

STATE-HATERS, STATE-LOVERS, AND ORLY LOBEL

Robert C. Fellmeth*

Responding to Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

Professor Orly Lobel has authored an interesting contribution to scholarship, combining political science, sociology, and legal history in her thoughtful examination of the role of legal institutions as the catalyst/forum for successful social change. Her article focuses on two historical examples of the interplay between law and societal reform: the labor movement during the New Deal and the civil rights movement of the 1960s. Were statutes, court decisions, and other manifestations of “law” the critical instrumentalities in achieving the results history records, or were they more reflectors of cultural or sociological developments? Or more perniciously, were they improvidently relied upon — did they fail to achieve the real transformation promised by their sponsors, or did they do so only with attendant costs commonly ignored or improperly discounted?

Professor Lobel examines the ongoing academic debate among schools of historical legal realism as well as among the more contemporary proponents (and adversaries) of critical legal studies concerning the role of legal systems as engines of societal progress. I commend her for her apparent interest in thinking and writing inductively. I have some frustration with the habit of scholars who engage in deductive filtering in debating the issues Professor Lobel discusses. That is, they start with the a priori assumption that “the state is evil” (and hence reform through legal mechanisms is intrinsically and necessarily flawed), or alternatively, that only reform by means of the state is legitimate and effective.¹ The brain is a nefarious and silent filter, and

* Price Professor of Public Interest Law, University of San Diego School of Law.

¹ The critical legal studies (CLS) analysis of power relationships determining judicial decisions is not necessarily tied to traditional liberal confidence in government, but many of its originators and promoters possess such a *weltanschauung*. The scholarship associated with the CLS movement tends to view courts as tied to the wealthy class and hence protective of the private status quo balance of power and hostile to state equitable correction or intervention. A more accurate appraisal of judicial bias would find it responding to the “empathy lines” of individual jurists — lines which may correspond to the CLS assumption, but often do not. On the remedy side, CLS scholars tend to view state intervention as inherently beneficial, or at the least, bone fide. A more balanced view would recognize the prevalence of special interest capture and use of

will allow all of reality to be distorted — not through direct fabrication, but through the mere selection of what is received by the brain, in what order, and with what allocation of time and attention. It is the subject matter of thought, what we choose to think about, that is the essential manifestation of our biases.

To her credit, Professor Lobel seems to be thinking and writing more inductively. Of course, one could argue that this conclusion is itself merely a reflection of this author's complementary bias. But there are some signs suggesting that it is more than that. She tests competing theories by applying them to historical examples that are too important to be dismissed as selectively chosen. And she tests them in good faith. By that I mean that those whose views she critiques should not complain about her characterization of their contentions. Her article passes the essential test of intellectual honesty: she states fairly the positions she critiques. It would likely win the agreement of those who hold those positions — if not to her critique, at least to her representation of their views.

My second frustration with the majority of critical legal scholars has to do with the importance of the argument that seems to dominate their work. Simply put, the role of legal systems in accomplishing constructive and permanent reform depends on questions rarely explored in the scholarship on point. For example, is the part of the legal system serving as the catalyst equipped to gather facts and make consistent judgments?² Doesn't it turn on whether the legal system has succeeded in changing underlying incentives for long term compliance? Isn't the efficacy of the legal system largely affected by the disproportionate influence of those with a relatively short-term profit stake in the issue? Isn't the efficacy of the judicial part of that system necessarily influenced by notions of standing, class action or mandamus inclusion,³ attorney fee availability, and access to the courts? Isn't the

government (for example, by state regulatory bodies), as well as the merit of some of the conservative critiques — that government tends to create stifling bureaucracies, attempts to justify its existence, gravitates toward Mother Hen approaches, and seeks to expand without limitation. It does not focus on prevention, nor on underlying market or rule changes that might address a wrong or internalize an external cost without "prior restraint" restrictions on human activity and without intrusive state oversight.

² For example, consider Justice Scalia's point about reliance on the judiciary to contemplate the unintended consequences of substantial rule change given its inherent passivity, lack of democratic credentials, and case limitations to the parties involved. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 607–08, 629–30 (2005) (Scalia, J., dissenting); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 999–1002 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

³ Petitions for the writ of ordinary mandamus traditionally lie against public officials at all levels who commit an abuse of discretion. This important check on the Executive is increasingly being limited by immunity for state officials and by other judicial doctrines. For example, there exists a trend to allow executive acts contrary to congressional or state legislative intent, based on

system of remedies, implementation, costs, and rewards not just germane, but critical to the success or failure of legal systems to accomplish long-term change as intended?

Professor Lobel's article does not alleviate this second source of frustration, for it seeks to explore the historical debate on its own terms. But it does shift the argument in subtle and sophisticated ways that begin to introduce empirically relevant questions. Professor Lobel is introducing reality so it may occasionally intrude into the netherworld of radical libertarian group-think. But she is not doing so from the standard liberal silent assumption that all progress emanates from Washington.

Note that every scholar has strong motivation to stake out a position of her own, preferably one with cosmic implications and reach. Nevermind that the typical level of abstract generalization makes the exercise as relevant as a private game of sudoku. The temptation to attempt to classify new categories of thought is not always resisted. One may take a position skewering those who commit the error of respecting the legal work of past social reformers — on whose shoulders many of our notions of justice and equity rest. One may rise in academia to the level of a revered and established scholar by rejecting wholesale their positions. And one may elevate oneself through dogma masquerading as inquisitive and nuanced thought, with attention-getting conclusions and inventive new abstract terminology.

Professor Lobel is not in that camp, and indeed, not in any easily discernible camp except one — the all too small camp that says, "Wait a second . . . what about the labor movement of the 1930s and what about the civil rights movement of the 1960s?" She is not advancing a self-interested schema; she is critiquing the overreach of others. Her approach is to promote balance and equivocation. When the exceptions are all considered, it is interesting how often the thesis may properly be reversed — or at least drawn back substantially. Professor Lobel is the cop on the beat here. Query, in what area of scholarship is she more needed than in the internecine and time-wasting travail between the state-haters and the state-lovers?

expansive judicial deference or on a requirement that the standard violated be artificially specific or precisely (perhaps mechanically) measurable. *See, e.g., Suter v. Artist M.*, 503 U.S. 347 (1992).