

## Lost Opportunity: Concluding Thoughts on the Finkin Critique

Karl E. Klare

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>

 Part of the [Labor and Employment Law Commons](#), and the [Legal History, Theory and Process Commons](#)

---

### Recommended Citation

Karl E. Klare, *Lost Opportunity: Concluding Thoughts on the Finkin Critique*, 44 Md. L. Rev. 1111 (1985)  
Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol44/iss4/7>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

## LOST OPPORTUNITY: CONCLUDING THOUGHTS ON THE FINKIN CRITIQUE†

KARL E. KLARE\*

I share Professor Finkin's view that it is time to wind down this debate, but I do so with a sense of regret. To my disappointment and to the misfortune of the entire labor law community, Finkin's sardonic put down of the emerging "critical" approach represents little more than a lost opportunity to share in dialogue and clarification.<sup>1</sup> Finkin's personalized focus and uncivil tone limited the possibility of a productive exchange between us. In fashioning my initial reply<sup>2</sup> to Finkin's critique, I believed it possible to begin a genuine and searching conversation between the "critical" and traditional perspectives. After reading Finkin's rejoinder,<sup>3</sup> however, I am convinced that further progress toward authentic dialogue must await another occasion and a different context.

One gets the impression that Finkin is also disappointed by the way things turned out, but for different reasons. Finkin is an able polemicist with a keen eye for argumentative advantage, but he never invested the necessary patience and care to make his critique a convincing advertisement for traditional legal scholarship. No doubt he could have done a much better job, but he seems to have supposed that a hodge podge of points taken out of context, strung together with a few sarcasms and a Walt Disney song, would convince all right-thinking people that my much-debated article has nothing whatever of value to offer.

Finkin's basic and essentially his only message was that the critical approach to labor law is not worth taking seriously. To be convincing, however, the author of such a critique must take the opposing viewpoint *very* seriously, at least for purposes of discussion. He or she must make an honest effort to learn something

---

† © Copyright 1986 by Karl E. Klare.

\* Professor of Law, Northeastern University.

1. Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23 (1984) [hereinafter Finkin, *Revisionism*].

2. Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731 (1985) [hereinafter Klare, *Reply*].

3. Finkin, *Does Karl Klare Protest Too Much?*, 44 MD. L. REV. 1100 (1985) [hereinafter Finkin, *Protest*].

about the approach under attack; to become acquainted with the relevant literature; to familiarize him- or herself with the problems that have been identified and addressed; in short, to learn something about the intellectual texture and context of the opposing approach. The persuasive critic must be particularly careful and scrupulous in setting out and analyzing the claims his or her opponents make on behalf of their methods.

These things Finkin was never prepared to do. By his own account he concluded, on an "initial (if hasty) reading,"<sup>4</sup> that the articles written by Katherine Stone<sup>5</sup> and myself<sup>6</sup> were not worth much. He returned to them later, ostensibly to determine whether they are "serious works to which attention must be paid,"<sup>7</sup> but in fact simply to correct the error of the misguided academic audiences that had found our work of interest.<sup>8</sup>

Finkin's critique turned out to be a concatenation of primitive misunderstandings and imprecise, sometimes fatuous readings of my article. My initial reply has refuted Finkin's specific charges in detail.<sup>9</sup> I need not cover that territory again, except to note that Finkin's rejoinder makes no response to, nor does it take issue with my treatment of, any of the specific historical or legal issues discussed in my reply. Finkin failed to provide an accurate and balanced account of my position or the questions I addressed, though he purported to summarize a seventy-four-page article in three crude and conclusory paragraphs.<sup>10</sup> The task of summarizing was made easier, of course, by ignoring my subsequent work and virtually the entire relevant methodological literature. Moreover, Finkin criticized me for arguments that are precisely the opposite of those I actually advanced, and he repeatedly criticized views speculatively and wrongly imputed to me. The joke of it all is that he did so in the name of "scholarly standards."<sup>11</sup>

4. Finkin, *Revisionism*, *supra* note 1, at 23.

5. Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

6. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978) [hereinafter Klare, *Judicial Deradicalization*].

7. Finkin, *Revisionism*, *supra* note 1, at 23.

8. Finkin gives the game away by immediately adding "[a]nd, if they are not [serious works], why are they being taken seriously at places that ought to know better?" *Id.*

9. Klare, *Reply*, *supra* note 2.

10. Finkin, *Revisionism*, *supra* note 1, at 24-25.

11. *See id.* at 86; Finkin, *Protest*, *supra* note 3, at 1101-02. There is a most peculiar convention in contemporary academic dialogue pursuant to which critics are licensed to attack critical legal studies (CLS) authors in the name of scholarship and professionalism without meeting even the most minimal scholarly obligation faithfully and accurately to

## Finkin must come forward with a more substantial critique if he

portray their opponents' work. Indeed, critics of CLS tend to project onto our scholarship, about which they often seem to know or care very little, a series of images about what they think we *must* believe in light of the political attitudes CLS symbolizes for them and in light of common perceptions within the profession of CLS's "style."

I will mention two striking examples of this phenomenon in addition to Finkin's critique. Dean Paul D. Carrington recently argued that persons engaged in CLS scholarship will necessarily end up teaching law students the ways of corruption, bribery, and intimidation, and that therefore CLS scholars have an ethical duty to resign their positions as law teachers. See Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984). Carrington cryptically dubbed his opponents "legal nihilists." Despite his occasional denials, he has several times indicated, and it is generally understood, that he attributes the dangers he sees to the CLS movement. See Finman, *Critical Legal Studies, Professionalism, and Academic Freedom: Exploring the Tributaries of Carrington's River*, 35 J. LEGAL EDUC. 180, 181 & 181 n. 7 (1985). Carrington's sole specific example of "legal nihilism" is a reference to Roberto Unger's *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983), a singularly inapt candidate for the label. Carrington later said that "[e]ven if I recede from my citation of Unger, I do not recant my expression of concern. There is a problem. I have seen it in living color and in person . . . [I]f some or all CLS folks can and will disavow the idea that legal texts do not much matter, I would be delighted." "*Of Law and the River*," and *of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1, 12 (exchange of correspondence; letter from Dean Carrington to Professor Robert W. Gordon). Carrington has never quoted from or otherwise shown that any CLS-related work advances the idea that "legal texts do not much matter." Indeed, Dean Carrington has never specifically analyzed a body of CLS work so as to demonstrate that anyone associated with the CLS movement actually holds the views he attributes to it.

In fact, as Professor Gordon has ably shown, CLS scholarship explicitly or implicitly repudiates virtually every proposition that Carrington attributes to the critical approach. See *id.* at 1-9 (1985) (exchange of correspondence; letter from Professor Gordon to Dean Carrington). Sadly enough, however, Gordon's patient refutation is beside the point. The Carrington article and much of the debate it has provoked are not really about the ideas contained in CLS scholarship. As Gordon has shown, these debates are really concerned with various images academics hold regarding what they think the "crits" must believe. Hence, the implied license to ignore the actual writings produced within the CLS movement when criticizing it.

A second example is Professor William E. Nelson's critique of the work of CLS legal historians. See Nelson, *Legal and Constitutional History*, 1984 ANN. SURVEY OF AM. LAW 227. In his survey of works on legal history by scholars associated with the CLS movement, Nelson chooses as his examples of representative works three books written by scholars with no connection to the critical legal studies movement. See *id.* at 229-32 (citing J. AUERBACH, *JUSTICE WITHOUT LAW* (1983) as a "seminal critical legal studies work"; citing W. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* (1982) as a work "typical of those recently written by members of the [CLS] movement"; and citing J. BAER, *EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT* (1983) as a "book within the rubric of critical legal studies").

Nelson does include a few passing references and citations to works by historians who are actually associated with the CLS movement. For example, he mentions that he had difficulty obtaining a copy of Mark Tushnet's *THE AMERICAN LAW OF SLAVERY, 1810-1860* (1981). But Nelson does not discuss or describe Tushnet's approach. Rather he simply asserts that Tushnet's book contains "not the objective facts . . . but a Marxist interpretation of those facts." Nelson, *Legal and Constitutional History*, at 232 (citation

is to vindicate his approach. He must offer some theory of his own as to how and why the labor law process unfolded as it did, and how the law serves and/or impedes industrial democracy. At the very least he must address himself to the fact that the pat, simplistic version he initially offered of the early Wagner Act cases does not square with the historical record. And at this point he really is obligated to articulate his own understanding of the methods of legal reasoning. In short, he must expose and defend his own theoretical and historical assumptions.

Unfortunately, Finkin *has no* theoretical or historical ideas, at least none that he is willing to expose to the scrutiny of debate, and he seems proud of this fact. Without irony he proclaims himself an "ad hoc, unsystematic tinker."<sup>12</sup> He seems to regard "intellection"—by which he presumably means theoretical reflection—as the enemy of labor law scholarship,<sup>13</sup> and to view intellectuals as enemies of the working class.<sup>14</sup> And so in his rejoinder Finkin makes a brief and very belated stab at addressing the methodological differences between us, contemptuously dismisses my work, and bows out.

No purpose would be served by extending this debate with a

---

omitted). We are to assume, of course, that because of the Marxist influence on his work, Tushnet is incapable of scholarly objectivity. Certainly Nelson deems it unnecessary to support the charge, since he fails to indicate any way in which Tushnet's interpretation is biased or distorted, nor does he cite a single passage or argument in Tushnet's book that he finds objectionable. (By the way, while Tushnet has written in the Marxist tradition, he has also published an exceedingly trenchant criticism of existing approaches to creating a Marxist legal theory. See Tushnet, Book Review, 68 CORNELL L. REV. 281 (1982) (reviewing HUGH COLLINS, *MARXISM & LAW* (1982))). In another instance, apparently by mistake, Nelson cites an article by a "critical" scholar in a list of works of "traditional" historical scholarship of which he approves. Nelson, *Legal and Constitutional History*, at 253 n. 154 (citing Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation From Vested to Substantive Rights Against the State*, 31 BUFF. L. REV. 381 (1982)).

Having in this fashion completed his survey of CLS works on legal history without substantive discussion of a single work of a single critical legal studies historian, Nelson then delivers a most strident attack on the defects of CLS scholarship. Paralleling Carington's views on teaching, Nelson expresses the opinion that one cannot practice competent, professional legal scholarship, at least in certain fields such as constitutional law, unless one agrees with a specified set of political assumptions and values. Nelson, *Legal and Constitutional History*, at 250-51. What is astounding is that Nelson could purport to write this attack in defense of scholarly objectivity, civility, and "the gentlemanly style," *id.* at 228, of scholarly debate.

This footnote draws upon Professor Gordon's unpublished essay-length letter to Professor Nelson (dated Aug. 26, 1985, copy on file with the *Maryland Law Review*).

12. Finkin, *Protest*, *supra* note 3, at 1110.

13. Finkin, *Revisionism*, *supra* note 1, at 87.

14. *Id.* at 87-88.

detailed refutation of Finkin's rejoinder. I will comment briefly on the methodological issue Finkin has raised, offer a few concluding observations on why Finkin passed like the proverbial ship in the night, and renew the call for meaningful dialogue between the traditional and critical approaches to labor law scholarship.

## I.

### *A Point of Methodology*

Belatedly, and as though thinking aloud, Finkin in his rejoinder wanders about attempting to come to grips for the first time with the jurisprudential issues involved in this debate. One point he raises is worth discussing because Finkin's error is so basic and revealing that an elucidation of that point might actually serve to clarify an aspect of this ill-fated dialogue.

The point has to do with the frameworks legal thinkers employ in explaining the course of judicial and administrative decisionmaking. To put it another way, the question raised concerns how we describe what happens, or should happen, when decisionmakers apply law to fact. Finkin's perspective encompasses two and only two explanatory frameworks. The first is the system of legal reasoning, including not only formalistic arguments (e.g., deduction from precedent), but also "policy" arguments (e.g., derivation of results from a set of officially sanctioned social policies). Finkin believes that there is a single, well-defined method of legal reasoning, which he variously labels "the traditional"<sup>15</sup> or "the conventional" approach.<sup>16</sup> When conventional legal reasoning fails as a descriptive or analytical tool, Finkin can conceive of only one alternative explanation of the course of legal decisions. In Finkin's second explanatory framework, decisions are the product of mere political choice.<sup>17</sup> Outcomes arrived at in such a way are deemed wholly "arbitrary," both in the sense that they are idiosyncratic and unguided, and in the sense that they reflect decisionmakers' personal preferences. Thus, Finkin argues, when legislative history is ambiguous on a point good judges do their best to be guided by it anyway because the only alternative is that decisionmakers will be "cast adrift in a sea of political choice."<sup>18</sup>

---

15. Finkin, *Protest*, *supra* note 3, at 1103.

16. *Id.*

17. *See id.* at 1104.

18. *Id.* at 1105.

There are two important problems with Finkin's position. The first has to do with the indeterminacy of legal reasoning, including social policy arguments.<sup>19</sup> By "indeterminacy" I mean that the accepted body of arguments of justification do not, as a matter of their own internal logic, *require* a single, determinate rule or outcome in a given case even when carefully and conscientiously applied. Clearly the lawyer's traditional forms and styles of argument exercise constraints on the structure, patterns, and concerns of legal decisions. That is, these arguments ("legal reasoning") form an important component of the political culture of the legal process. Certainly no one in the critical legal studies (CLS) movement has ever denied this. If anything, a fairly standard criticism made by our sociologically inclined colleagues is that CLS devotes entirely too much attention to the structure of legal argument. On the other hand, since the rise of Legal Realism it has been common currency among American legal scholars that "legal reasoning" exercises much weaker constraints on legal outcomes than is often popularly assumed, and that such constraints are indirect, rather than reflecting a pure matter of logic. All skilled lawyers know this, although for purposes of advocacy they often speak as though the constraints of legal reasoning were more compelling than they are.

I will briefly mention a number of the reasons why traditional legal reasoning imposes weaker and less direct constraints on the formulation and application of legal rules than is conventionally assumed. Several are basic Legal Realist insights. For one, all fields of law simultaneously embrace and advance competing and conflicting values. The Realists observed that skilled lawyers are commonly able to invoke such competing values, and the conflicting lines of precedent and other authority embodying them, to generate competent legal arguments for opposite outcomes in a given case. In so doing judges and advocates are not necessarily "distorting" the law to serve partisan interest or to indulge idiosyncratic whim. They may well be exercising professional skill in good faith in a context in which the body of authoritative rules and justifications is itself internally contradictory.

Other sources of indeterminacy in legal reasoning are the extraordinary variety of available precedents and the countless gaps and ambiguities. There is also the question of "circularity." Legal reasoning presupposes neutral, initial formulations of the facts, but in reality characterizing the facts always involves selective judgments

---

19. See generally Klare, *Reply*, *supra* note 2, at 757-64.

that in turn rest on controversial frames of reference regarding the parties' background rights and entitlements. Finally there is the great variety and flexibility of the accepted repertoire of argumentative techniques, e.g., distinguishing inconvenient precedents on the facts, extending helpful precedents, and altering the perspective on a case by creative analogy to another field of law. Typically the tools of legal reasoning themselves lack unambiguous criteria for determining when one rule or argument trumps another.<sup>20</sup>

Although I will not attempt to defend the point here, the indeterminacy of the accepted canons of justification within the conventional framework of legal reasoning is as much a problem in the context of modern regulatory statutes, such as the National Labor Relations Act,<sup>21</sup> as in that of older common law fields. As I will explain in a moment, however, the fact that the *arguments of justification* found in conventional legal reasoning are not tightly determinative of outcomes does *not* entail the conclusion that the *outcomes themselves* are or must be random and unstructured.

In some ways, much work in the CLS vein can be profitably understood as an effort to extend and deepen this portion (although not others) of the Legal Realist tradition. Indeed, in my view one of the most interesting theoretical contributions of CLS has been to blend the historicism of classical social theory with the Legal Realist critique of formalism to yield a post-Marxist critique of objectivism in social theory.<sup>22</sup> In any event, the level of acrimony in the criticisms of CLS scholarship suggests that these basic lessons of Legal Realism must be debated and relearned again by every generation of American legal scholars. Perhaps Finkin is convinced that these insights are simply mistaken. Perhaps he has found a way to thread legal reasoning together at a higher level of coherence than anyone

---

20. This does not mean that we can never have the experience of closure or "boundness" with respect to legal problems, nor is it a claim that all systems of justification are inherently indeterminate. Moreover, I recognize that legal rules themselves vary markedly with respect to their degree of "formal realizability," that is, the degree to which they are self-executing. What I mean to say is that decisionmakers and scholars often exaggerate how tightly the traditional arguments of legal justification can or do constrain outcomes, and they commonly describe as legally compelled results that are in fact determined by conscious or unconscious reference to values and criteria external to legal reasoning.

21. National Labor Relations Act, as amended, 29 U.S.C. §§ 151-169 (1982 & Supp. 1984) [hereinafter "the Act"].

22. On this point, see Klare, *Reply*, *supra* note 2, at 757-58; Tushnet, Book Review, *supra* note 11; see also Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities* (forthcoming in AM. U.L. REV.) (1985) (making similar point but with somewhat different formulation and emphasis).



else has yet achieved. But this is not disclosed in his writing, which rather more likely shows that he has yet to grasp the jurisprudential significance of the problem.

The second difficulty with Finkin's position—and this is the main point of this brief rejoinder—is that there exist other descriptive and analytical frameworks for understanding the decisionmaking process. Finkin's dichotomous formulation errs in assuming that only two conceptions of legal decisionmaking, based respectively on traditional canons of argument and on personal preference, are possible. But there are alternatives to saying that either the judge is constrained by legal reasoning or the judge is unguided and his/her decisions are “merely a matter of ‘political’ choice.”<sup>23</sup> Although Finkin seems genuinely unaware of this, most of what is interesting in American legal theory of the past thirty or forty years are attempts to say what does or should fill the gap between traditional legal reasoning and random, arbitrary decisionmaking.<sup>24</sup> Indeed, the existence of the sociology of law is premised on the assumption that there is something to observe and say about what bridges that gap. *That the justifications contained in the standard panoply of legal arguments do not tightly and logically determine results does not entail the conclusion that the outcomes themselves are random or arbitrary.*

Precisely the task some in CLS have set for ourselves is to discover and describe the ways in which labor law decisions do form a coherent whole. Critical labor law scholars have not argued, as Finkin seems to think, that legal outcomes are unpatterned, nor have we sought to demonstrate that the outcomes “merely” reflect the personal political predilections of judges. What CLS scholars have argued is that, insofar as we can identify patterns and structures within labor law, these patterns reflect and constitute relatively coherent but often competing visions of how industrial life should be organized. That is, they reflect sets of values and assumptions about organization, hierarchy, participation, entitlements, and loyalty; in short, all of the components of a vision of workplace governance. A related claim is that the observable patterns and structures

---

23. Finkin, *Protest*, *supra* note 3, at 1104.

24. Two obvious examples of such contributions at the normative level are institutional competence theory and the several varieties of law and economics. Prominent spokespersons for each of these approaches have claimed that institutional competence theory or microeconomic analysis can provide a new method for determinate resolution of legal problems, thereby answering the Realists' implicit challenge to the legitimacy of legal reasoning. CLS writers have expressed skepticism on this score, insisting on the importance of recognizing the element of political judgment that is an irreducible component of all legal decisionmaking. But that is an argument for another day.

within labor law are not congruent with, and cannot be fully explained by, the stated logic and justifications recognized within the framework of traditional legal reasoning and conventional scholarship. The critical perspective similarly argues that the institutional and legal patterns of American industrial relations are not tightly determined by an underlying metalogic of history or by the inherent functional needs of advanced industrial societies. If we are correct in these arguments, it seems a worthwhile scholarly task to uncover and explore these deeper structures and patterns of meaning. In demonstrating that the shape and decisional content of labor law are not tightly determined by traditional rules of legal argument or by technological imperatives, we thereby expose the possibility that other governance arrangements are imaginable and might be chosen by the people whose lives are affected by industrial relations institutions.

Let me briefly illustrate these themes. In closing, Finkin once again raises the case of *NLRB v. Mackay Radio & Telegraph Co.*,<sup>25</sup> the basic authority for the rule that employers may permanently replace economic strikers.<sup>26</sup> The purpose of Finkin's reference to an obscure, previously unmentioned detail is unclear.<sup>27</sup> There is, however, a subtle but telling shift in Finkin's position. In his original critique he emphasized that the permanent replacement rule was "dictum," perhaps to depreciate its significance.<sup>28</sup> Now he describes the rule as "a dictum that did become law."<sup>29</sup> Despite this acknowledgement, Finkin's rejoinder, like his critique, simply ignores the real legal and social policy issues of the *Mackay Radio* case: What is the industrial relations impact of the rule? Is it necessary? Is it compelled by the legislative history? If not, why was it adopted and why has it survived, despite some subsequent qualifications, for nearly half a century? What outlook on industrial organization does the rule reflect or express? Above all, is the rule sound or does it work injustice?

Finkin's theoretical abdication is no accident. His methodology

---

25. 304 U.S. 333 (1938).

26. *Id.* at 345-46.

27. Finkin purportedly offers his *Mackay Radio* example as a criticism of my approach, but it is hard to see why he thinks his point is damaging to anyone's position but his own. He is seemingly unaware that by exposing this new ambiguity he has actually illustrated and thereby supported my views about the indeterminacy of the legislative history.

28. See Finkin, *Revisionism*, *supra* note 1, at 25, 36.

29. Finkin, *Protest*, *supra* note 3, at 1106.

simply does not enable him to ask or confront analytically interesting questions. He does not show, or even purport to show, that the *Mackay Radio* rule is dictated by the legislative materials. But his only alternative to traditional legal argument is to analyze the case by reference to gut feeling and personal predilection, that is to say, to fail to provide any analysis of the case at all.

Finkin's approach is inaccurate as well as ineffective. There *are* patterns and coherencies to observe. Political choices were and are made in the evolution of labor law, but these choices are connected, they can be seen to add up.<sup>30</sup> By contrast to him, I offered a theory of the *Mackay Radio* rule. I argued that it reflected and was an aspect of an emerging judicial mindset on industrial relations problems, a mindset also reflected in other contemporaneous opinions.<sup>31</sup> My methodology aimed to uncover this mindset and to probe its influence on the evolution of labor law. Discussion of this kind hopefully enables us to explore with new insight the *Mackay Radio* rule's place in labor law and whether the rule should be altered, questions of great significance to working people.

Frequently at this point in the discussion, skeptics of CLS, having previously criticized what they took to be the political arbitrariness of our approach, now take the view that our point is entirely trivial. That is, critical scholars are often accused of simply restating in fancy language ideas that have been conventional learning for half a century. "Everybody knows," it is said, "that values and assumptions about social life that are external to traditional legal reasoning infiltrate the legal process."

For what it is worth, I very much doubt that CLS scholars are simply restating universally accepted assumptions about the legal process. Certainly our critics do not customarily act and write as though our points about values in the legal process are commonly accepted. I suspect one of the reasons CLS work arouses such debate is that our claims regarding the role of values and choice in

---

30. Indeed, these observations are in no sense unique to labor law. See Klare, *Reply*, *supra* note 2, at 759-62 (discussing evolution of case law under the Civil Rights Act of 1964). Does Finkin really believe that the only legitimate form of criticism of recent Supreme Court retrenchment in civil rights decisions is to argue that the Court has somehow misunderstood a transparent legislative history?

31. Another example is the important dictum of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) (NLRA permits employer to refuse to make a collective contract and to unilaterally determine terms and conditions of employment). Finkin now acknowledges that this dictum "never became law," Finkin, *Protest*, *supra* note 3, at 1105, and that I so recognized. *Id.* Finkin tells us the literary source of the dictum but offers no theory of why the Court enunciated it.

legal decisionmaking and argument in fact comprise an implicit critique of traditional legal reasoning, of conventional teaching methods and scholarship, and of the legitimacy of the existing case law process. The depth of belief one encounters in the view that beyond traditional legal reasoning lies only personal arbitrariness<sup>32</sup> betokens some resistance to fully acknowledging the limitations of conventional legal analysis.

The claims advanced in CLS work on labor law, sketched above, may or may not be true, and they may or may not contain valuable contributions to knowledge. One thing, however, is clear. Now nearly eighty pages into his critique, Finkin has yet to address himself in any substantial way to these claims.

## II.

### *A Failed Dialogue*

As I noted in my initial reply, this debate is not occurring in a vacuum. American collective bargaining is in jeopardy. The percentage of the labor force that participates in collective bargaining has been steadily declining for many years. Collective bargaining and workers' rights are under political, economic, and academic attack. And the structure of labor law is not an inessential aspect of the crisis of collective bargaining. There is a spectrum of views, of course, but knowledgeable and concerned observers earnestly warn that prevailing interpretations of the Act have increased the risks and decreased the value of collective bargaining to workers. Some proclaim outright that "[l]abor law has failed."<sup>33</sup>

Indeed, Finkin must be just about the only informed observer in the country who counts himself among the friends of collective bargaining but who does not think that the labor law system is in

---

32. Professor Finkin is not alone in this belief. Professor Nelson also incorrectly assumes that if the critical scholars argue that the law's own stated rules of justification do not tightly determine outcomes, the CLS scholars must therefore be arguing that law is grounded "only in the self-interest or political values of judges," Nelson, *supra* note 11, at 250, and that "law is *simply* the product of political choice." *Id.* at 230 (emphasis added). In a similar vein, Nelson states that "[t]he primary argument of critical legal studies theorists . . . is that the rule of law is a concept without meaning." *Id.* at 254. This attribution to CLS is also plainly incorrect. See, e.g., Klare, *Law-Making As Praxis*, *TELOS*, Summer 1979, at 123, 133-34 (viewing legalism as great achievement of human culture). See also Kennedy, *Freedom and Constraint in Adjudication: Toward a Critical Phenomenology of the Rule of Law* (forthcoming, manuscript on file with the *Maryland Law Review*).

33. *House Subcomm. On Labor-Management Relations of the Comm. on Educ. and Labor, The Failure of Labor Law—A Betrayal of American Workers*, H.R. REP. NO. 98, 98th Cong., 2d Sess. 1 (1984). See generally Klare, *Reply*, *supra* note 1, at 733-34 and sources cited.

deep trouble. At least from all that appears in his article, labor law is as healthy and robust as ever. All the old assumptions and perceptions remain valid. There is no need even to consider whether a fresh viewpoint would be helpful. So far as we can tell from his critique, the only cloud on the horizon is that some misguided souls haven't gotten the message.

But I suppose we ought not to take Finkin's article at face value. Suppose, instead, we assume that Finkin knows what is plain for all to see about the current crisis of collective bargaining and of labor law. Then we must ask why a self-professed friend of collective bargaining would, at a time in which industrial democracy is on the defensive, devote so much energy to a campaign conducted in the most self-important and intemperate terms for no apparent purpose other than to make sure the world knows it should pay no attention to the work of Katherine Stone and myself.

There is a sense in which the attention should be flattering. I do believe that the issues Stone and I have raised rightfully belong on the agenda of those who care about the future of collective bargaining. The energy Finkin has devoted to this campaign might ironically be taken as a tacit acknowledgment that our overall effort to challenge and rethink fundamental assumptions, if not our particular arguments, should command the attention of those committed to the revival of the labor movement and to a concomitant redirection of labor law scholarship.

Unfortunately, Finkin does not appear to have approached the debate with an eye toward the difficult and pressing issues now confronting the collective bargaining system. Rather, the only salient aspect of Finkin's contribution to the debate seems to be a passionate need, for reasons entirely unknown, to vindicate a personal sense of grievance and of wounded pride that some lawyers, scholars, and labor activists have found something of interest in Stone's and my work.

In times past academic labor lawyers—"intellectuals" if you will—played an important role in working out the legal theory of, and thereby advancing, collective bargaining. This role was (and always will be) secondary to working peoples' own efforts to expand and give meaning to industrial democracy. Nonetheless it was an essential role. Our predecessors set a high standard of creativity and sophistication in labor law theory. One can only hope that contemporary labor law scholarship will match that standard. Certainly we can demand no less of ourselves than to aspire to reach that level.

Finkin's critique is not a step in that direction. So long as he remains unwilling to take alternative viewpoints seriously enough to devote to them the scholarly care and judgment of which he is no doubt capable, there is little likelihood that he can spark the sort of debate that will be fruitful for the labor law community as a whole. This is truly a pity. Searching debate, now more than ever, is essential to intellectual progress on the agenda facing labor law scholars. I welcome criticism of CLS labor law scholarship. Friends of industrial democracy in academic life, including CLS scholars, have nothing to lose and everything to gain from vigorous, probing confrontation with each other's ideas. In that spirit, I conclude by expressing the hope that Finkin's personalistic polemics will turn out in retrospect to have been a temporary detour on the path toward a genuine dialogue between the critical and traditional approaches to labor law.