

1-1-1987

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Recommended Citation

Richard Michael Fischl, *Some Realism About Critical Legal Studies*, 41 U. Miami L. Rev. 505 (1987)

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ESSAY

Some Realism About Critical Legal Studies

RICHARD MICHAEL FISCHL*

What is "Critical Legal Studies," and why are people saying such terrible things about it? *The Wall Street Journal*, for example, calls it a "Marxist/Anarchist movement," which holds that "law is merely a tool for the rich, and should be toppled forthwith."¹ A senior official in the Reagan Justice Department denounces it as "'60s radicalism turned into '80s legal theory."² An article in *The New Republic* labels the movement's adherents—many of whom are law professors at the nation's most prestigious law schools—"guerrillas with tenure."³

Voices within legal academia have scarcely been more generous. One calls the published works of the movement "irresponsib[le]" and "[g]rotesque."⁴ Another suggests that "the Crits" (critical legal theorists) represent "a pathological phenomenon, a Peter Pan syndrome."⁵ And Dean Paul Carrington of Duke declares that they are "nihilist[s]," who "have an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy."⁶

As a dues-paying member of the Conference on Critical Legal Studies, I confess that I find these statements quite troubling. (Indeed, as a "guerrilla" *without* tenure, I find them positively frightening.) They trouble me because Critical Legal Studies ("CLS") has played an invaluable role in my own professional life. I "grew up" on CLS.

* Associate Professor, University of Miami School of Law. The following is an expanded version of a presentation given on the "New Developments in Legal Education" panel at the 1986 Conference of the Southwest Association of Pre-Law Advisors, in Dallas, Texas. Many thanks to the *University of Miami Law Review* for agreeing to publish it here; to Jeremy Paul for his many helpful suggestions; and to other friends too numerous to mention by name for their thoughtful reactions to an earlier draft. For the title, of course, apologies to Karl Llewellyn, whose works (in particular, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931)) still inspire.

This article is dedicated to my colleagues on the Miami faculty, who continue to have the self-confidence and good sense to chew on ideas, and not the people who hold them.

1. *The Veritas About Harvard*, Wall St. J., Sept. 3, 1986, at 26, col. 1 (editorial).
2. Eastland, *Radicals in the Law Schools*, Wall St. J., Jan. 10, 1986, at 16, col. 4.
3. Menand, *Radicalism for Yuppies*, NEW REPUBLIC, Mar. 17, 1986, at 20.
4. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 414 (1984).
5. Johnson, *Do You Sincerely Want to Be a Radical?*, 36 STAN. L. REV. 247, 248 (1984).
6. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984).

I attended Harvard Law School (the so-called " 'Rome of Critical Legal Studies' ") in the mid-1970's and studied there with a number of CLS scholars. And nothing else in my legal education prepared me as well for the practice and teaching of law as the lessons I learned (and am still learning) from those scholars and from others in the CLS movement. The quoted criticisms thus seem to me to represent what is, at best, a profound misunderstanding of what CLS is all about; at worst, they are distortions by individuals who should know better, but who apparently feel tremendously threatened by the enterprise.

There is, however, a frequent criticism of CLS that contains more than a grain of truth. Many of the writings associated with the movement are extremely difficult to read and understand—some of them, perhaps, needlessly so.⁸ Accordingly, the fair-minded law student, lawyer, or law professor who would like to draw her own conclusions about CLS faces the formidable task of having to negotiate some rather challenging terrain. This essay is an attempt to map that course. I want to try to explain why the detractors might feel threatened by CLS, but at the same time convince the rest of you that you shouldn't be. In particular, I want to assure you that it's perfectly safe to attend, hire from, be an alumnus of, or teach at a law school with a prominent CLS presence.⁹ (Indeed, I think that you

7. Trillin, *A Reporter at Large: Harvard Law School*, NEW YORKER, Mar. 26, 1984, at 76, col. 3 (quoting Harvard Law School Professor Duncan Kennedy).

8. This criticism can be—and usually is—overstated. See, e.g., Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203, 1203 (1985) (suggesting that most CLS scholars do not "writ[e] clearly"). Some of the best CLS works are hard to penetrate not because of the way they are written, but because of the novelty and complexity of the ideas with which they deal. See, e.g., Woodward, *Toward a "Super Liberal State"*, N.Y. TIMES SUNDAY BOOK REV., Nov. 23, 1986, at 29, col. 2 (reviewing R. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986)) ("This book is tough going but not, as one might expect, for reasons of style. It is written clearly, powerfully and on occasion eloquently. The difficulty is the content."); see also Hyland, *A Defense of Legal Writing*, 134 U. PA. L. REV. 599 (1986) (defending complex conceptual analysis in good legal writing against "the myth of the universal applicability of the Hemingway style [, which] . . . makes it seem as if the various levels of language and thought can be telescoped into one").

9. The "usual suspects" in this regard seem to be Harvard, Stanford, U.C.L.A., Rutgers-Camden, S.U.N.Y. Buffalo, and the Universities of Wisconsin and Miami. See, e.g., Wash. Times, Sept. 25, 1986, at 5A, col. 4 (listing several law schools where CLS purportedly has a "sizeable influence"). If the situation here at Miami is any indication, however, the reports of our ubiquity are exaggerated. I am reminded of the story of the philosopher who offered a vigorous defense of solipsism in a lecture delivered to a lay audience. Someone approached the philosopher afterward and exclaimed, "That was a wonderful lecture, Professor! You know, I think I'm a solipsist, too!" To which the philosopher is said to have replied, "That's funny. I thought I was the only one."

To be sure, a number of my colleagues are sympathetic with, if often critical of, CLS. Their receptiveness is at least in part attributable to the strong "Legal Realist" tradition among the faculty at Miami and the influence of Deans Soia Mentschikoff and Wesley Sturges,

should have serious reservations about any school that would follow Dean Carrington's advice and banish us to academic Siberia.)

To that end, I want to give a brief account of the theory of law associated with CLS and to describe its place in the history of American legal thought. But two major caveats: First, CLS is not a monolith. Over 150 of us¹⁰ identify ourselves with the movement,¹¹ and I suspect that there are about that many positions among us on any given concrete issue. (In this sense, we differ little from any other intellectual movement in the history of academia, law or otherwise.) So, what I offer you is not "the CLS perspective," or even the Miami CLS perspective. It's Fischl on CLS, for what it's worth.

The second caveat is that a complete account of the ideas associated with CLS would fill volumes; thus, what follows is necessarily a somewhat oversimplified account. This point should not be taken lightly. If there is any one premise to which most CLS adherents subscribe, it is that our contributions to legal thought are revealed less in the broad pronouncements that some of the more hyperbolic among us are given to make, than in the "details" of our scholarly treatments of the rich texture of moral values and ideological assumptions reflected in legal doctrine,¹² our specific prescriptions for legal education,¹³ and, perhaps most importantly, what goes on each day in our classrooms. I therefore strongly urge those of you who want to

who were major forces in the Realist movement. See generally W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973). As I suggest below, CLS owes a significant intellectual debt to Legal Realism.

10. See, e.g., Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984) (listing published works by approximately 150 authors).

11. For example, by paying dues, attending the so-called "annual conferences" (though we didn't have one in 1986), and endlessly citing each others' articles in our scholarly works. See, e.g., *infra* notes 12 & 13.

12. The "complete works" as of 1984 are compiled in Kennedy & Klare, *supra* note 10. Some of the most accessible, if not necessarily the most representative, among them appear in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982). For the ambitious, and particularly for those who want to know whether CLS scholars are capable of offering a "positive" program, see R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986).

There is also a growing body of scholarship about CLS. See, e.g., *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984); *Symposium on Critical Legal Studies*, 6 CARDOZO L. REV. 693 (1985). The authors working in this genre can be divided into roughly three categories: insiders and friendly critics who are "institutionalizing" CLS by attempting to describe it as a "movement" (see, e.g., this article), hostile critics who would probably prefer to institutionalize some of its adherents (see, e.g., Carrington, *supra* note 6), and insiders trying, among other things, to fend off the challenges from both directions (see, e.g., Kennedy, *Psychosocial CLS: A Comment on the Cardozo Symposium*, 6 CARDOZO L. REV. 1013 (1985)).

13. See, e.g., Boyle, *The Anatomy of a Torts Class*, 34 AM. U.L. REV. 1003 (1985); Jaff, *Frame-Shifting: An Empowering Methodology for Teaching*, 36 J. LEGAL EDUC. 249 (1986); Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note 12, at 40; Paul, *A Bedtime Story* (Sept. 10, 1986) (unpublished manuscript).

come to grips with CLS to read our works and observe our classes, and not to rely solely upon the brief introduction to its ideas and theories that I offer here.

I. PROLOGUE: THE LEGAL REALIST CRITIQUE

A. *Two Views of Law*

Americans, lay people and lawyers alike, seem to hold two contradictory images of the institution we call "law." On the one hand, we espouse an idealized image of law that begins with the notion of a set of legal rules enacted by our elected representatives in the form of either statutes or constitutional provisions. Now we may be somewhat cynical about the processes by which we select the representatives to perform this task; witness the widely shared and no doubt largely correct assumption that only a candidate with massive financial resources or the "right connections" has a good chance of being elected to public office. And we may be equally dubious about the law-enactment process. We may, with good reason, believe that legislatures are more responsive to horse-trading by powerful economic interests than they are to the interests of the electorate at large. That, as we say, is just "politics."¹⁴

Yet our idealized image of the law has a heroine who comes riding to the rescue: the judge. Horse-trading and the pork-barrel have no place in *her* domain. According to the idealized image, good judging consists of the rote, almost robot-like application of legal rules to the facts of individual cases. There is no room for the judge's personal preferences in the performance of this role. Central to this image, then, is the premise that a meaningful distinction exists between what a legislature does when it makes the laws, and what a judge does when she applies them—that is, a sharp distinction between what we call "politics" and what we call "law." (I take it that this is a major part of what we mean when we say that ours is ultimately "a government of laws and not men.")¹⁵

14. For a sophisticated and persuasive account of the political economy of recent elections and legislative developments on the national level that goes a long way toward vindicating these intuitions, see T. FERGUSON & J. ROGERS, *RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS* (1986).

15. The sources of the quote are traced in Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 4 n.2 (1986). Problematic for this idealized image is the existence of a third source of rules, beyond statutory and constitutional law: the common law of contracts, torts, and property, which was "made," originally in any event, by *judges*. But the idealized image represses the fact of this decidedly non-mechanical judicial enterprise by viewing the common law as a more-or-less "natural" set of rules that have been with us time out of mind, and by confining the modern judge to the straightforward application of those rules through the principle of *stare decisis*. See generally Paul, *Searching for the Status Quo*

At the same time, we hold a second view of law, a skeptic's view. We often frankly recognize the judicial process as overtly political and highly discretionary. Recent events remind us, for example, of the significance we attribute to the ideology of those who get appointed to the nation's courts, irrespective of the appointees' asserted "craft" and professional skills. And we all suspect that there is a large measure of truth in the punch line to the old joke about the lawyer who, when asked, "What is two plus two?", responds: "What do you *want* it to be?"

This skeptical perspective is often accompanied by the sincere belief that the idealized image of judging—as more-or-less rote law-application—would work, if only judges did their job right. But there is also a nagging sense that there is something inherent in the enterprise that dooms even the conscientious judge to failure. Recall, for example, the scene early in the movie *Paper Chase*, when the very traditional Professor Kingsfield warns his students, "For every answer you give, I will pose another question—always another question." First-year law students soon learn (as does anyone who consults a good lawyer) the painful lesson that there is always a counterargument, always a countervailing consideration, always "the other side"—at least in any case that matters. They learn, in short, that there is seldom a "sure bet" in the realm of legal discourse, and that when a judge "finds" that one set of arguments trump another in a given case, there is reason to suspect that there is more going on than the mere mechanical "application" of legal rules to the facts.

* * * * *

This conflict is not merely academic. A society's image of the nature of law will have a profound impact upon its understanding of the legitimate institutional role that judges should play within the political system. A society that holds what I have called the idealized image of law, for example, would have no difficulty squaring judicial power with a professed commitment to representative democracy. In such a society, the role of the judge would be understood as simply to carry out faithfully the laws enacted by the people's representatives in the legislature. Conversely, a society holding the skeptic's view would be hard-pressed to reconcile with its democratic aspirations the judge's license to impose her own discretionary choices on the citizenry.

It is not surprising, then, to find that if Americans are ambivalent about law, we are downright schizophrenic about our view of the

appropriate institutional role for our judges. Note that for the better part of two centuries, we have regularly called upon the judiciary to answer the most intractable questions we have faced, from the lawfulness of slavery¹⁶ to the constitutionality of state anti-abortion legislation.¹⁷ Yet at the same time, politicians, presidents, attorneys general, and even law professors routinely express grave doubts about the legitimacy of this inveterate practice, and outrage when the courts render decisions that thereby “substitute their judgment for the will of the people.”

How did we get to this ambivalent state of affairs? How did we reach a point where we seem to believe both that law is mechanical and rule-bound, on the one hand, and that it is political and highly discretionary, on the other? Where we entrust many of our most deeply divisive questions to judges, but routinely condemn them for giving us the answers?¹⁸ Like the poor, these conflicts may have always been with us. But a better understanding of what’s at stake may be achieved by examining the current predicament against the broader scheme of the history of modern American legal thought.

B. *Scientific Jurisprudence vs. Legal Realism*

Our conflicted understanding of law may reflect an earlier battle about its nature, a battle between “Scientific Jurisprudence” and “Legal Realism” that first took place some sixty years ago. Scientific Jurisprudence, a 19th century development, was just what the name suggests.¹⁹ It was a theory that viewed legal reasoning—that is, the

16. *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

17. *Roe v. Wade*, 410 U.S. 113 (1973).

This practice may reflect a third view of law: a Romantic view that is, in a sense, the flipside of the “skeptic’s” view. Thus, there seem to be occasions when we actually *want* judges to transcend the robot-like law-applier’s role and to save us from what we suppose to be our (or, more often, someone else’s) democratic excesses. For an insightful argument along these lines, see Winter, *Tennessee v. Garner and the Democratic Practice of Judicial Review*, 14 N.Y.U. REV. L. & SOC. CHANGE 679 (1986).

18. This latter phenomenon has always called to my mind the scene in *Casablanca* when Louie, the French police official played by Claude Rains, silences the din in Rick’s Cafe to announce that he is ordering the place shut. “On what grounds?” objects Humphrey Bogart’s Rick. “I’m shocked,” replies Louie, indignantly, “shocked to find gambling going on in the backroom of this establishment.” At which moment Rick’s croupier enters from the backroom, hands Louie a large wad of bills, and says, “Your winnings, sir.” The scene ends with Louie somewhat sheepishly tucking the booty into his pocket.

19. Although “formalism” is often used as a synonym for Scientific Jurisprudence, *see, e.g.*, M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 253-66 (1977), I have avoided that term here because its current usage suggests an approach to legal reasoning that transcends any particular historical period. *See, e.g.*, R. UNGER, *supra* note 12, at 10; Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Moreover, the term “scientific” captures the roots and aspirations of the jurisprudence that I

analysis that a judge or a lawyer undertakes in "applying" the law to the facts of a particular case—as a species of "science." It was, most of all, a claim that this characteristic sharply distinguished law-application from what a legislature did when it was *making* law.

Thus, where law-making was understood as an act of will, a matter of the subjective choice of the legislators, law-application was thought to be precise, logical, and, like all scientific undertakings, susceptible to objective verification. Concrete results in specific cases were thought to be syllogistically "required" by the law—whether the authoritative source was the common law, legislative enactment, or the Constitution. Thus, professionals trained in the legal method could confidently describe judicial decisions as "right" (that is, correct as a matter of legal analysis) or "wrong."²⁰

Where did this jurisprudence come from?²¹ There is persuasive evidence for several interrelated "causes": sociological (the rise of a professional self-image among lawyers and a concomitant need to distinguish their analytical endeavors from mere "laymen's reasoning"²²), intellectual (the "scientification" of many intellectual disciplines during this period²³), and political (the contemporaneous efforts to justify controversial judicial decisions by casting them in terms of a neutral legal science²⁴), among others. Whatever its roots, Scientific Jurisprudence is no doubt closely connected, historically and conceptually, with the idealized image of law that I described at the outset. By appearing to show that there was a single, correct answer to every legal question, and that a competent judge could

want to describe more directly than the term "formalism." See *infra* notes 21-24 and accompanying text.

20. For more nuanced presentations of this jurisprudence, see, for example, M. HORWITZ, *supra* note 19, at 253-66; P. MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 99-265 (1965); Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3, 9-14 (1980); White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1000-02 (1972); see also G. GILMORE, *THE DEATH OF CONTRACT* 12-34 (1974).

21. Scientific Jurisprudence was itself a rejection of the earlier 18th century view that law was God-given or "natural." On this historical transformation, see M. HORWITZ, *supra* note 19.

22. See *id.* at 257; P. MILLER, *supra* note 20, at 99-265. This development was of a piece with the emergence of the modern law school, and the effort by legal academics to justify its place in the university setting. See e.g., G. GILMORE, *supra* note 20, at 12.

23. See P. MILLER, *supra* note 20, at 99-265. It should perhaps be noted here that the view of "science" underlying this jurisprudence was itself a product of uniquely 19th century conceptions. See White, *supra* note 20, at 1001; see generally T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

24. See M. HORWITZ, *supra* note 19, at 253-66; see also *infra* notes 26-28 and accompanying text.

always "find" that answer, it provided a comforting solution to the problem of squaring judicial power with democratic ideals.

* * * * *

Someone once said that "[i]t takes a theory to beat a theory,"²⁵ but often a theory's own adherents can do the job faster. The classic example of this phenomenon is the turn-of-the-century Supreme Court, busy as it was striking down all manner of popular state and federal social legislation, from minimum wage and maximum hours laws to child labor statutes, as interfering with the due process clause of the fourteenth amendment.²⁶ The Justices involved may well have believed that they were simply "applying" that constitutional provision to the cases at hand.²⁷ But by the early part of the 20th century, there was a growing sense, particularly among progressives and liberals in legal academia and elsewhere, that such decisions were anything but "scientific," let alone consistent with democratic ideals. Challenges thus arose on several fronts.²⁸

Most relevant to my purposes here was the challenge mounted by Karl Llewellyn and the Legal Realists in the 1920's and 30's.²⁹ The Realists had no quarrel with the earlier movement's scientific aspirations; indeed, on one level, they simply claimed to do science better.³⁰

25. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 YALE L.J. 1435, 1435 (1983).

26. U.S. CONST. amend. XIV. The classic case is, of course, *Lochner v. New York*, 198 U.S. 45 (1905). For a thoughtful rendering of this oft-told story, see A. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895* (1960).

27. See Kennedy, *supra* note 20, at 9-14.

28. For an eloquent and more complete account of the responses to Scientific Jurisprudence and their connection to the Progressive and New Deal political movements, see White, *supra* note 20; see also P. ROSEN, *THE SUPREME COURT AND SOCIAL SCIENCE* (1972).

29. See W. TWINING, *supra* note 9. This is the appropriate time for a caveat much like the one stated earlier about CLS: Legal Realism was not a monolith either. (Nor, for that matter, was Scientific Jurisprudence.) See, e.g., Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1233-34 (1931) ("One thing is clear. There is no school of realists. There is no likelihood that there will be such a school. There is no group with an official or accepted, or even with an emerging creed.").

Thus, I realize that I am painting here with a broad brush. Nonetheless, even Llewellyn agreed that it is meaningful to discuss Realism as a "movement," at least in terms of its general tendencies and, particularly, its "method of attack." *Id.* at 1234. Indeed, in *Some Realism About Realism*, Llewellyn attempted to do just that. See White, *supra* note 20, at 1017 (arguing that Llewellyn and Jerome Frank "may be considered the primary exponents of Realism not because their views were the most representative of the movement (most of the individuals who considered themselves Realists were disinclined to allow their colleagues' views to represent their own), but because they were the most anxious of their peers to see themselves as members of a jurisprudential 'school,' to attempt to state its canons, and to criticize other schools").

30. See *infra* notes 49-52 and accompanying text.

But the Realists contended that the judicial method embraced by Scientific Jurisprudence was “legal magic and word-jugglery.”³¹ In an explicit rejection of that approach, the Realists argued that law is indeterminate—that is, that what we call legal reasoning can rarely be said to require, in any objective sense, a particular result in a given case.

This claim—its fancy name is “the indeterminacy argument”—finds powerful reflection in what I described earlier as the second, “skeptical” view of law that we hold today. It is also a central tenet of Critical Legal Studies.³² Indeed, I will argue below that much of the contemporaneous attack on CLS is motivated by the movement’s vigorous embrace of the “indeterminacy argument.” Accordingly, the nature of that argument is worth a long digression for close examination.

C. *The Indeterminacy Argument: The Emperor Unclothed*

1. THE ARGUMENT INTRODUCED

The indeterminacy argument is a claim about our traditions of legal discourse—a claim, to put it crudely, that for virtually every “rule” there is a counter-rule, an exception, or some other lawyerly gambit available to put the legal question at issue in equipoise.³³ It would be impossible to undertake anything like a satisfactory demonstration of this point here, but three examples may at least be suggestive. First, consider the so-called “canons of construction,” the guidelines available to judges to assist them in their interpretation of statutes.³⁴ A famous one states that “statutes in derogation of the common law are to be strictly construed.”³⁵ Under this canon, a judge is supposed to hew as closely as possible to the literal command

31. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935).

32. Thoughtful and accessible accounts of the historical connection between Legal Realism and CLS are set forth in White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819 (1986), and Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669 (1982). For a particularly insightful account of this connection, rendered before CLS even existed, see Casebeer, *Escape From Liberalism: Fact and Value in Karl Llewellyn*, 1977 DUKE L.J. 671.

33. See, e.g., Llewellyn, *supra* note 29, at 1239 (arguing that the Realists had “come close to demonstrating that in any case doubtful enough to make litigation respectable[,] the available authoritative premises—i.e., premises legitimate and impeccable under the traditional legal techniques—are at least two, and . . . the two are mutually contradictory as applied to the case in hand”).

34. See, e.g., K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 521-35 (1960).

35. *E.g.*, *American Sheet Metal, Inc. v. Em-Kay Engineering Co.*, 478 F. Supp. 809, 814 (E.D. Cal. 1979).

of the legislature when she is interpreting a statute that is "in derogation of the common law." At the same time, a second canon declares that "remedial" statutes "must be liberally construed."³⁶ This means that a judge interpreting a "remedial" statute should read it broadly—beyond the precise wording, if that's what it takes—in order to effectuate the legislature's public purpose.

Let's take a look at how these canons work. Consider the common law "employment-at-will" rule. In the absence of an express contractual agreement to the contrary, an employer enjoys the presumptive right to discharge an employee without notice "for good cause or for bad cause, or even for no cause."³⁷ Assume that the legislature enacts a statute that prohibits employers from "discharging or otherwise retaliating against any employee because of such employee's refusal to engage in any conduct unlawful under the laws of the State." Assume further that the statute provides a private right of action for affected employees, enabling them to secure reinstatement and backpay. Then consider the case of a trucking company that fires an employee for reporting to the authorities the employer's persistent violation of various provisions of the state's highway safety and motor vehicle code. The employee sues for relief, and the employer defends, contending that he has not engaged in conduct prohibited by the employment statute.

What should the judge do when she is presented with this controversy? Recall our "canons of construction." Arguably, the statute in question "derogates" the employer's common law right to discharge an employee "for good cause or for bad cause, or even for no cause." According to the first canon, therefore, the statute should be "strictly" construed. Operating on that premise, the judge might reason that the legislature said only that an employer couldn't dismiss an

36. *E.g.*, *United States v. One Hazardous Product Consisting of a Refuse Bin*, 487 F. Supp. 581, 588 (D.N.J. 1980).

37. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518 (1884), *overruled on other grounds*. *Hutton v. Watters*, 132 Tenn. 527, 544 (1915). Even if an employee succeeds in extracting a promise of employment for a specific duration from her employer, various common law devices—unique to the employment contract context—may render such a promise unenforceable. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1818-20 (1980); *see also* 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 39 (1924); 1A CORBIN ON CONTRACTS § 152, at 13-17 (1963).

On the wisdom and effect of recent judicial and legislative inroads into the employment-at-will rule, compare Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947 (1984) with Finkin, "In Defense of the Contract At Will"—Some Discussion Comments and Questions, 50 J. AIR L. & COM. 727 (1985) and Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983) [hereinafter Note, *Public Policy*]. *See generally* Casebeer, *Teaching an Old Dog Old Tricks: Coppage v. Kansas and At-Will Employment Revisited*, 6 CARDOZO L. REV. 765 (1985).

employee who refused to *engage in* unlawful conduct; the legislature said nothing at all about limiting the employer's right to fire an employee for *reporting* such conduct. Accordingly, the judge might reasonably reject the employee's argument that the judiciary should expand the limitation on the employer's common law right that is imposed by the statute.

But arguably, the statute is also "remedial" in nature; that is, the legislature enacted it to achieve the remedial purpose of preventing employers from using the at-will-employment rule to circumvent the laws of the state. According to the second canon, then, the statute should be "liberally" construed. Operating on that premise, the judge might conclude that this remedial purpose is thwarted every bit as much by permitting the discharge of a "whistleblower," as it is by permitting the discharge of an employee who refuses to engage in unlawful conduct. Accordingly, she might reasonably accept the employee's argument that the statute should be construed to cover her case.

The point, of course, is that either canon of construction arguably applies to the situation at hand—indeed, as you have no doubt figured out, "remedial statutes" are, by their very nature, "statutes in derogation of the common law." But the two canons point in precisely opposite directions! Neither canon is "right"; lawyers use versions of each all of the time.³⁸ As a leading Realist put it, a statute "can be extended pretty widely and contracted pretty narrowly. And if you are a little clever, it will catch or let out the situation you are deciding."³⁹ Thus, the Realists argued, legal rules that judges traditionally use to justify their decisions do not—*cannot*—yield a single "correct" answer to the questions put.

38. Compare 30 NINTH DECENNIAL DIGEST pt. 1, *Statutes* § 239 (1976-81) ("Statutes in derogation of common law or common right") (collecting cases) with *id.* § 236 ("Remedial statutes") (collecting cases). Dean Mentschikoff first brought the conflict between these particular canons to my attention during an unforgettable lecture she gave to the newly-hired faculty at Miami in the fall of 1983. Other examples of this phenomenon will no doubt readily occur to perceptive observers of the judicial scene. Compare "[T]here is no need to refer to the legislative history where the statutory language is clear" with "But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on superficial examination"; and compare "[I]f extreme hardship will result from a literal application of the words, this may be taken as evidence that the legislature did not use them literally" with "It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation." K. LLEWELLYN, *supra* note 34, at 529, 530; see also S. MENTSCHIKOFF & I. STOTZKY, *THE THEORY AND CRAFT OF AMERICAN LAW: CASES AND MATERIALS* 46-47 (1981).

39. Radin, *The Theory of Judicial Decisions: or How Judges Think*, 11 A.B.A. J. 357, 361 (1925).

2. THE APOLITICS OF LEGAL ARGUMENT

Note that the “liberal” construction of the statute in my first example supports relief for the discharged “whistleblower” and is thus also “liberal” in the sense we usually mean it in our political discourse. But that is simply happenstance. Giving a statute a “liberal” construction means giving it a broad reading in order to effectuate the underlying legislative purpose. Thus, the effect of a liberal construction depends in large part upon whether that purpose is itself “liberal” or “conservative.”⁴⁰ The point is that there is nothing necessarily “liberal” or “conservative” about any of the legal arguments in the lawyer’s arsenal; argumentative gambits used one day to achieve one set of results, politics-wise, can often be flipped the next to achieve the opposite. My second and third examples should help bear this out.

There is a recurring debate in American contracts cases about whether a court, in determining the meaning of an agreement between two private parties, should confine its inquiry to what the parties actually said (or wrote), or rather should explore more broadly all of the circumstances surrounding a transaction—for example, the parties’ prior course of dealing, their actions after the agreement was reached, and any customs of their trade—to divine the parties’ reasonable understanding of their deal.⁴¹

To make this conflict concrete, take the facts of *Hurley v. Eddingfield*,⁴² the case I start with in my first-year Contracts course. An individual living in turn-of-the-century rural Indiana suddenly became seriously ill, and summoned his family doctor to his aid. “[W]ithout any reason whatever,”⁴³ the doctor refused to go, and the patient died. I ask whether the doctor breached a contract with the patient, and the class typically splits right down the middle on the question.⁴⁴

40. For a liberal construction of a “conservative” law, see, for example, *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 127-34 (1st Cir. 1979) (liberal construction of Hyde Amendment prohibiting expenditure of federal funds for certain medically necessary abortions); see also *Harris v. McRae*, 448 U.S. 297, 306-11 (1980) (reaching same result on other grounds).

41. See, e.g., G. GILMORE, *supra* note 20, at 35-53.

42. 156 Ind. 416, 59 N.E. 1058 (1901).

43. *Id.*

44. *Hurley* itself did not address this issue. Rather, the patient’s estate sued the doctor in tort, claiming that the doctor had wrongfully caused the patient’s death by “refus[ing] to enter into a contract of employment” with him. *Id.* at 417, 59 N.E. at 1058 (emphasis added). Thus, counsel for the estate apparently believed that the doctor and patient were not already parties to a contract. Perhaps counsel’s view that an “employment” contract was at stake influenced his theory of the case; such contracts were terminable at will under contemporary doctrine, see *supra* note 37 and accompanying text, and thus no remedy was available for their unilateral “breach.”

Many students point out that, so far as the facts stated in the opinion reveal, the doctor never specifically promised the patient that he would come to the latter's aid. Accordingly, they conclude, there can be no contract between the parties. Others seize upon the fact that the doctor was the patient's "family physician."⁴⁵ They argue that, given the common understanding of the rights and responsibilities that such a relationship entails, and particularly in light of the probable scarcity of medical care eighty years ago in rural Indiana, the patient would have reasonably understood the doctor's "promise" to attend to him in emergency situations as being implicit in their relationship.

What follows is a healthy debate about the merits of one approach to fact analysis versus the other. Those who support the doctor's position argue, among other things, that it is dangerous to permit the courts to determine that an individual has consented to a contractual obligation where that individual has not done so expressly. Those who support the patient, on the other hand, are convinced that such a restrictive view of the facts ignores the significance of context in human communication and will thus frustrate the parties' real understanding and expectations.

By the end of their debate, both sides seem convinced that their respective arguments about the proper approach to fact analysis and their respective instincts about the degree of responsibility that the law should require from the doctor to the patient somehow "connect up." That is, the students have an intuition that the "conservative" position, which insists on the doctor's absolute right to choose not to come to the aid of the patient, is supported by an equally "conservative" argument about courts' sticking to what the parties have actually *said* and not casting about for what they might have meant; and they have the corresponding intuition that the "liberal" position, which insists on the doctor's duty to aid the patient, is supported by the equally "liberal" argument about the importance of context to understanding human relationships.⁴⁶ However I try to persuade them that they both have valid points, each side is ready to conclude

45. 156 Ind. at 416, 59 N.E. at 1058 (emphasis added).

46. As usual, the students' instincts are on to something. As Duncan Kennedy demonstrated in his seminal piece, at least within the law of contracts, the forms of legal argument and the substantive legal regimes they tend to promote *do* seem to match up. See Kennedy, *supra* note 19 (discussing the connection between "formalism" in legal argument and "individualism" as a social ideal, and the connection between "antiformalism" and "altruism"); see also Jaff, *supra* note 13, at 263-67 (discussing connection between context-sensitive analysis and an ethic of interpersonal responsibility). *But see infra* note 48.

that its approach to fact analysis is just "good lawyering," and that the other's is inherently defective.

But an amazing thing happens during the second semester, when the students take their course in criminal procedure. Early in that course, they study the following problem: The police confront a citizen and ask whether they can search his person or home, in spite of the fact that they have no warrant authorizing them to do so. Although the citizen has a constitutional right to decline, the police may effect such a search if the citizen "voluntarily" gives his consent. Naturally, there is great difficulty in determining whether consent is really voluntary—that is, in determining whether the citizen complied with the request because he thought he must, or whether he knew of his right to decline and gave his consent anyway. The same debate the students undertook in the doctor/patient example ensues, but suddenly, the "liberals" find themselves vigorously defending what we previously characterized as the "conservative" argument (the police must prove that the citizen explicitly and knowingly consented to the search)—and the "conservatives," the "liberal" one (the voluntariness of the citizen's consent may legitimately be determined from the broader context of the challenged search).⁴⁷

In sum, the students begin to learn the important lesson that most legal arguments are not inherently "conservative" or "liberal"; they are merely the rhetorical tools available to the lawyer to urge a particular result in a particular case.⁴⁸ Sometimes the lawyer will

47. See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

48. To be sure, there is a consistent substantive thread that runs through the respective legal arguments in the two examples. Thus, the argument that insists on express consent may reflect a resistance to the coercive power of the state, whether exercised to compel a citizen to "keep her promises" or to open her home to the police. Conversely, the argument that embraces contextual analysis may be more receptive to the exercise of such power. When viewed as a debate between "libertarian" and "statist" positions, then, each of the respective arguments *does* seem to have a consistent "political" bias. See Kennedy, *supra* note 19; Jaff, *supra* note 13. (The modern American "liberal" and "conservative" positions may simply reflect the fact that conservatives are relatively more likely to express libertarian views when the target of state power is, say, a doctor; the liberals, when the target is a criminal defendant.)

But even this bias becomes problematic when we move to a third legal context in which the issue of "consent" plays a major role: rape. Take the situation in which the victim's protests are equivocal and her consent is arguably inferable from the context (for example, the victim has had intercourse with the perpetrator on previous occasions and, at the time in question, has invited the perpetrator into her apartment for a drink). If the victim's express consent is required, then the perpetrator may nonetheless be guilty of rape; if, on the other hand, the victim's consent can be inferred from the context, then the perpetrator may be innocent. Thus, contrary to his position with respect to the earlier hypotheticals, the libertarian's resistance to the coercive power of the state might well lead him to favor the broader contextual approach in the rape context. (To be sure, however, the matter is far from clear. It all depends on whose autonomy the libertarian prefers to protect: the perpetrator's from the state, or the victim's from the perpetrator. See generally Singer, *The*

need to argue for a requirement of "express" consent, sometimes for a more "contextual" analysis of the parties' dealings; just as, in my earlier example, sometimes she will need to argue for a "strict" or "narrow" construction of a statute, sometimes for the effectuation of the underlying legislative purpose. But again, neither argument is "better" or "more lawyerly"; other things being the same, they can each almost invariably claim equal legitimacy in the realm of legal discourse.

3. MORE SCIENCE

The indeterminacy argument creates a major difficulty for the judge—and, indeed, for the prospect of justifying the exercise of judicial power in a democratic society. If legal cases may be plausibly argued "either way" on the basis of the legal rules, then how is the judge to choose between the competing claims of the parties? How does she determine whether the whistleblower should be reinstated despite the employment-at-will rule? Whether the physician must come to the aid of the dying patient? Whether the police may constitutionally search the citizen? Typically, when she delivers her opinion in a case, she will invoke one or the other of the legal arguments with which she is presented to justify her result. But if neither argument actually compels that result, how should the conscientious judge decide the case?

The Realists embraced the view that legal questions are inevitably "social policy" questions, even if the judges and lawyers involved are utterly unaware of that fact. Left to their own devices, judges would invariably decide those questions on the basis of their own

Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 WIS. L. REV. 975.)

The point is that the respective "biases" of the legal arguments involved depend upon the nature of the background legal regime rather than upon anything inherent in the arguments themselves. In the physician/patient and search-and-seizure hypotheticals, the background regime protects the defendants' autonomy in the absence of their consent. Conversely, in the rape case, the background regime *constrains* the defendant/perpetrator unless his *victim* has given consent. (The same is true in the context of a consent defense to an intentional tort like battery.) Because a requirement of express consent would negate a finding of consent in these contexts, it tends to protect the defendant's autonomy in the physician/patient and search-and-seizure examples, but may have the opposite effect in the rape case.

Indeed, even *within* a single background legal regime, the "political" tendencies of these respective arguments may vary widely. For example, in the doctor/patient contract hypothetical, a requirement of express consent is consent-negating, while contextual analysis is consent-affirming. But when applied to certain contract defenses, the arguments may "flip." Thus, a requirement of express consent may be consent-affirming ("she *signed* the contract"), while contextual analysis may be consent-negating ("but its terms were hidden in a maze of fine print and minimized by deceptive sales practices"). See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (defense of unconscionability).

unstated (and often subconscious) psychological, sociological, and economic assumptions,⁴⁹ and then rationalize their decisions by invoking legal rules and principles.⁵⁰ Accordingly, the Realists concluded that judges should consciously and frankly engage in sophisticated and fact-sensitive social science analysis so that they could make better policy.

To overstate the matter somewhat, the Realists sought to substitute one form of science for another. They dismissed the analytic science of Scientific Jurisprudence, with its focus on the abstract logical reasoning of judges, but would have put in its place an empirical science of the human relationships and institutions whose disputes judges were supposed to resolve.⁵¹ The further the judge could delve into the details of our daily endeavors, the more likely she would be to develop the "situation sense" necessary to reach the proper "policy" solution to the dispute presented. As Llewellyn explained in a famous passage in *The Common Law Tradition*:

Every fact-pattern of common life, so far as the legal order can take it in, carries within itself its appropriate, natural rules, its right law. This is a natural law which . . . is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man and of the life conditions of the time and place; it is thus . . . indwelling in the very circumstances of life. The highest task of law-giving consists in uncovering and implementing this immanent law.⁵²

49. See, e.g., Cohen, *supra* note 31, at 834. Arguing that "[s]ocial policy" was the "gravitational field that gives weight to any rule or precedent," Cohen sounded the call for a "legal science" that would undertake to examine:

the psychological doctrines embedded in our rules of evidence, the sociological theories assumed in our criminal law, the economic assumptions embalmed in our doctrines of constitutional law, and the psychological, sociological, and economic *facts* which gave force and significance to rules and decisions in these and other fields of law.

Id.

50. See, e.g., J. FRANK, *LAW AND THE MODERN MIND* 130 (1936) ("What then is the part played by legal rules and principles? . . . [O]ne of their chief uses is to enable judges to give formal justifications—rationalizations—of the conclusions at which they otherwise arrive. From that point of view these formulas are devices for concealing rather than disclosing what the law is." (footnote omitted)).

51. For a more sophisticated analysis of the Realists' views in this connection, see White, *supra* note 20, at 1013-21.

52. K. LLEWELLYN, *supra* note 34, at 122 (quoting L. Goldschmidt, Preface to *Kritik des Entwurfs eines Handelsgesetzbuchs*, *Krit. Zeitschr. f.d. ges. Rechtswissenschaft*, Vol. 4, No. 4); see also J. FRANK, *supra* note 50, at 146-47:

It has been argued that judges will go far towards abandoning "medievalism" when they begin to procure, and to rely on, carefully prepared factual data as to the social setting of the cases which come before them for decision. . . . [T]here deserves to be studied the possible employment, throughout the field of law, of [the] . . . patient investigation, by disinterested experts, of the facts and

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Born of the progressive politics of the New Deal era, then, Realism undertook its rule-debunking program in the service of exposing the law for what it really was: social policymaking. But the Realists did not intend to leave the Emperor naked. The law's "ought" could be found in the real-world's "is," discovered by a fact-sensitive adjudication overtly and consciously informed by the methods of social science.

D. *Reaction: The Emperor Strikes Back*

The response to the Realist critique was swift and severe. Legal academia and the establishment bar were, understandably, extremely threatened by a school of thought that assertedly viewed judging as "mere" policy-making, rather than the analytic reasoning that Scientific Jurisprudence had envisioned. The resulting attacks on the Realists, and on Llewellyn in particular, were vociferous; indeed, some of them recall the characterizations of Critical Legal Studies that I quoted at the outset.⁵³ In Llewellyn's own words:

I was shown to disbelieve in rules, to deny them and their existence and desirability, to approve and exalt brute force and arbitrary power and unfettered tyranny, to disbelieve in ideals and particularly in justice.⁵⁴

Thoroughgoing accounts of the long-term effects of and responses to Realism have been eloquently rendered elsewhere;⁵⁵ I want to make only two brief points here. The first concerns the Realists' legacy in "mainstream" legal thought—that is, its continuing

background of individual cases But the systematic, deliberate and openly disclosed use of the unique facts of a case will not be of much service until the judges develop the notion of law as a portion of the science of human nature.

For works offering perceptive discussions of Llewellyn's "situation sense," see W. TWINING, *supra* note 9, at 216-27; Casebeer, *supra* note 32, at 673-76; Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 698-708 (1984).

53. See *supra* notes 1-6 and accompanying text. One critic, for example, argued that the Realist controversy was no less than a contest between "the force and validity of principles, precedents, reason, free will, and impartial justice on the one hand, and the impact of emotion, irrationalism, bias, environment, and juristic skepticism in the legal order." Kennedy, *My Philosophy of Law*, in MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 147, 157 (Julius Rosenthal Foundation 1941); see also White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 283 n.14 (1973) ("[i]n its most extreme form the attack on Realism came close to equating it with treason").

For some of the more responsible challenges to Realism, see W. TWINING, *supra* note 9, at 379-82.

54. K. LLEWELLYN, *THE BRAMBLE BUSH* xi (1950).

55. See W. TWINING, *supra* note 9, at 375-87; White, *supra* note 32, at 825-36; White, *supra* note 53, at 282-91.

impact on day-to-day law practice and teaching. The second concerns the Realists' continuing influence on modern legal theory.

* * * * *

The principal legacy of Legal Realism for mainstream legal thought is the introduction of "social policy" analysis as an acceptable and indeed indispensable element of sophisticated legal reasoning and argument⁵⁶—albeit in a form that bears precious little resemblance to the far subtler version that the Realists seemed to have had in mind.⁵⁷ It will come as no surprise to any lawyer (let alone to any social scientist) that "policy" analysis as we practice it today turns out to be every bit as indeterminate as the legal rules it would supplement—a fact that no amount of "balancing" or "weighing" of policies can hide. Indeed, while good lawyers, judges, and law professors now routinely offer "policy" arguments to support virtually every legal claim they make, the standard counterarguments are familiar enough in most areas of the law to be virtually habitual. Thus, for example, there is seldom a labor case in which one side cannot invoke the goal of "preserving industrial peace," and the other "promoting workplace democracy"; there is seldom a patent case in which the policies of "providing incentives for innovation" and of "promoting competition" are not in conflict. And virtually everywhere we hear the recurring claims of "the need for flexibility and fairness," on the one hand, and "the need for certainty and predictability," on the other.⁵⁸

Much of what we do is thus reduced to something of a shell game, albeit a sophisticated and complicated one. One shell is the mass of legal rules; the other is our arsenal of "social policy" claims. And while the two provide a rich rhetoric for legal decisions, they do not "decide cases" any better together than they do apart. Thus, the pea—the search for a ratio decidendi that really *works*—is shuffled back and forth, sometimes under one shell, sometimes the other, but never in one place long enough to expose either for the hollow receptacle that it is.⁵⁹

* * * * *

The second claim is that the Realist critique has served as the starting point for most serious legal theory in the latter half of this

56. This contribution can be traced as well to the efforts of scholars and lawyers associated with Sociological Jurisprudence, a school of thought that bridged the gap between the Scientific Jurisprudence of the late 19th Century and Legal Realism in the 1920's and 1930's. See White, *supra* note 20, at 1000-12.

57. See *supra* notes 49-52 and accompanying text.

58. See, e.g., Kennedy, *supra* note 19, at 1710-13.

59. The metaphor was inspired by my now dim recollection of Roberto Unger's opening lecture in Jurisprudence at Harvard Law School, Spring Term 1978.

century.⁶⁰ The argument that legal rules cannot, of themselves, decide cases has received almost universal acceptance. But so has the belief that there is still something special about the nature of legal reasoning, something that infuses it with some measure of “neutrality” and “objectivity” and accordingly distinguishes it from the subjective vagaries of “politics” and “ideology.”⁶¹ Thus, jurisprudential schools have come and gone, each offering its own solution to the problem of indeterminacy,⁶² each preaching mostly to the converted and getting beaten up by pretty much everyone else.⁶³ As a result, most legal theorists—outside of CLS, anyway—firmly believe that law is different from “politics,” but vigorously disagree as to any plausible basis for that belief.

* * * * *

We have thus returned to our starting point. We *do* simultaneously hold two radically conflicting views of law—the idealized image of law as neutral and objective, and the skeptic’s image of law as political and highly discretionary.⁶⁴ For, on the one hand, “we are *all* realists now”⁶⁵—everyone “knows” that legal rules do not decide cases. But we are able to persist in our commitment to the idealized image because the fact of indeterminacy is hidden by a style of argument that oscillates between doctrine and policy and thus obscures the emptiness of each. Meanwhile, we cling to the faith that legal reasoning is more than “just politics” and hope that someday someone will show us convincingly just how that might be so.

60. See sources cited *supra* note 55.

61. See R. UNGER, *supra* note 12, at 1-4.

62. Scholars of the Law and Economics school, for example, accept the Realists’ notion of judicial “policy” analysis, but attempt to give that notion determinate content by embracing the policy goal of promoting and protecting “efficient” private markets. See, e.g., R. POSNER, *THE ECONOMICS OF LAW* (3rd ed. 1986). Liberal rights theorists, by contrast, reject “policy” analysis altogether, in favor of the judicial articulation of moral “principles.” See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

63. See, e.g., *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980); *A Response to the Efficiency Symposium*, 8 HOFSTRA L. REV. 811 (1980); *Change in the Common Law: Legal and Economic Perspectives*, 9 J. LEGAL STUD. 189 (1980). It may be that the Law and Economics and the rights theories, see *supra* note 62, share a common characteristic that leaves their respective solutions to the indeterminacy problem particularly vulnerable (and tempting) to attack. Each movement seems to promote what appears to be a particular political program—Law and Economics, the conservatism of so-called laissez-faire; rights theory, the liberalism of the Warren Court. Thus, neither movement sounds very convincing when it suggests that all it is “really” up to is attempting to construct a nonpolitical approach to judicial decision making. See, e.g., Gabel, Book Review, 91 HARV. L. REV. 302 (1977) (reviewing R. DWORKIN, *supra* note 62); Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of Law and Economics*, 33 J. LEGAL EDUC. 274 (1983).

64. For a thoughtful account of this predicament, see Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 769-73 (1985).

65. W. TWINING, *supra* note 9, at 382 (emphasis added).

II. THE CRITICAL LEGAL STUDIES MOVEMENT

A. *CLS Explained: The Indeterminacy Argument Reinvigorated*

Where does Critical Legal Studies fit in all of this? Like Legal Realism, CLS combines a progressive political critique with a skeptical jurisprudence.⁶⁶ The political critique espouses the view that our society and its institutions fall dramatically short of our democratic and egalitarian ideals.⁶⁷ The skeptical jurisprudence forthrightly embraces the indeterminacy argument and rejects the claim that the reasoning judges use to justify the results they reach can, in fact, *compel* those results. Indeed, like Realism, CLS views the political critique and the skeptical jurisprudence as closely connected. The false claim that judging is “objective” or “neutral” obscures the fact that, as a matter of legal reasoning, most legal decisions could have just as well come out “the other way,” and thereby conceals the removal of many important social choices from the realm of democratic decisionmaking.

The skeptical jurisprudence thus goes well beyond the version of the indeterminacy argument that everyone professes to accept today—the argument that legal rules do not, of themselves, decide cases. It is a broader claim that draws on the strand of the Legal Realist critique that rejects altogether the possibility of “neutral” judicial decisionmaking.⁶⁸ It holds that the idealized view of the judge as a mechanical law-applier—and of law as apolitical—is fundamentally and inescapably flawed, because of the very nature of legal discourse and its connection to human experience and interaction.

1. THE POLITICS OF INTERPRETATION

Let us return briefly to two of the hypotheticals that I discussed earlier and examine a common thread that runs through the disputes presented in each of them. In the “whistleblower” case, the “law” that the judge was to apply was the command of the legislature, a statute limiting the employment-at-will rule. Recall that the dispute centered upon the intention to be attributed to the legislature on the basis of what it had said in and meant by that statute. In the doctor/patient case, the “law” that the judge was to apply was the “intention (or not) of the parties” to form a contract. The dispute centered upon the intention to be attributed to the doctor on the basis of his state-

66. On the political roots of Realism, see *supra* notes 26-28 and accompanying text.

67. See, e.g., THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note 12; R. UNGER, *supra* note 12, at 15-42.

68. See Casebeer, *supra* note 32, at 684-702; White, *supra* note 20, at 1018-20.

ments to and relationship with the dying patient.⁶⁹ What the hypotheticals (and, indeed, virtually all legal disputes) have in common, then, is that they present questions of *interpretation*. In both of them, the judge must discern the meaning and significance of language and other communicative conduct by and among various legal actors: legislatures, other judges, the citizens and their institutions.

From the idealized perspective, the judge is viewed as an objective and neutral facilitator, performing this interpretive role; she simply carries out “the command of the legislature” or “the intention of the parties.” To Critical Legal Studies, however, judicial interpretation is not and can never be an “objective and neutral” activity. In attempting to reconstruct the legislature’s or parties’ intentions, the judge’s own moral values and ideological assumptions inevitably play a powerful role; the quest for a value-neutral interpretive approach is thus seen as simply futile.⁷⁰ Once again, I will not pretend to offer a definitive demonstration of this point here; another reference to one of our hypotheticals should provide the gist of the argument.

Recall that the question presented in the doctor/patient case was whether the judge should require the doctor to come to the aid of the dying patient. On the one hand, the judge deciding the case is presented with the fact that the doctor had never expressly promised to come to the patient’s aid, thus suggesting that no such commitment could be fairly inferred. On the other hand, the fact that the doctor had served as the patient’s “family physician” suggests that such a commitment was implicit in the broader context of the parties’ relationship. But how is the judge to evaluate these facts and their conflicting implications? The law doesn’t tell her, and the facts themselves point both ways.

At its core, the doctor/patient case—like all legal disputes—presents a conflict between opposing values or interests. The interests here are the right of the doctor to be free of the patient’s demands on

69. The third hypothetical—the search-and-seizure case—is a variation on the doctor/patient example. Thus, the Constitution has been read to permit warrantless searches if the targeted citizen voluntarily consents (see *supra* note 47), and the dispute presented in that hypothetical centered upon the intention to be attributed to the citizen on the basis of his statements and conduct, and their context.

70. See, e.g., Feinman, *supra* note 52, at 698-708; Jaff, *supra* note 13; Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981). For an eloquent and wonderfully accessible account of the connections between this argument and modern theories of literary criticism, see Frug, *Henry James, Lee Marvin and the Law*, N.Y. Times Book Review, Feb. 16, 1986, § 7, at 1, 29. For more thoroughgoing studies of how such theories relate to legal problems generally, see Boyle, *supra* note 64; Gudridge, *The Persistence of Classical Style*, 131 U. PA. L. REV. 663 (1983); Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984). On the Realist roots of this argument, see Casebeer, *supra* note 32, at 684-702; White, *supra* note 20, at 1018-20.

the doctor's life, and the right of the patient to rely on the doctor's services.⁷¹ Consciously or unconsciously, the judge will have to decide which of these values is more important. To be sure, the facts will have an influence on the values the judge will impose, but the judge's values will also have an impact on how she reads the facts.

Thus, the absence of an express promise on the part of the doctor may loom large in the mind of the judge who is more inclined to protect the doctor's freedom (and accordingly to undertake an especially searching inquiry in order to ascertain the presence or absence of consent). Conversely, the fact that the doctor was the "family physician" may predominate in the analysis of the judge who is more inclined to protect the patient's reliance (and accordingly to undertake an especially searching inquiry in order to ascertain the understandings and expectations that might have arisen out of that relationship). One may not claim that either of these interpretative approaches is "better" or more faithful to what "really happened" than the other; in the end, they simply reflect different assumptions about whether, and to what extent, we should protect the the doctor's freedom versus the patient's reliance.

In sum, then, interpretation is not a "neutral" or "apolitical" task. Whenever the judge is called upon to construe the meaning of a "text"—be it a legislative command in the form of a statute, a judicial one in the form of a precedent, or a "private" agreement between citizens—she will invariably have to make a value judgment about the merits of the dispute that brings the parties to court. The only question is whether she will do so consciously and openly.

2. THE POLITICS OF LAW

To CLS, there is a second difficulty—apart from the problem of interpretation—with the image of law as "neutral" and "apolitical." In a nutshell, it is this: what we think of as "natural" forms of human association are often simply a reflection of unexamined social conventions or constructs that are, in turn, embodied in and reinforced by the law. The classic example of this phenomenon can be found in the tradition of legal analysis that treats the initial distribution of legal entitlements ("property rights") as a "private" law issue, more or less immune from "public" (legislative) interference, and thus obscures the fact that various institutional arrangements could be open to democratic revision or reform.⁷²

71. Indeed, the conflict between freedom and reliance underlies many aspects of contract law. See Kennedy, *supra* note 19; see also G. GILMORE, *supra* note 20.

72. See, e.g., Casebeer, *Toward a Critical Jurisprudence—A First Step by Way of the*

Bear with me, if you will, through one more hypothetical. Near the beginning of my course on labor law, I engage my students in the following dialogue: Picture an employee who works for a company that produces widgets. One working day, this employee builds four widgets and, at the end of that day, tenders to her boss an amount in cash equal to the cost of the necessary materials and their procurement, the reasonable rental value of her workspace and tools, and the apportioned cost of other managerial expenses. She then leaves the shop and takes the widgets with her, planning to sell them and keep the profit. What, I ask, will happen?

My students stir restlessly until someone volunteers that the employer will sue the employee, or have her arrested. On what theories, I respond. Someone hazards the guess that the employee has committed the tort of conversion or the crime of theft. I then ask why the *employer* is not guilty of the same misconduct when he pays the employee a reasonable "rent" for her labor, keeps the widgets for himself, and sells them for his own profit. There is more stirring and murmuring, until someone finally says, "Because the widgets belong to the employer—the law says that they're his property."

Why should that be, I ask. After all, there is nothing "necessary" about permitting the employer to "rent" the worker and keep the widgets; why not structure the relationship the other way around? When someone objects that, if we did that, "then we wouldn't have capitalism," I reply that that's exactly my point. The law reflects and enforces a core assumption about the relationship between employer and employee in a market economy: the employee's legally protected interest in the job is limited to his wage, while the employer is accorded the exclusive right to both the widgets and the profits to be earned from their sale.⁷³

Public-Private Distinction in Constitutional Law, 37 U. MIAMI L. REV. 379 (1983); Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 SETON HALL L. REV. 1 (1983); *A Symposium: The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

73. At this point in the dialogue, someone will often object that the law's decision as to who gets the widget may not be an expression of any substantive policy preference at all; rather, he will observe, the law may simply be attempting to facilitate the parties' reasonable expectations with respect to the terms of their contractual exchange. And neither the employer nor the employee would have ever dreamed that the widgets would, at the end of the working day, belong to anyone but the employer.

The difficulty with this argument is that it is inevitably circular. "Private" contractual exchange can only take place against a background distribution of legal entitlements, determined and enforced by the state, that tells you what's yours and tells me what's mine to keep or exchange. See, e.g., Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943). The terms of any exchange—and hence the parties' expectations with respect thereto—will depend upon what the law says that each of the parties has to give (sell) to the other in the first place. Accordingly, one cannot point to the "parties' expectations" in

To CLS, the decision to give legal sanction to (and hence to enforce by state coercion) this or *any* distribution of legal entitlements reflects assumptions that should not be immune to re-examination and critique. We might want to consider the current arrangement in light of our democratic and egalitarian aspirations and ask whether it exacts too great a cost in terms of the self-determination and the bargaining power of working people. Or we might conclude that employer ownership provides advantages in terms of investment incentives and transaction efficiencies, and therefore decide that we prefer to leave things the way they are. The point is that the current distribution is a *choice*—not a “natural” or “necessary” phenomenon. It only *seems* “natural” because of our habit of treating the initial distribution of legal entitlements as a “private” law issue, which obscures the fact that this arrangement is wholly a matter of political choice. A major aim of CLS, then, is to open up such subjects to democratic examination and debate.

3. SQUARING THE CIRCLE: INDETERMINACY, PREDICTABILITY, AND LEGAL REASONING

The foregoing arguments often prompt two related questions. The first challenges CLS with an insight drawn from the actual experience of legal practice: if legal reasoning is so “indeterminate,” how is it that competent lawyers are usually able to give their clients sound advice? The second question points to an apparent tension *within* the arguments CLS makes: if legal reasoning is so “indeterminate,” how can the movement contend that the law ever reflects a particular set of political choices or assumptions in any systematic way?

Such questions reflect, among other things, a misunderstanding of the nature of the indeterminacy argument that CLS embraces.⁷⁴

order to justify the initial placement of the legal entitlement, because that placement will ultimately determine their expectations.

The background distribution of legal entitlements also shapes the parties' expectations with respect to what they can *gain* from a contractual exchange. To use our widget example, if the employer is given the initial right to the widget, the employee may not be willing to pay more than the “wage” to obtain it. If the employee is given that right, however, she may not be willing to accept anything less than its full market price to give it up. Accordingly, not only does the initial placement of the entitlement determine who pays whom for the widget, but it may also greatly affect the parties' beliefs regarding the *price* at which they would be willing to exchange it. See Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 401-29 (1981) (“The Offer-Asking Problem”).

74. To be fair, however, the second question points to a tension evident within the movement itself. Thus, there are at least two discernible strands of Critical Legal Theory. See R. UNGER, *supra* note 12, at 121-22. On the one hand, there are CLS scholars who stress the indeterminacy—and hence the incoherence—of law. See, e.g., Kelman, *Trashing*, 36 STAN. L.

That argument simply holds that legal outcomes are not constrained by legal reasoning, because legal reasoning can virtually always justify contradictory results in a given case.⁷⁵ It does not mean, however, that judicial decisionmaking is altogether *arbitrary*. Judicial choices are, in fact, constrained in significant ways by a variety of phenomena that make up the professional "culture" within which legal decisionmaking takes place.⁷⁶ Recall the widget hypothetical from the previous section. However compelling your legal argument might be that the employee and not the employer should get the widgets at the end of the working day,⁷⁷ the odds of convincing a judge to buy that outcome are slight indeed. You would be fighting an uphill battle against the legal profession's customs and conventions, the judge's "common sense," her fears of reversal by a higher court or the legislature, her fears of criticism from the bar and the academic community, and—given the stratum of society from which our judges are usually recruited—probably her personal ideological commitments as well.⁷⁸ Our recognition of (or intuitions about) these psychological, sociological, institutional, and political constraints on the judge's behavior would lead all but the most naive among us to make the confident and surely accurate prediction that the judge would reject the employee's claim, even if we were to acknowledge that the *legal* arguments at issue are in equipoise. The point, then, is that constraints of this sort account for our experience that law is predictable—to the extent that it *is* predictable.⁷⁹

REV. 293 (1984). On the other hand, there are those scholars who mine various areas of legal doctrine and attempt to uncover coherent value structures within them. See, e.g., J. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983). For an insightful and provocative analysis of the conflicts and connections between and within these differing approaches, see Boyle, *supra* note 64.

75. See, e.g., R. UNGER, *supra* note 12, at 8-11; Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 9-19 (1984); Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473 (1984).

76. The most thoughtful and thoroughgoing account of this point is offered in Singer, *supra* note 75, at 19-25:

[The indeterminacy argument] does not mean . . . that outcomes in our legal system are completely unpredictable or that the choices made by judges are arbitrary in the sense that they are unconsidered. Considered choices can be described and even predicted to some extent because they are conditioned by legal culture, conventions, "common sense," and politics. Custom, rather than reason, narrows the choices and suggests the result.

Id. at 24-25; see also Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 124-25 (1984).

77. For arguments to this effect that are quite persuasive as a matter of "legal reasoning," see Singer, *supra* note 75, at 22-23, and Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694, 697-705 (1980).

78. See Singer, *supra* note 75, at 19-25.

79. Forecasting judicial behavior is seldom as easy as it seems to be in the widget example; most cases that are worth litigating are much "closer," in terms of the various constraints

One of the more significant of the “cultural” constraints on judicial choice may lie in the structure of legal argument and reasoning itself. If legal arguments can’t *decide* cases, they may nevertheless have a powerful impact on the way we think about (or, more importantly, don’t think about) legal disputes.⁸⁰ As the previous section suggested, our “instinct” that the employer’s ownership of the widget is implicit in the “natural” order of things—a matter of just plain “common sense”—is an instinct that is in part created and reinforced by a tradition of legal argument in which virtually all lawyers, judges, and legal academics in this society are trained. Accordingly, we simply don’t think of different employer/employee arrangements as plausible (let alone likely); indeed, we usually don’t think about the possibility of other arrangements *at all*.

In sum, then, CLS rejects the view—wrongly attributed to the Legal Realists as well—that judicial decisionmaking is altogether unconstrained, that judges decide cases on the basis of “what they had for breakfast.” It holds instead that legal reasoning forms an important part of the professional “culture” that shapes judicial decisionmaking in ways that are often not self-evident. Much of the theoretical work of the movement attempts to explore various manifestations of this phenomenon and to examine the underlying moral values and ideological assumptions that are thus revealed.

B. *CLS Defended: So Are You Guys Commies, or What?*

What, then, are we to make of the terrible things being said about CLS? Are the movement’s adherents—as *The Wall Street Journal* contends—“Marxist/Anarchist[s]” who believe that law is “merely a tool for the rich”?⁸¹ Not by a long shot. Most of us no more believe that economic power “determines” the law than we believe that legal reasoning determines it; indeed, a rejection of such vulgar Marxist determinism is a major contribution of CLS scholarship to progressive legal thought.⁸²

operating on the judge, than the question whether the employer or the employee should get the widget.

80. See, e.g., Gabel, *supra* note 63, at 313 n.18; Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1358 (1982); Singer, *supra* note 75, at 21.

81. *The Veritas About Harvard*, *supra* note 1, at 26, col. 1.

82. See, e.g., Boyle, *supra* note 64, at 721-30, 762-69; Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 12, at 281. Many of us do work in an intellectual tradition in which Marx plays an important role; indeed, his core insight that human belief systems are social constructs is the starting point for much modern social theory. But that hardly makes us Marxists. Indeed, to the extent that that reckless charge suggests that we favor totalitarianism and/or thought control, it describes a set of ideological commitments that are the polar *opposite* of those held by CLS.

Would we “toppl[e]” the law “forthwith”?⁸³ Hardly. However indeterminate it is—however much we may think that it conceals the removal of important social issues from the arena of democratic choice—many of us would readily agree with the sentiments eloquently expressed by the British historian E.P. Thompson:

[T]he rule of law itself, the imposing of effective inhibitions upon power and the defense of the citizen from power’s all-intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretensions of power continue to enlarge, a desperate error of intellectual abstraction. More than this, it is a self-fulfilling error, which encourages us to give up the struggle against bad laws and class-bound procedures, and to disarm ourselves before power. It is to throw away a whole inheritance of struggle *about* law, and within the forms of law, whose continuity can never be fractured without bringing men and women into immediate danger.⁸⁴

Moreover, we recognize that our legal tradition embodies a rich texture of conflicting values and aspirations—“good and bad, emancipatory and oppressive.”⁸⁵ Indeed, in one of the most ambitious constructive projects undertaken by a CLS scholar, Roberto Unger has sketched a future that explicitly and extensively draws on the “constraints on power” and the “emancipatory” kernels contained in current legal doctrine.⁸⁶

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Then why all the fuss? Why do our detractors say the things they do? One reason, I think, is ignorance: some of our critics simply do not know what they are talking about.⁸⁷ To be sure, the situation is in part one of our own making; as I mentioned at the outset, CLS scholarship can be terribly rough-going and thus easily misunderstood.

A second reason for the passionate denunciations is institutional politics. As legal education passes from the hands of one generation of scholars to those of another, there are bound to be some painful

83. *The Veritas About Harvard*, *supra* note 1, at 26, col. 1.

84. E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 266 (1975); see Forbath, *Taking Lefts Seriously* (Book Review), 92 *YALE L.J.* 1041, 1050 n.40 (1983) (reviewing *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 12); Gordon, *supra* note 76, at 95 n.88; Kennedy, *supra* note 19, at 1720 n.82; Klare, *supra* note 80, at 1358 n.1; Note, *Public Policy*, *supra* note 37, at 1951 n.127.

85. Forbath, *supra* note 84, at 1051; see also Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 *TEXAS L. REV.* 1563, 1597 & n.43 (1984); Kennedy, *Critical Labor Law Theory: A Comment*, 4 *INDUS. REL. L.J.* 503, 506 (1981).

86. R. UNGER, *supra* note 12.

87. Compare Carrington, *supra* note 6, at 227 & n.21 with R. UNGER, *supra* note 12.

and difficult moments; Red-baiting is a crude but not altogether ineffective means on the part of some to resist the transition.⁸⁸ Once more, however, we are not without fault; when we toss around macho-sounding expressions like “trashing” and “deconstruction,” we are more likely to alienate our elders than to engage them in a serious and mutually respectful debate.

In the end, however, I think that the primary impulse for the opposition comes from the same source as did the hostile reaction to the Legal Realists: an honest and legitimate fear of the implications of the indeterminacy argument taken seriously. Part of this, of course, stems from a genuine concern about defending the judicial role in a democratic society, but I think that it ultimately runs much deeper than that. If law and politics cannot be separated—if lawyer, judge, and law professor cannot claim that they are “just doing their jobs” when they make a legal argument or accept one—then legal actors must be ready to accept personal responsibility for the part they play in the legal system and society at large. Given the amount of power that those in our profession wield, this is indeed a frightening prospect.

But the alternative is to deny that we are exercising power over other people’s lives even while continuing to do so. It seems to me that the greatest danger of that denial is not that those whose lives we affect will believe it; they won’t for a minute.⁸⁹ Rather, the danger is that *we* might believe it and thus continue to avoid the self-knowledge that is indispensable to responsibility.⁹⁰

88. Recall the sage dictum that academic politics are especially bitter because the stakes are so low. See generally *War Between Professors Pervades Harvard Law*, Wash. Post, Dec. 21, 1985, § A, at 3.

89. See J. COHEN & J. ROGERS, ON DEMOCRACY 146-83 (1983).

90. See Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71, 74 (1970).