

## Looking Back and to the Left: From the Bremen Conference to the Present

By David M. Trubek\*\*

It is not easy to remember the thoughts and feelings that accompanied the American contingent's participation in the 1986 Bremen conference and which led to this volume. Time has eroded memories. But more than that, there is no single "American" set of thoughts and feelings to recall. Although we shared a desire to explore critical legal thought with colleagues from Germany, we were, in fact, a very heterogeneous group. We came together -- momentarily -- for the Bremen conference but we approached it from different perspectives, participated from different motives, and went different ways in the years after the publication of the book.

Hard as it is to reconstruct my own feelings about an event so long in the past; it is harder still to speak for the whole American contingent. Sure, we all thought it would be neat to go to Europe and exchange ideas with European scholars, famous or not so famous. Sure, some of us realized that by meeting in Germany we could not only break bread with scholars from another tradition but also advance purely US agendas. But beyond that we were driven by separate motives, separate dreams. These differences came from within the various strands of the American tradition and played out in the years following the conference as we went our separate ways in the US and global legal academic scenes.

But I did not know that at the time. I came to this project after a decade of struggle on the American scene. As a leading figure in law and society, one of the founders of CLS, and a sponsor of some of the early efforts to create critical race theory and feminist jurisprudence, I had worked hard to unite the several strands of the legal left in America. The Bremen conference looked like an opportunity to bring these strand together in a productive way.

Because of this dream, I could not see the deep fragmentation that was already there and would grow with time. Rather, I hoped that the trip to Germany would help us form a common discourse, a new form of critical legal thought in the U.S. that would emerge from the fusion of older traditions like "law and society" with newer movements like CLS and the related strands of feminist and critical race theory. The Bremen conference occurred at a moment in which some in the American legal left still thought we could create a big tent

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for progressive scholars and believed that such a group could become a force not just in the academy, but also in national life. That was, I must confess, the dream that animated me as I worked with our colleagues in Germany to organize the Bremen event and the subsequent publication, which is being reissued here.

I knew that there were differences among the Americans but I thought that if we presented ideas from the various legal lefts in the US to a foreign audience we would see that all of the Americans shared a common discourse. After all, we were all the heirs of legal realism, shared a view that law is in some way politics by another name, ascribed to progressive values of equality and community, and were strong critics of the *status quo* in America. These commonalities, I thought, might be harder to see at home when we were divided into such sects as law and society, CLS, femcrits, critical race theory, and other movements. But I hoped they would become more apparent when we addressed an audience, which, while it came from a different legal culture, shared some of the theoretical and political ideas that animated people in our country.

I speak for myself here. While I think that a lot of Americans shared the idea that the visit to Germany would help consolidate the left legal academy in the US there were very different ideas what issues and ideas should be central, what kind of alliance should occur, and how it would come about in the U.S. Some looked primarily to alliances among academics while others dreamed of linkages with unions, social movements and other activist groups. Some saw the road to unity as one based on compromise and consensus, while others thought ironically that debate, fragmentation, and dissensus would be the best way to promote progressivism.

The idea of meeting with left legal scholars in Germany was not motivated simply by a search for a neutral venue that might bring to light what I thought were the common strands in American legal thought or others saw as an opportunity to continue and sharpen internal debates. Rather, it was also driven by a kind of provincial American eurocentricism. It is ironic that Christian speaks of America as a sort of “promised land” for German legal intellectuals; for many of us, *Europe* was the promised land, the home of great theoretical and political traditions in law and social theory. We knew about von Jhering through Karl Llewellyn, some of us had studied Jurisprudence with Fritz Kessler, many had read Marx, Weber, Habermas, and Adorno. Indeed, CLS had appropriated the term “critical” as a way to signal our debt to the inheritance of the Frankfurt School and to stake out a position on the left of the ideological spectrum -- although it was not clear that we understood the Frankfurt School’s theories or, if we did, whether we were ready to follow them.

From afar, Germany looked like a place where there existed a theoretically informed left legal culture of great sophistication. We wanted to learn more about it but also show that we could play the same game. Like ambitious provincial actors performing for the first time

on the metropolitan stage we were both awed by high European culture and desperate to prove we were just as good as our European counterparts -- or even better.

Perhaps there was another dream held by some on the American side. For a long time, US left intellectuals had looked at the European political scene with jealousy. In Europe, they thought, you could find organized parties on the left that had a role for intellectuals. These parties, we imagined, were really guided by a social theory—usually some version of Marxism—and looked to intellectuals to help orient their activities. This was true, it was believed, of German Social Democrats, French Socialists, and Communist parties in France and Italy. And what a far cry this was from the US scene. Our parties were pragmatic alliances of disparate interests tied together more by calculations of electoral chances than any shared ideology or communal spirit. And they had little if any room for intellectuals. Perhaps, a few of us dreamed, we could learn from the European political model as we sought to build a unified left in America.<sup>109</sup>

Again, this view was not shared by all of us. Indeed, for some this whole idea seemed to come from an earlier era in the world of ideas and politics. For them the idea of organized parties controlled by bureaucratic elites and committed to totalizing ideologies was a relic of the past. This model, it seemed, was based on social and political conditions that no longer existed and flawed ideas that had been further corrupted by being used as a justification for bureaucratic domination. People like this had no dreams of recreating the politics of European socialism: rather, they looked to post-structuralism, preferred Foucault to the later Marx, talked about anarchist models of organization, favored multiplicity and dissension over doctrinal unity and bureaucratic discipline.

Divided though they were, the Americans were all drawn to Europe by complex and powerful motives that included admiration, longing for an imagined utopia, and opportunities for self assertion and a chance to prove that we had come of age culturally. We also shared with our German colleagues a vague hope that we might create a transnational left legal network that might continue the work begun at the Bremen event.

All that helps explains why we were able to assemble such a strong group of scholars from the US and produce a volume with so many outstanding essays by German and American scholars. Many of the articles that were published in 1989 are still being read: Rudolph Wietholter's essay is a classic and it, as well as Gunter Frankenberg and Gunther Teubner's chapters, are still being cited today. On the US side, David Kennedy and Kim Crenshaw's chapters are still read and referred to (Kim's has been cited over 1500 times since it was published in an expanded version) and my own contribution, written with John

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<sup>109</sup> See the discussion in Kennedy, Duncan, *Radical Intellectuals in American Culture and Politics, or My Talk at the Gramsci Institute*, 1 *RETHINKING MARXISM* 100 (1988).

Esser, was the subject of a special panel at the 2010 meeting of the Law and Society Association that was devoted to reclaiming the critical tradition in socio-legal studies.<sup>110</sup>

While the Bremen conference and the volume that followed created a record of many shared – and some divergent -- ideas, it neither led to fusion of left scholarly movements in the U.S. nor did it build a strong transatlantic network of progressive legal scholars. The Americans returned to our shores as divided as when we left. While feminist legal studies and critical race theory flourished in the years after Bremen, CLS as an organized entity did not last into the 1990s. And while Law and Society grew apace, became much more international, and occasionally hosted some panels on left topics, officially it kept its distance from policy issues and from movements with political agendas.<sup>111</sup>

The causes of the fragmentation of the legal left in America are manifold and have been written about elsewhere. Among them were the pull of the social movements, the pressures of academic careers, disciplinary divergence between lawyers and social scientists, and in some cases actual repression. Law and Society was the oldest of the progressive movements, having started in the 1960s, while CLS started in 1977 and feminism and critical race theory really got going in the early 1980s. Law and Society always tried to maintain a balance between left liberal politics and scientific neutrality. In the 1960s when such issues as civil rights and anti-poverty were accepted by the mainstream, there wasn't much apparent tension between progressive values and "science". But when faced with demands to embrace more radical objectives and admit openly to political agendas the Law and Society Association and its leading figures retreated behind the wall of scientific objectivity and all efforts to unite LSA and CLS came to naught.

Feminists and critical race scholars were not hampered by scientism and were willing to embrace a more radical agenda. But they were devoted primarily to issues deemed important by the social movements they spoke for and less interested in alliances with other "left" groups. CLS had started as an effort to be a "large tent" embracing a variety of left causes including racial and gender equality but the feminists and critical race scholars split off from CLS early on. At the same time, the CLS project of radicalizing law schools, announced with glee in such publications as Duncan Kennedy's *Legal Education and the Reproduction of Hierarchy*<sup>112</sup>, led to a backlash. One prominent critic went as far as to call

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<sup>110</sup> Trubek, David and John Esser, 'Critical Empiricism' in *American Legal Studies: Paradox, Program, or Pandora's Box?*, reprinted at 14 *LAW AND SOCIAL INQUIRY* (1989)

<sup>111</sup> For an effort to align CLS and law and society, see Trubek, David, *Back to the Future: The Short Happy Life of the Law and Society Movement*, 18 *Fl. St. U. L. Rev.* 1 (1990) and works cited therein.

<sup>112</sup> KENNEDY, DUNCAN, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM A CRITICAL EDITION, WITH CONTRIBUTIONS FROM PAUL HARRINGTON, PETER GABEL, ANGELA HARRIS, DONNA MAEDA AND JANET HALLEY, AND WITH A NEW INTRODUCTION AND AFTERWORD BY THE AUTHOR* (1983/2004)

for removing CLS scholars from the law schools because they did not believe in the “rule of law”. Even if no one was actually fired, some scholars associated with CLS saw their careers blocked, at least temporarily, by this backlash and junior scholars –probably including some feminists and critical race scholars-- figured it was best to downplay any connection with the movement or its leading figures. For this and other reasons CLS as an organized movement came to an end not long after the Bremen conference.<sup>113</sup>

While CLS as a movement was over by the dawn of the 1990s, it has left its mark on the legal academy in the US and made significant contributions to world legal thought. CLS permanently transformed academic legal discourse in the US, opening space that has been occupied by multiple left ideas and approaches. It launched a scholarly tradition that made important contributions during the life of CLS as a functioning movement and continues on long after the organizational phase ended. Original CLS texts figure in the canon of American legal thought<sup>114</sup> and are read around the world while the several “post-CLS” movements continue to work along lines pioneered during the movement’s heyday.

If Bremen did not lead to a unified academic left in the US, neither did it launch a genuine transatlantic network of radical legal scholars. To be sure, individual scholars moved back and forth across the Atlantic, some as a result of links created in Bremen. But until very recently, progressive scholars in the US focused on US issues and Europeans thought primarily about domestic and EU issues. There was little sense that there were common issues and certainly no thought that we needed to do collaborative work. American scholars had enough to contend with in their efforts to bring about at least limited reforms in the law schools, protect some progressive legislative and judicial gains that came under attack from conservative forces in the Reagan years and afterwards, and explore new issues like Lesbian, Bisexual, Gay and Transgender rights. Europeans had a lot of their hands as neo-liberalism began to take hold in some places and the EU expanded into every corner of European legal life.

It seems however, that the situation may be changing. In the two-plus decades since we met in Germany globalization has changed the legal landscape on both sides of the Atlantic. New issues confront legal scholars everywhere and universities have begun to invest more in international and comparative scholarship. This has created conditions that could foster not just transatlantic but possibly even global networking among progressive legal scholars. Human rights have become a major issue world wide, attracting critical scholars from all over the world. The impact of globalization on labor markets north and south, east and west, has created issues for labor law scholars everywhere. EU law and

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<sup>113</sup> For reflections on CLS as idea and movement by a leading figure, see Zamboni, Mauro, Interview with Duncan Kennedy, Harvard Law School (USA), May 2008, available at <http://duncankennedy.net/documents/interview-may-2008-Mauro%20Zamboni.pdf>

<sup>114</sup> Kennedy, David and William Fisher eds., THE CANON OF AMERICAN LEGAL THOUGHT (2006)

international economic law have begun to make deep inroads into domestic legal orders everywhere creating another set of common issues. The old field of law and development, which collapsed under strong criticism of its complicity with power and its reliance on simplistic neo-evolutionary theory, has revived in new forms generating several working North-South scholarly networks. Law students are beginning to look and study abroad. Some post-CLS scholars, including David and Duncan Kennedy who attended the Bremen meeting, have sought to create a global network of progressive scholars that is based at the Harvard Institute for Global Law and Policy (IGLP) and whose statement of purpose echoes central CLS themes. IGLP is described as:

*"...a collaborative faculty effort to nurture innovative approaches to global policy in the face of a legal and institutional architecture manifestly ill-equipped to address our most urgent global challenges. Global poverty, conflict, injustice and inequality are also legal and institutional regimes. The IGLP explores the ways in which they are reproduced and what might be done in response"* (IGLP 2011)<sup>115</sup>

Perhaps the time is ripe to build on these efforts to form even more inclusive global networks of progressive legal scholars. Of course, this globalization scenario may be just one of the dreams that left intellectuals are prey to—but maybe it is not.

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<sup>115</sup> IGLP, the Harvard Institute for Global Law and Policy, (2011) website at <http://www.harvardiglp.org/>