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Book Review

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IDEOLOGY AND COMMUNITY IN THE FIRST WAVE OF CRITICAL LEGAL STUDIES by Richard W. Bauman. Toronto: University of Toronto Press, 2002. 257 pp. Cloth $65.00/,42.00. ISBN: 080204803X. Paper $27.50/,18.00. ISBN: 0802083412.

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Richard W. Bauman's objective in "this book is to provide a rounded assessment of critical legal work at both the theoretical and doctrinal levels" (pp.6-7), by focusing primarily "on American manifestations of critical legal studies . . . in the decade after 1975" (p.6). Going back to the first wave of Critical Legal Studies (CLS) allows Bauman to focus on the fundamental claims and arguments of the leading CLS figures before CLS "modulated into new forms of theory, such as neopragmatism and postmodernism (and other styles of thinking that connote novelty and supercession)" (p.10). His focus on the actual claims made by leading theorists also provides a much richer and more accurate picture of CLS than focusing on an ideal CLS construct. In setting forth this picture, Bauman acknowledges that he is "a liberal . . . convinced that liberalism, in a sophisticated and supple form, has survived the critical legal onslaught and that, like a sapling in the buffeting wind, it is now stronger for enduring such rough treatment" (p.11). Although he characterizes his book as "an essay in sympathetic understanding and grounded in critique" (p.176), demonstrating the survival of contemporary liberalism seems to be the primary motivation behind Bauman's reevaluation of CLS. Consequently, his book will be most valuable to other legal and political liberals who are interested in seeing how contemporary liberalism can possibly meet or counter the objections against liberalism levied by a sophisticated CLS account.

In Chapter 2, Bauman begins his construction and critique of CLS by setting forth the various formulations of legal, political, and economic liberalism offered by Karl Klare, Roberto Unger, David Kennedy, and Mark Tushnet. He notes that the aim of their critiques of liberalism is to demonstrate the incoherence of liberal metaphysical assumptions about the nature of individuals and society. This incoherence then serves to undermine "fundamental jurisprudential concepts, such as the rule of law, constitutionalism, and judicial review," which "are intertwined with liberal ideology" (p.14). To counter this argument, Bauman argues that this critique simplistically identifies liberalism as a unitary set of metaphysical presuppositions about "the subjectivity of values, radical individual autonomy, or the superiority of experience in the private realm over that in the public realm" (p.15). Unlike the comprehensive liberalism of Immanuel Kant, Bauman emphasizes that contemporary liberal theorists, like John Rawls, have offered accounts of liberalism independent of "a comprehensive metaphysical or ontological framework" (p.30), and that they have not been "blind to the importance of an individual's non-political interests or goods" (p.37). He further faults critical legal writing for focusing on "the core of liberalism" rather than on what liberal theorists have actually said. As a result, he maintains that critical legal authors have generally failed to understand the progressive possibilities of some contemporary versions of liberal theory and that "many of the charges leveled against liberalism by critical legal writers have missed the mark" (p.42).

Chapter 3 moves on to consider the account of liberal legal consciousness that critical legal scholars claim pervades and distorts the "modern concept of law; legal institutions; and the respective roles of citizens, lawyers, judges, and legislators" (p.43). Bauman notes that one of the key aspirations of CLS is to expose the liberal ideological content of the law in order to emancipate individuals from the oppression of this ideology and the legal system that reifies it. The ultimate goal of uncovering this liberal legal consciousness is to allow political agents to "realize that their real interests are not served by current forms of law" and to bring about a fundamental social transformation (p.43).

Bauman identifies several problems with this account of legal consciousness. First, it attributes a shared consciousness to all liberal democracies which is contrary to the "widespread difference in the way that citizens [in societies like the United States] identify their multifarious interests and, in so far as any talk of consciousness makes sense, adopt distinctive modes of consciousness according to circumstances such as gender, ethnicity, race, and other features" (p.75). In addition, the CLS rejection of realist epistemology results in an incoherent account of legal consciousness. The prevailing historicism of CLS posits that "legal consciousness is all there is

to ‘reality’” (p.65). However, the demystification of liberal legal consciousness presupposes that “liberal legal consciousness is completely out of touch with reality” (p.65). Unless humans have an external standard of truth, the mystified position remains untouched because there is no way to access this alternative reality. Thus, like Marxist theories of ideology, Bauman concludes that CLS lacks the conceptual foundations to demystify the prevailing liberal legal consciousness and bring about the promised transformation of society.

In Chapter 4, Bauman focuses on the CLS critiques of contract doctrine offered by Duncan Kennedy, Roberto Unger, Clare Dalton, Elizabeth Mensch, and Jay Feinman to evaluate the CLS technique of “trashing” existing legal doctrine. He characterizes trashing as a pattern of analysis that identifies established doctrine, isolates its implicit political or economic assumptions, reveals that the doctrine is ideologically tilted toward liberal values, and shows that the legal doctrine is incoherent and manipulable. In other words, CLS trashing attempts to undermine the foundations of liberal legal institutions by showing that law is not independent of politics in the manner in which liberal legal and political theory suggests. Once this is realized, Duncan Kennedy has argued that it will be possible to imagine “a community that self-consciously and collectively chooses the values its law will be geared to protect” so that it will be possible for the law to reflect an “altruist model of substantive harmony” (pp.106, 107).

With respect to the particulars of contract law, CLS theorists have focused on the classical background to contract law. Classical contract law is characterized as focusing on the consensual, private ordering of relations by “independent, freedom-seeking individuals” who should be allowed to pursue their self-interest without interference from courts except to enforce their bargained-for exchange (p.84). As particularly embodied by Williston’s treatise on contract law, “classical theory was one based on a developed set of clear rules that could be derived from the logic of the contractual relationships” so that subsequent disputes could be “resolved simply by deducing what legal consequences flowed from the classical model as elaborated by courts in the form of settled rules” (p.87). CLS theorists claim that classical contract doctrine and its formalism are inconsistent with the practice of contemporary courts limiting or extending liability based on “the doctrinal categories of reliance-based protection, promissory estoppel, unconscionability, duress, and standards of good faith and fair dealing” (p.94). The CLS critique goes further than the critique of legal formalism levied by legal realism. CLS also argues that “the policies and values (such as the facilitation of transactions or encouragement of economic growth) favoured by their realist predecessors” are also incoherent so that “doctrinal indeterminacy and inconsistency undermine the conventional modes of legal argument and judicial decision making” (p.79). Consequently, the liberal promise of an autonomous legal system fails because neither legal rules nor an orderly set of policies or values can provide a logic for deciding contract disputes that is autonomous from moral, economic, and political premises.

Despite CLS’s claims, Bauman maintains that these accounts of contract doctrine largely repeat prior critiques, like those of legal realists, and that their “thin” accounts suppress the role of important notions, such as fairness, in their descriptions of the evolution of contract doctrine. CLS accounts also fail “to take adequate notice of modern developments in which consumers, employees, and other parties to contracts have received special solicitude from judges and legislators” so “that the values underlying contract doctrine have already been partly changed in a way that stresses communal rather than individual interests” (p.122). They also ignore more recent systematic treatments of contract law by theorists like Ian Macneil. Macneil treats contract law “as essentially a relational, rather than a transactional, institution” and views contract relations as based on “cooperation and trust” and regulated in part by “non-legal sanctions” (pp.98, 99). Furthermore, Bauman claims that the CLS critique “seriously exaggerates the standard of coherence among legal materials appropriate to this area of law” (p.79), so that it presumes rather than demonstrates that “the ideas of promise-based and reliance-based liability are mutually exclusive” (p.119). Rather than paralyzing common law reasoning, Bauman argues that “the presence of principles that seem to pull in different directions is in fact necessary to the growth and adaptability of the law” (p.79). Therefore, he concludes that the “main principles underlying contract doctrine . . . are not fundamentally contradictory, nor do they create an overall scheme that is embarrassingly indeterminate” (pp.8-9).

The most important contribution of this book may be its attempt in Chapter 5 to identify the “Communitarian Vision of Critical Legal Studies” and explain why the envisioned political transformation has failed to

materialize. Bauman's approach in this chapter is more one of understanding than of defensive critique. The perplexing thing about calling CLS a "Movement" is that it hesitates or refuses to offer a clear vision of post-liberal society. Bauman helpfully identifies two paradoxes that explain why the CLS Movement has refused to propose such a communitarian vision explicitly. First, the "paradox of engagement" arises from critical legal theorists advocating the perpetual critique of liberalism to facilitate a political transformation of society "while refusing on principle to disclose in detail their substantive political views" (p.124). Second, the "paradox of postponement" arises because CLS not only recognizes that political values inevitably shape the law but also deprivileges critics from speaking for the community and dictating what values should shape a legal regime in the future. To explain these paradoxes, Bauman notes that politics for CLS should be "a concrete, local, community-wide process that gives no special authority to the critical legal commentator" so that the members of the community "should be free to work out through discussion their own version of just principles based on circumstances known intimately and peculiarly to them" (p.163). "The critical legal approach is to stress the virtues of solidarity, intersubjective communication and cooperation, but of course the radical critics are sternly opposed to any reconstitution of society based on such communal notions as differentiated power, hierarchical dependency, or the dominance of tradition as a bonding or legitimating force" (pp.155-56). Despite these claims about the nature of political decision making, Bauman's conclusion is that to continue their project, "critical legal writers must begin to spell out the practical political ramifications of their ideals" so that "[r]eaders of the radical literature should be given the chance to compare the principles espoused by critical legal studies with the actual forms of social and political life to which those principles are supposed to lead" (pp.170, 171). Without taking this step, Bauman maintains that the communitarian vision of CLS will never come into being.

While Bauman provides persuasive rebuttals to many of the CLS criticisms of liberalism, contemporary liberalism suffers from some of the same shortcomings Bauman observes about CLS. For example, Bauman criticizes CLS for not having a conceptual foundation (an external standard of truth) to demystify the liberal legal consciousness claimed to be inherent in the law. Bauman also argues that contemporary liberal theorists, like John Rawls, avoid the "comprehensive metaphysical or ontological framework" (p.30), held to be incoherent by CLS. However, Bauman fails to realize that Rawls similarly lacks a conceptual foundation to justify his "political not metaphysical" form of political liberalism. In POLITICAL LIBERALISM, Rawls argues for a non-universal rational justification of law based on a political conception of justice ("implicit in the public political culture of a democratic society") because comprehensive religious, philosophical, and moral doctrines are not rational. In THE MEANING OF RELIGIOUS FREEDOM, Franklin Gamwell convincingly contends that Rawls's evaluation of all comprehensive doctrines as not rational constitutes a (negative) comprehensive doctrine, which is incoherent. In other words, this comprehensive doctrine is self-contradictory because it presupposes—the possibility of rational comprehensive evaluation—what it denies—the possibility of rational comprehensive evaluation. Both legal liberalism—at least if Rawls is exemplary of contemporary liberalism as Bauman argues—and CLS are thus incoherent because they lack external standards of truth to justify their accounts of law. Consequently, despite Bauman's noble attempts to chronicle the survival of liberalism, the future of legal theory may not be found in either liberalism or the CLS Movement but in a turn to "post-modern" comprehensive or metaphysical conceptual foundations for the law.

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