouses this line with an intelligent sense of its limitations. This is because our first and most obvious limitation is that we are relatively impotent. I would like to be the Castro of Contracts and the Trotsky of Torts. The reality, however, is otherwise, blue jeans and cigars notwithstanding.

There are reasons for this impotence. First of all, while our

statement of the critique of liberal legalism has a systematic quality, it is afflicted with partiality and obscurity. Other teachers' experiences may be different, but my students usually yawn when I am most politically intense. The goal of coldly effective political indoctrination is no more than just a goal at present. Every day I work to develop ways to overwhelm my charges with the logical incoherence and the apologetic ideological character of the system that they are learning to manipulate. The truth in which I most deeply believe, however, has a hermetic quality. It is not a truth easily accessible to everyone.

Second, even when my critique is clearest, it is infuriatingly difficult to distinguish from the more sophisticated and cynical forms of liberalism. Colleagues and collaborators, whose instinct is to undermine and debunk a radical approach to law, either depict my critique as a sinister deviation from the ideals of freedom and academic neutrality or make fun of me for claiming a degree of originality that my ideas do not possess. As long as they can turn my dramatic contradictions into the mere tensions of bourgeois orthodoxy, they have no incentive to make a martyr of me.

Third, the utopian fragments in which I believe lack even the systematic character of the critique of legalism. My ideals are a basis for preaching rather than for training. My students, habitues of pluralism, often object to my comments, but not because I give them too much of "my personal political preferences." My students would like to spend more, not less, time speculating about policy issues. They encounter such speculation from one point of view or another in most of their classes. The time is not too distant when every law school, like every college, will need a "house radical" or two; and you cannot both have them and purge them, at least until more of them exist.

Thus, my response to the Blue Critique is: Do not worry. We are not such big-timers as the critique suggests. We lack the intellectual and political force that the Blue Critique attributes to us. Until we possess force of that kind, it is silly to be preoccupied with one's responsibility for controlling the minds of the young. It is equally silly to be preoccupied with what the power structure would do to us if we had it.

This response is certainly not a Kantian approach to deciding what to do. It is not the program of the abstract universal

leftist in this historical moment. On the other hand, it is not paralysis. The real questions are whether my response withstands the Green Critique and whether, after abandoning grandiosity in all its forms, there remains any reason to continue teaching. Here is an outline of what might be gained.

First, we can have some impact on students. We can support those students who come to law school believing they have leftist convictions and who find those convictions in jeopardy in first-year law school classes. It is irrelevant that these students are compromised by their very decision to attend law school. They are no worse morally than we are. These students may not be an historic revolutionary generation; but we can give them a sense that a leftist way of thinking about law exists and introduce them to a community of leftist lawyers that will serve them in good stead for the rest of their professional lives.

In addition to supporting leftist students, we can undermine the complacent centrism of countless other students. This does not mean stopping them from becoming big-time or small-time corporate lawyers; that is too much to expect. It does mean, however, giving nonleftist students a sense of uneasiness or reinforcing their existing sense of uneasiness about what they are going off to do. It means reducing their political self-confidence by training them to analyze legal doctrine in a way that is simultaneously correct, useful to them, and delegitimizing of the established order. These students will welcome the training because it is useful. We can make clear that manipulative techniques work because the system that is being manipulated is both intellectually and morally bankrupt. The goal is to make some of the pious truths of liberalism, the bar, and the "political philosophers" of the system sound silly to them.

We can make at least a few converts; and who are we to sneeze at even a few converts? We are coming gradually to constitute a radical community, and few communities of any kind exist within the educational system. We have much to say, and there is much more to be said if we can get the message out. This is a basis for recruitment that becomes stronger and more valid every year.

Our success with students can be measured in several ways. Counting converts is the most direct, but also most misleading and dangerous method, given the pure joys of ego tripping and

Pied Piper fantasies. Perhaps the best test is whether our political message is sufficiently organized and general to teach students arguments to use in other classes against our colleagues. Because such confrontations happen rarely, it is premature, indeed idiotic, for us to worry whether we are using our trifling power irresponsibly. It does happen occasionally, however, and that means the effort is far from hopeless.

Again, we must work to become at least a little threatening before we should worry either about being purged or about our uncertainty of the place of law in a post-revolutionary order. The moments when a colleague or a student reacts with real anger to my ideas (not to my clothes) are frightening, but they are also the crucial moments of reward. It hurts to be disliked in such a basic way, but the hurt tells me that I am still there and still plugging; it is the pinch that awakens from a dream.

Struggling to be more than a token is only part of the story. There is also radical legal *thought*. Such a thing exists, and we are doing it. No one else is.

First-year teaching is a way to carry on this dual effort. It confronts one with the partial and confusing quality of the radical critique of bourgeois legalism. First-year students constantly demand more explicit and realistic utopian formulations than we feel able to provide. The incredible difficulty of our task is nowhere more evident than in the compulsory classes that all students consider essential to their professional success. If we can achieve our goal of political education there, we can accomplish it anywhere in the law school curriculum. If we cannot achieve it there, there is reason to doubt the meaningfulness of success in seminars on environmental law, which students select for a little rest and relaxation or perhaps a touch of finishing school.

One special difficulty that we face as we try to do radical legal thought in American law schools, in first year classes or otherwise, is that we are not doing it for our colleagues. Isolation is a fundamental condition of our intellectual existence. The existing establishment in legal academia is a monument to vacuity. Most of those individuals teaching law outside that establishment are either conservatives keeping alive the reactionary modes of seventy years ago or people without strong theoretical interests. None of us studied at a law school where radical theory was strong because there are no such law schools in the

United States.

A fundamental psychological problem for many of us is to make a decisive emotional break with teachers whom we like but whose ideas are wrong and corrupt. I want my colleagues to approve of me and to admire my work; but they will not approve of me and will not admire my work if I do it outside of and against their wrong and corrupt tradition. It is a delusion to hope to be the one radical, or one of the few radicals, whose writings are considered to be "analytically rigorous" or even "interesting." To submit to one's own longing for status within the present law school hierarchy is to betray not just some vague promise of the possibility of doing radical work, but an already substantial and dynamic radical enterprise. Within the hierarchy, being "analytically sound" means being a good liberal. To be "interesting" means to fool around on the edges without threatening the established order. People whom we really threaten simply cannot be expected to embrace us for it. If they do embrace us, we are doing something wrong.

This thought brings me to the Conference on Critical Legal Studies. The Conference is in part a response to the rage and envy that we inevitably feel when we renounce the support and admiration of those who trained us and whose works we once accepted as a measure of accomplishment. Rage and envy will appear from time to time in all of us. It is degrading that those feelings are so strong and persistent; they undermine what we do.

We can kick the habit, however. Like giving up any addiction, it requires isolated struggle with oneself; but it also requires recognizing and accepting one another as fellow sufferers. Denial is not the answer. We must construct a community of radical legal scholars. We must recognize that we work both for one another and for the future. Our position is bizarrely favorable, for while the law is an almost unexplored area for serious critical inquiry, it can claim to be perhaps the single most important area of bourgeois ideology. That we are at a dead end seems unlikely. We do not lack the needed tools. Suggestive elements of radical theorizing about all aspects of social life lie readily at hand. We do need faith, but nothing superhuman. There are many of us, and we are producing feverishly. We *can* create a new kind of academic group—a group that affirms crea-

tive thought rather than repressing it and that subverts academic hierarchy rather than submitting to or reproducing it. If we can succeed in that effort, even the abstract universal leftist, in the depths of his despair, will have to recognize that we have something going.