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DOES KARL KLARE PROTEST TOO MUCH?

MATTHEW W. FINKIN*

The last number of this Journal carried a lengthy and densely footnoted reply by Professor Karl Klare to a published lecture I had given at the University of Maryland that had criticized one of his articles.¹ I have no desire to turn our exchange into a cottage industry. The interested reader (if any so stalwart there are) is free to read his article, my criticism, and his reply, and decide whether I have at virtually every turn mischaracterized, distorted, taken out of context, and so forth—or whether my conclusions are amply supported in his original text.

There are, however, three aspects of Klare's reply upon which a brief comment might be helpful. The first is Klare's puzzlement about why I wrote the piece. That is easily explained. The Industrial Relations and Labor Studies Center of the University of Maryland was kind enough to invite me to give a lecture—on six weeks notice, manuscript to follow. Now Klare may be able to come up with something new and arresting, even profound, on short notice; but I am not. All I could think to do was a critical (but not necessarily disapproving) assessment, akin to a book review; and so I cast about for a suitable subject. Given the attention the CLS "movement" has been clamoring for, the Klare and Stone articles seemed about as good a topic as any; and, I thought, such a discussion might perform a useful function.

The second is substantive. Klare imputes to me the "view that the way labor law has unfolded in case law, is, in broad outline, the only way it could have unfolded consistent with congressional command,"² and that I believe accordingly that all the cases he treats were rightly decided.³ Consequently, a group of legal straw men are assembled and I am challenged to explain how my "inevitablism" or

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1. Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731 (1985) (hereinafter "K.2") replying to Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23 (1984) (criticizing Klare, *The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978) (hereinafter "K.1")).

2. K.2 at 763.

3. See, e.g., K.2 at 766 and 794.

“doctrinalism” would deal with them.⁴ But, I am simultaneously castigated for failing to take a position on these cases.⁵ Both assertions cannot be correct. The latter is factually accurate; I did *not* take a position on the cases, “inevitablist,” “instrumentalist,” “liberal institutionalist,” or otherwise, and for a very simple reason: I set out to assess Klare’s ideas about these decisions, not to advance my own.

The third is that which Klare makes central to his reply—or, more accurately, his reconstruction;⁶ namely, his methodology. Klare claims that his approach is unconventional and so cannot be judged in conventional terms. I did indeed assess his work in conventional terms and so, if he were right about the claim he made for himself, I would be compelled to confess error: One cannot judge a cubist painting by the conventions of the late nineteenth century French Academy; between Bouguereau and Picasso there was no common painterly vocabulary, and so discourse would have been impossible.

But we’re not talking about painting, we’re talking about legal scholarship.⁷ And, as I read Klare’s defense, he does not deny that there are canons by which scholarship is to be judged; that we must ask of his work what we ask of all such work: has the author sought the relevant evidence; has he treated the evidence honestly; is there

4. K.2 at 786-89. Indeed, I am made to represent a veritable constellation of (presumably pejorative) abstractions: A “particularly narrow and rarified form of doctrinalism,” (K.2 at 737), “reductionism” (K.2 at 757), “unexamined doctrinal traditionalism,” (K.2 at 754), “inevitablist,” (K.2 at 763), “formalism and instrumentalism,” (K.2 at 820), and, “liberal institutionalist,” (K.2 at 814).

5. See, e.g., K.2 at 773 (“[Finkin] never expresses any substantive views on the matter of contractualism.”), K.2 at 802 (“Finkin cannot seem to make up his mind about *Sands*.”), and K.2 at 814 (“As with the *Jones & Laughlin* dictum, *Sands Manufacturing*, and *Mackay Radio*, Finkin proves unable to take a stand on *Fansteel* or to give us a sense of his views on the justice of the result.”)

6. It appears to me that under the guise of “explaining” what he “really” meant, Klare has substantially modified his views. But I leave it to the truly ardent to compare his original article with his reconstruction.

7. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 455 (1984) (footnote omitted):

Think of the painters Klee, Miro, Klein; any resemblance to the real world is beside the point. They offer us another world—a world of personal inscrutable visions that shock, amuse, bewilder, and fascinate us—or no world at all. They do not proffer a blueprint, or even a portent, of the future. If Picasso puts two eyes on the same side of the bull’s head, he’s not recommending a project for crossing cattle and flounder. Dali had no message for watch-makers when he depicted a melting watch folded at right angles over the edge of a table. If this can be done with pigments, why not with ideas? CLS is not offering concrete revolutionary proposals; it is simply offering surrealistic pictures for our minds.

evidence he had (or should have had) that is slighted or ignored; and, overarching all, has he asked the hard questions that test his claims?

The task he set for himself was to reconstruct the collective mindset of the United States Supreme Court in the period from the passage of the Wagner Act to the beginning of the Second World War, "their assumptions, hidden and overt, about work, organization, and the nature and function of law; their political values; their sense of industrial justice."⁸ Ordinarily, one would have thought the assiduous scholar would have had to mine the Justices' upbringing, education and experience, their biographies, letters, diaries, speeches, and the contemporaneous and later reflections of friends, adversaries and advocates to develop such a picture; but Klare restricts himself to the narrowest set of materials—their opinions in the early Labor Act cases. One must wonder at the outset whether examining the entrails of judicial decisions is really so unconventional — or so sure a guide to the deeper quest for what the Justices "really" had in mind. But let us take Klare's approach as we find it:

I was interested in an entirely different layer of meaning in case law than Professor Finkin, namely what it teaches about the underlying attitudes and consciousness of significant legal actors. From this point of view, "dictum" may be as important as "holding"; myth may be as important as insight; the unsaid may be as important as the written or spoken word.⁹

This poses a second methodological problem, for Klare rejects the claim "that legal reasoning is an objective, relatively determinate, and self-contained analytical method that is radically distinct from open-ended ethical and political discourse,"¹⁰ that there is a "specialized 'legal' method of analysis (as distinct from general political or ethical discourse) through which determinate solutions can be derived to legal problems."¹¹ The Justices, however, seemed to have applied this analytical method to the issues before them. If this "myth" was important to them, comprised a part of their mindset, and so played a role in their actions, it would have to be accounted for. Would Klare not have to explain the choices available to the Justices in *their* frame of reference?

8. K.2 at 749.

9. K.2 at 750 n. 58.

10. K.2 at 737.

11. K.2 at 783.

This is what I thought Klare had in mind: First, that is what he said:

The Court decided issues of law in particular cases. Yet in many cases, the Court easily could have reached one or more alternative results, while employing accepted, competent, and traditional modes of judicial analysis and remaining well within the boundaries of the legislative history of the Act.¹²

And second, he accepted the “‘relative autonomy’ of legal consciousness, institutions, and practices,”¹³ including, I presumed, the traditional methods of legal analysis and reasoning. From that perspective, his conclusions struck me as nonsensical.

Now that we have the benefit of Klare’s reconstruction, it appears, despite what he said, that we are not to look at the choices before the Court from the Court’s frame of reference, because it is that very frame of reference that he seeks to expose. Thus the choices before the Court were broader than and perhaps even different from what the Justices themselves realized. But how do we know what those choices were? Klare puts it in a nutshell:

I said that a liberal, reformist Congress passed an ambiguous statute with a legislative history that left many unanswered questions. That employers feared the worst and that things said in Congress gave credence to some of their fears, however implausible they may seem today. That in terms of concrete legal issues (as opposed to grand political design), the Act was open to a variety of *plausible* interpretations which, as the decisions added up, could give varying political hues to labor law. And that, had some rather than other paths of interpretation been followed, the possibilities for enhancing and deepening workplace democracy might have been increased.¹⁴

The problem, in terms of Klare’s methodology, lies in the word “plausible.” Klare seems to recognize that some statutory readings are plausible and others implausible. But measured against what? The conventional approach would measure the choices presented against the text and legislative history, to appreciate the conditions that lend to legislative change, in Learned Hand’s phrase, to “re-constitute the gamut of values current at the time when the words

12. K.1 at 292.

13. K.1 at 269 n. 13.

14. K.2 at 765 (emphasis both omitted and supplied).

were uttered,"¹⁵ all in a sympathetic effort to appreciate what the legislature was driving at.

But Klare's treatment of the legislative history—which he ignored in his first attempt—is a tissue of ambiguity: "[S]tatutory interpretation," he writes, "necessarily involves politically significant choices between alternative outcomes, each of which may find justification in the legislative history."¹⁶ If the crux of Klare's theory is that in close cases (and some not so close) judges are guided by their personal values and unarticulated assumptions then he has labored prodigiously, for almost two hundred pages, to give birth to a mouse. No, he seems to go beyond that simplistic notion:

In light of the weak constraints that legislative history imposes on many politically significant interpretive decisions, most contemporary observers have come to understand arguments about legislative history—like arguments about precedent and institutional competence—to be specialized, stereotyped rhetorical maneuvers that lawyers habitually make, but *not* a distinct mode of "reasoning" in a determinate manner from general principle to specific result. In a word, most sophisticated modern lawyers understand, though they do not always say, that reasoning from legislative history ultimately rests on political choices. The importance of all this is that over the long run, across many discrete contexts, isolated decisions of statutory interpretation may accumulate so as to provide significant momentum to some, but not other, political values.¹⁷

Because the legislative history is ambiguous at "many" points, does it follow that adersion to legislative history as a mode of reasoning *at large* is a merely matter of "political" choice? And precisely what does "political choice" mean? Klare disclaims any taint of "instrumentalism."¹⁸ He disclaims that his methodology means that the Court reached results "because of" anything; the choices made merely reflect the mindset he explores. But that mindset included the Justices' "political values," and their assumptions about the organization of the workplace.¹⁹

15. Letter of Learned Hand quoted in Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1394 n. 155 (1962).

16. K.2 at 784.

17. K.2 at 784-86.

18. K.2 at 815.

19. Klare asserts that he is "agnostic" on whether the Court chose as it did "because" of anything — including whether they chose in order to implement the values they held. *Id.* at 815. This is not entirely surprising because, pushed to a logical end, an

It was because I thought Klare saw the Court's values at work that I looked for *some* connection between Klare's social history and the judicial process. But, it seems, his "history-from-the-bottom-up" was merely to sit in isolation. And, I thought, even that history was seriously flawed. Why are the aspirations of radical minorities (and rabidly conservative businessmen) more relevant to the work of "a liberal reformist Congress" than other groups who pass entirely unnoticed? And, if the actions and aspirations of radical minorities in the 30s are relevant, I asked why Klare had virtually ignored the role of the Communist Party, about which there is a growing body of scholarship and whose position would seem to say *something* about at least one element active in the working class of the time. For this I am accused of "red-baiting, McCarthyite innuendo."²⁰ By this manner of reasoning, were I to criticize an article on ethnicity in America by adverting to the total neglect of the Jewish community, I should rightfully be accused of anti-Semitism.

I know Klare thinks me a slippered pantaloon, but the more he explains his methodology the less I understand it. He placed great emphasis on dictum in *NLRB v. Jones & Laughlin Steel*,²¹ wherein Chief Justice Hughes observed that the Wagner Act did not prevent the employer " 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine' ";²² but Klare recognized that that dictum never became law. Why? It "was not consistent with the legislative history."²³ In other words, when Klare decides the legislative history is "clear" the decision is determinate; when he decides the legislative history is ambiguous it is then to be abandoned altogether, and the Justices cast adrift in a sea of political choice. But what happened to "plausible" readings? Does not plausibility admit of degree? Are not some arguments, even to an ambiguous legislative history, more persuasive than others? Or are there three definitive categories of statutory readings — the statutorily compelled, the implausible, and the plausible — with all plausible readings created equal?

If Klare were to have said that words, all words, mean whatever we want them to, that all judicial decisions are politics, that what we

affirmative position would have the potential of achieving full intellectual closure. Every decision would be the product of the court's mindset whatever the result, because that is the way it chose. Like Descartes' imp, his theory could not be disproved; but neither could it be proved.

20. K.2 at 835.

21. 301 U.S. 1 (1937).

22. *Id.* at 45.

23. K.2 at 797.

teach in law schools is nothing more than “stereotyped rhetorical maneuvers,” I would find nothing to discuss.²⁴ It is the fact that he sees *some* constraint upon judicial behavior in the legislation *and* in the legislative history that requires these questions to be addressed. But he refuses to come to grips with them.

Let me test Klare’s theory another way, by use of an illustration that did not become apparent until his reconstruction. He focused upon a dictum that did become law, the *Mackay Radio*²⁵ rule, that allowed a struck employer to resist a strike by hiring permanent replacements. But there was a holding in the case other than the right of nondiscrimination in recall. Before the Court were three separate opinions of the Ninth Circuit. In one of them, Judge Mathews would have avoided the question presented by a close reading of the Act: the Act included in the definition of a statutory employee one whose work had ceased in connection with a “current labor dispute”; but the Board had made no express finding that when the employees struck it was in consequence of a “current labor dispute” within the meaning of the Act. Accordingly, for all that appeared before the court, the employees were not covered by the definitional section and so were not statutory “employees” subject to the statute’s nondiscrimination provisions.

Judge Mathew’s opinion was squarely before the Supreme Court—indeed, it was the first question presented in the Labor Board’s petition for certiorari. The Board argued to the express statutory protection of strikes and to the broad definition of a labor dispute:

Had respondent’s operators presented demands for a wage increase and, without negotiation, gone on strike because they deemed acceptance of their demands improbable, the strike would clearly be a labor dispute. The *subject* of the dispute, and not the *justification* for it, determines its nature as a “labor dispute” both under the Act and in the universal usage of the term.²⁶

The company argued to the unavoidable fact that the definitional section was there—was limited to those whose employment had ceased as a consequence of a “current labor dispute”—and invited the Court to pour meaning into that phrase:

24. But others might. See Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203 (1985).

25. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

26. Reply Brief of Petitioner National Labor Relations Board at 13.

The mere finding that the men went out on strike is not a finding that they ceased work in connection with a current labor dispute. If every strike is *per se* a labor dispute and strikers are thus included automatically in the definition of employees . . . it is necessary to . . . read out of the Act all of Section 2(9), which limits the term "labor dispute" to controversies concerning terms and conditions of employment or representation of employees. Employees sometimes strike in sympathy with others. Sometimes they strike before any controversy has arisen, because of the whims of their leaders. For all that is shown by the findings, the men may have gone on strike for some such reason and not because of any controversy constituting a "labor dispute."²⁷

Neither side cited anything in the legislative history to support their positions; from what appeared to the Court, the question had never been considered by Congress.

If the Labor Act was a texture of competing policies (as indeed it is), if the legislative history was a texture of ambiguity (as often it is), if the Court were making political choices among a variety of "plausible" readings, resulting in an elevation of "responsible" employee behavior over spontaneous (or "irresponsible") employee action, what better vehicle than this aspect of *Mackay Radio*. The legislative history seemed to be silent. Section 2(9) was there, ready to be expanded upon. And, most important, a requirement that the Board first look into the state of negotiations, to ascertain that there was an authentic "current labor dispute," to assure (in effect) that the employees were acting "responsibly" in striking as a precondition of statutory protection, would be entirely consistent with the judicial mindset Klare posits. Such a result would not have been implausible; in fact, the old Labor Board had held that a union leader had not been impermissibly discharged for leading a strike because the strike was "unreasonably precipitate."²⁸ But the Court rejected it out of hand:

It was unnecessary for the Board to find what was in fact the state of the negotiations . . . when the strike was called, or in so many words that a labor dispute as defined by the Act existed. The wisdom or unwisdom of the men, their justification or lack of it, in attributing to respondent an unreasonable or arbitrary attitude in connection with

27. Brief of Respondent Mackay Radio & Telegraph Co. at 20.

28. *In re Johnson Bronze Co.*, 1 NLRB (old) 105, 108 (1934).

the negotiations, cannot determine whether, when they struck, they did so as a consequence of, or in connection with, a current labor dispute.²⁹

If, in Klare's methodology, dicta is as important as holding, is not holding as important as dicta? At first blush, this aspect of *Mackay Radio* badly needs explanation under Klare's theory, but he never mentions it.

I should imagine that three such explanations would be possible. First, like the fate of the dictum in *Jones & Laughlin Steel*, Klare could say that the result was "compelled" by the legislative history, but that would be yet another example of "determinism," and, in any event, the parties found nothing sufficiently compelling to bring to the Court's attention.³⁰ Second, he could look to the broader policies of the Act and its structure: acceptance of the company's

29. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 344 (1938).

30. I did take a quick look at the legislative history. In the hearings on the draft predecessor to § 13, § 303 of S. 2926, the provision was criticized for not requiring any demand or negotiations before the right to strike was exercised. Statement of James T. Young in 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 702 (1959). And by another for leaving the right to strike unqualified. Statement of Leslie Vickers, *id.* at 717. But another argued that the provision needed strengthening. Statement of Isadore Polier, *id.* at 1052.

Later in the legislative process, Senator Wagner dwelt upon the definition of "current labor dispute" in his subsequent draft:

Extremely important changes have been made with reference to the inclusion of employees whose work has ceased *under particular circumstances*. First, the committee draft requires that the cessation be a consequence of, or in connection with, any current labor dispute connected with an unfair labor practice. This would require, in the case of a worker discriminatorily discharged, that a strike or immediate threat of strike exist before such worker may be considered an "employee" within the meaning of the bill. This is particularly clear from the emphasis on current labor dispute. There is thus a premium on strife rather than peace. S. 1958 corrects this by including as an "employee" one whose work has ceased because of any unfair labor practice.

Id. at 1343 (emphasis added). Does this mean the Board should inquire into just what the "particular circumstances" were?

S. 1958 provides that the labor dispute shall be "current," and the employer is free to hasten its end by hiring a new permanent crew of workers and running the plant on a normal basis. . . .

The broader definition of "employee" in S. 1958 does not lead to the conclusion that no strike may be lost or that all strikers must be restored to their jobs, or that an employer may not hire new workers, temporary or permanent, at will. All that is protected here is the right of those in a current labor dispute or strike to participate in elections, to be free from discrimination in reinstatement after they have agreed to return on the employer's terms, to collective bargaining, to freedom from interference, restraint, or coercion, etc. As already stated, the definition goes no further than the existing construction of 7(a) by the Textile Board and the National Labor Relations Board, and the existing judicial concept of a striker. The limitation in the committee draft

argument would be inconsistent with the system of private ordering created by the statute and with the policy of governmental nonintervention in the labor market. But to Klare that kind of intervention was a plausible reading of the Act, pointing to the emancipation of the workplace. Accordingly, were he to apply his reading, the result would be diametrically opposed to the possibility he claims it held.³¹ Finally, he could argue that having limited the effectiveness of the strike by allowing the permanent replacement of strikers, the Court could afford to throw a sop to labor by not imposing a potentially unworkable restraint on the right to strike. But that would be "instrumentalism." None of these square with his theory. So, this aspect of a case to which he attaches such significance passes quietly, unnoticed.

Klare may well have a new methodology, but it strikes me, at its best, as rife with conflict about what it really is about; at its worst, as jejune and unscholarly. Neither his original article nor the reconstruction helps us to a better understanding of the Labor Act or the judicial process. And, because Klare eschews "instrumentalism," neither writing helps effectively to shape a body of law that will usher in a better world for workers.

What we see at work in Klare's reconstruction is not only a System, but the close identification of that System with basic values that the believers in the System espouse, and even with the needs and

would be a distinct step backward and an unjustified restraint on the right to strike *for better terms*.

Id. at 1346 (emphasis added). Does this mean that employees who struck frivolously were not striking "for better terms" and so there was really no "current labor dispute"? I do not view the resolution of the issue as "compelled" by at least these aspects of the legislative history.

31. K.2 at 799:

For Finkin, the balance of power in the workplace is primarily a function of market forces. (Citation omitted). He apparently assumes that the mission of the statute is to inaugurate collective wage bargaining in markets that are otherwise left largely untouched by the law. It is no wonder, then, that he does not take seriously the possibility that the statute might be interpreted so as to alter and restructure the labor market. . . . [T]he Court's interpretations of the statute ratified preexisting imbalances of power rather than giving a sturdier content to workers' statutory rights that might have enhanced employees' bargaining power.

"Might have enhanced"—or curtailed, had the company's argument been accepted. Once intervention is allowed, why should Klare assume that it will always benefit the workers—unless, of course, he is a "determinist." The Court declined to launch upon that sea and, had it done so, given the current Labor Board, one must wonder why Klare is so sanguine about likely outcomes.

aspirations of working people. Consequently, any attack on the System becomes an attack on those values and, quite possibly, upon the aspirations of working people.

It is possible, I submit, to hold deeply to certain values that the System's adherents might also embrace while rejecting the System; rejecting it: because life (and so history) is too richly textured, too highly nuanced to submit to a System; because acceptance of a System requires an abnegation of a scholar's responsibility to confront inconvenient facts; even because the very breadth of the System's sweep requires its believers to take both it and themselves far too seriously. It seems to me that it is not unbecoming to the scholar to acknowledge the provisional nature of the "truth" he has discovered, and to eschew System for a less structured, less sweeping, and less grandiose approach.³² Klare terms me an "ad hoc, unsystematic tinker[]." ³³ And so I am.

32. F. NIETZSCHE, *TWILIGHT OF THE IDOLS* in 16 *THE COMPLETE WORKS OF FRIEDRICH NIETZSCHE* 4 (O. Levy ed.) (A. Ludovici trans.) (1964): "I distrust all systematisers, and avoid them. The will to a system, shows a lack of honesty."

33. K.2 at 783.