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Assume you are a moral judge in South Africa within a system of tainted laws. The case before you involves a black man who has been caught living in Johannesburg in violation of the Group Areas Act[1] and the Urban Areas Act.[2] "These acts allowed ownership and occupation in certain areas only by designated racial groups."[3] The defendant faces jail if convicted.

How would you decide the case? Some philosophy of justice is behind your decision. Some legal theory motivates you. Would you:

(1) Say the law is the law (positivism) and apply the law as written?

(2) Look to natural law to determine what is right and just? In other words, look to a "higher" law and hold as the natural tradition would say "an unjust law is no law at all."

(3) Resign, saying resignation is the proper response to truly unjust legislation and the only honorable alternative? "Gandhi called on the judge who was condemning him to obey the law and apply the maximum possible sentence or resign. Gandhi, of course, joined Socrates in accepting the penalty bestowed by positive law."[4]

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1. Act 41 of 1950, consolidated through Act 77 of 1957 and Act 36 of 1966.

2. Act 25 of 1945, Section 10, inserted by Section 27 of the Black Laws Amendment Act 54 of 1952. The South African government "announced repeal of the Urban Areas Act, the pass laws and related influx control legislation in April, 1986, effective as of July 1, 1986. The Abolition of Influx Control Act 73 of 1986." Pitts, *Judges in an Unjust Society: The Case of South Africa*, 15 DEN. J. INT'L L. & POL'Y 49, 54 n.21 (1986). "[T]he Group Areas Act and the Urban Areas Act together classified geographic and living areas as white or non-white." *Id.* at 54.

3. *Id.* "The pass laws governing movement between racial areas were consolidated and expanded under the inaptly named Abolition of Passes Act and Coordination of Documents Act." *Id.*

4. *Id.* at 86-87 (citing Gandhi, *A Plea for the Severest Penalty Upon His Conviction for Sedition*, in THE LAW AS LITERATURE 459, 465 (E. London ed. 1960)) (footnotes omitted).

(4) Protest or be civilly disobedient in your decision? The protest could be accomplished by writing a decision saying you are civilly disobeying the law and unwilling to apply it.

(5) Apply your conscience through the judicial lie. In other words, carefully construct your decision to achieve the conscientious result in a way which is less visible than the protest.[5]

(6) Interpret the law as unjust and make a new and just law in your decision? Not only interpret the law as unjust but also take an active role in stating what the new and just law should be and is. In other words, play an instructive role as a "moral tutor" in order to promote justice. That is, internalize just values through the law.[6]

(7) Say it's time for a change? The tyranny of the law is obvious and change is good for human beings anyway.

As you have probably already realized, each of your actions has positive and negative consequences. The purpose of this paper is to explore how judges try to achieve justice as they decide cases. It will explore two basic approaches to justice and the consequences of those approaches. It will look at how our society tries to define justice; how our system attempts to achieve justice; and, when cases finally arrive at the courts, how judges try to apply the concepts of justice in those cases. The paper will look at several difficult cases to see how *you* might "do justice" if you were a judge. Finally, the paper will explain how the deciding courts tried to achieve justice in those difficult cases.

I. WHAT IS JUSTICE?

Before we can consider how justice is interpreted in case law, it is necessary to consider the traditional views of justice in America. There are many ideas as to the meaning of justice, but for our purposes most seem to fit roughly into one of two general categories. Call category one "The Traditional Western View of Justice" (Traditional view). Call category two "The Critical Legal Studies View of Justice" (CLS view).

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5. Pitts, *supra* note 2, at 89.

6. *Id.* at 92 (citing J. TUSSMAN, GOVERNMENT AND THE MIND (1977)).

A. The Traditional Western View of Justice

The United States Constitution states in the Preamble that one of its purposes is to "establish justice." What did our forefathers mean when they penned "establish justice?" What was the philosophical concept behind "justice" upon which our forefathers premised their mandate?

Most of the founders of the constitution were trained in the classical Greek tradition of education.[7] They were aware of the teachings of Socrates, Plato, and Aristotle. They were also aware that the ancient Greeks personified justice as the Goddess Themis. In her left hand is a scale, in her right hand a sword, and her eyes are blindfolded. Why did the Greeks personify justice in this manner?

Aristotle wrote that justice could be defined using two concepts: Proportionality and rectification.[8]

> This, then is what the just is—*the proportional*: The unjust is what violates the proportion. Hence, one term becomes too great, the other too small, as indeed happens in practice; for the man who acts unjustly has too much, and the man who is unjustly treated, too little, of what is good. In the case of evil, the reverse is true; for the lesser evil is reckoned a good in comparison with the greater evil, since the lesser evil is rather to be chosen than the greater and what is worthy of choice is good, and what is worthier of choice is greater good. . . .
> The remaining one is *the rectificatory*, which arises in connection with transactions both voluntary and involuntary . . . for it makes no difference whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery, the law looks only to the distinctive character of the injury and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it.[9]

The reader will note that under the rectification aspect of justice Aristotle tells us that "the law looks" at the injury, the one who was in the wrong and the one who was being wronged. Thus, in the concept of rectification lies the idea of a system that can exact a remedy.[10]

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7. Burger, *Tell the Story of Freedom*, 72 A.B.A. J. 54, 56 (1986).
8. ARISTOTLE 209-15 (W. Ross ed. 1956).
9. *Id.* (emphasis added).
10. Daly, *Thinking About Justice*, in ENHANCING CONSTITUTIONAL STUDIES 3, 5 (1987).

So, the Greeks personified justice as the Goddess Themis, the balance representing proportionality, the sword representing rectification, and the blindfold representing equality. Since people are naturally social beings, justice is the cement which holds society together.

The Traditional view asserts that justice exists outside of any particular law or any particular action of the lawmaker. There is a natural law which "manifests our constant striving for objective and universal values" applicable to all people.[11]

> From early on, the Greek notion of natural law . . . involved both the idea of natural rules universally binding men . . . and the idea of . . . a naturally social being who could fulfill his potential in society. Cicero and the Stoics further developed the [ideas of natural law] so that man could live a just life by ascertaining the universal laws of nature through reason. In the Middle Ages, the scholastics stressed the transcendent version of natural law, only to be followed by Humanists' concepts of virtue during the Renaissance. Locke's version of natural rights strongly influenced the leaders of the American Revolution.[12]

Essentially, the Traditional Western thinkers (Traditionalists) have linked law and morality and have concluded that an immoral or unjust law is not a law.[13]

The majority of traditional, western-trained judges also view justice from a natural law perspective. They say that justice is a concept that applies to all people and that if one thinks deeply enough about the idea of justice, one can compare what society is doing against the universal concept of justice. If justice is violated, then the specific law which violates the concept of justice is invalid. Such a law, the Traditional Western judge

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11. Pitts, *supra* note 2, at 69.

12. *Id.*

13. But this conclusion has troubled some thinkers. Clearly, there are laws that exist that are in fact "unjust." R. DWORKIN, TAKING RIGHTS SERIOUSLY 122 (1977). Professor Ronald Dworkin, who has written extensively on the idea of the link between the law and moral principles, rejects the idea that an unjust law is not a law. Pitts, *supra* note 2, at 70. "Dworkin believes that judges have no discretion in any 'strong' sense." *Id.* (citing R. DWORKIN, *supra*, at 31-39, 68-71 (1977)). "Dworkin is ambivalent about morality." Pitts, *supra* note 2, at 72 (citing R. DWORKIN, *supra*, at 93). He thinks that the only way one can determine morality is to look at the "background rights" defined as those that provided justification for political decisions of society in the abstract. Pitts, *supra* note 2, at 72. Essentially, Professor Dworkin tends to view the purposes of rules as the law. *Id.* at 73 (citing R. DWORKIN, *supra*, at 105-08).

(Traditionalist judge) would say, does not have the authority or power of law.[14]

B. The Critical Legal Studies View of Justice

A new thinking predominated legal philosophy during the 1920's and 30's. The American Legal Realism school of thought flourished. Many lawyers, judges, and scholars seemed to think that the only way to truly understand American law was to understand that the basis of all law was "the liberty of contract" and "property rights." They argued that America wasn't rooted in an abstract idea called "justice" but that property law and the freedom of contract were its cornerstones.[15]

Since the late 1970's, several professors from Harvard University Law School have taken the American school of Realism a step further. Professors Roberto Mangabeira Unger and Duncan Kennedy argue that there is often a conflict between the "law" and "how-I-want-it-to-come-out" when a judge is assigned a case. When such a conflict occurs, they argue, the Traditional view of achieving justice through law is "junk."[16] Their basic premise is that "law is only politics."[17]

Professor Roberto Unger, in his book *The Critical Legal Studies Movement*,[18] argues that since law is only politics, we must understand three political forms that the law should take in order to make law work for all groups.

> The *first* form is the cumulative loosening of the fixed order of society—its plan of social division and hierarchy, its enacted scheme of the possible and desirable modes of human association. The sense of this progressive dissolution is that to every aspect of the social order there should correspond a practical or imaginative activity that makes it vulnerable to collective conflict and deliberation. . . . In this way no part of the social world can lie secluded from destabilizing struggle. A *second* version of the ideal that guides the elaboration of alternative institutional forms is that the life chances and life experiences

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14. Jesus Christ, Mahatma Gandhi, and Martin Luther King used this idea of justice when they violated what they perceived to be unjust written laws of their respective societies.

15. *See* Tushnet, *Critical Legal Studies: An Introduction to Its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986).

16. Burton, *Reaffirming Legal Reasoning: The Challenge from the Left*, 36 J. LEGAL EDUC. 358, 359 (1986).

17. *Id.*

18. R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1983).

> of the individual should be increasingly freed from the tyranny of abstract social categories. He should not remain the puppet of his place in the contrast of classes, sexes, and nations. The opportunities, experiences, and values conventionally associated with these categories should be deliberately jumbled. A *third*, equivalent version of the ideal is that the contrast between what a social world incorporates and what it excludes, between routine and revolution, should be broken down as much as possible; the active power to remake the [sic] reimagine the structure of social life should enter into the character of everyday existence.[19]

The three distinctive claims of the CLS Movement are: (1) "[T]hat legal reasoning is radically contradictory and inherently indeterminant in both easy and difficult cases."[20] (2) "[T]hat legal reasoning is a contingent reflection of the current social structure and elite visions of a just society."[21] (3) "[T]hat legal reasoning is a vehicle for legitimating an unjust social structure."[22] To CLS thinkers, commonly known as the CRITS, the governing structure is neither just nor inevitable. The CLS philosopher simply sees the law as whatever those in power say it is. Essentially, the CLS thinkers say that the ideal aim of any system of rights is to serve as a counter to any scheme that can become insulated against the ordinary forms of challenge.[23]

So a highly intellectual, highly influential group of philosophers and thinkers are presently teaching that the Traditional view of justice is incorrect. They are repeating what the Positivists of old have said, "The law is the law,"[24] and what the Legal Realists of the 1920's and 30's have said, "Lets be realistic in our understanding of what law really is."[25] For the Realists,

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19. *Id.* at 23 (emphasis added).

20. Burton, *supra* note 16, at 360 (citing R. UNGER, KNOWLEDGE AND POLITICS (1975); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976)).

21. Burton, *supra* note 16, at 361 (citing Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Prospectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157, 162 (1982)).

22. Burton, *supra* note 16, at 362 (citing Freeman, *Legitimizing Racial Discrimination Through Anti Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 383).

23. R. UNGER, *supra* note 18, at 24.

24. *See, e.g.*, J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Anchor Book ed. 1973); T. HOBBES, LEVIATHAN (M. Oakeshott rev. ed. 1947); J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED ETC. (London 1968).

25. Tushnet, *supra* note 15.

the law was simply an attempt to achieve protection of contract rights and property rights.

CLS philosophers have now moved beyond the Positivists and Realists. They maintain that if the law is what those in power say it is, then their prescription for resolving the wrongs that occur in society is to make sure that no one gets too powerful; that all fixed orders of society should be loosened; that all life experiences should be freed from the tyranny of abstract social categories; and that the social world should be broken down as much as possible, with a continued remaking and reimagining of the structure of social life. In other words, make sure that no one has the ultimate power to make the ultimate law to tyrannically protect him or herself and his or her powerful position.

CLS thinkers do not accept the proposition that there is "something out there" that can be discovered in order to understand the meaning of justice. There is no such thing as an abstract, definable concept of justice. Rather, all that really exists is the power to shape and control society, and the CLS philosophers want to make certain that no one group or person can design a system of law which continuously protects that power. They maintain that true democratic justice can best be achieved in this fashion.

C. Some Comparisons

The CLS philosophers argue that everything boils down to money. All law is interpreted through the value system set up by the economics system.[26] They argue that social values are actually so abstract that they can justify any decision. But in fact, the real social value today is increasing society's wealth. The CLS philosopher "insists that the social values, on which there may well be agreement, are not valuable in some abstract and timeless sense. They are values because our society is structured to produce in its members just that sense of values."[27] In other words, a CLS philosopher argues that one "cannot think about altering legal rules to conform to a society's values when those

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26. *See* Freeman, *A Critical Legal Look at Corporate Practice*, 37 J. LEGAL EDUC. 315, 318 (1987). "The practice of law at 'the top of the profession' is seriously and intimately connected with the distribution of economic and political power in our world." *Id.*

27. Tushnet, *supra* note 15, at 509.

values are constructed partly on the basis of the legal rules themselves."[28]

The CLS arguments are unsettling. If their argument about social construction of values is correct, then they "put into question the deepest values of a society: Because there is nothing timeless about those values, we might simply decide to abandon them."[29]

In contrast, the Traditionalist philosopher thinks that there are deeply rooted values that are immutable. The philosopher reasons that all people who think deeply enough will come to the conclusion that certain values exist outside the laws and rules and that the laws and rules really should conform to those values. The Traditionalist philosopher thinks that law does matter and that judges who interpret the law and apply it should also apply a value system based on more than economics and the social influence of economics as reflected through law.

However, one CLS philosopher, Professor Mark Tushnet, argues:

> [I]n a reasonably well developed system of legal rules, talented lawyers could produce arguments, resting on accepted premises of this system, that supported both the result and its opposite, and that those arguments would satisfy any demands that might be made for internal coherence or consistency with prior decisions.[30]

On the other hand, Judge Alvin B. Rubin, a Traditionalist judge on the United States Court of Appeals for the Fifth Circuit, argues in answer to Professor Mark Tushnet's argument that judges do give attention to doctrine.[31] Judge Rubin states, "My conclusions are that legal doctrine is a real force, judges follow it, and they decide all but a small fraction of the cases that come before them in accordance with what they perceive to be the controlling legal rules."[32] Judge Rubin maintains that "[d]ecision by consensus according to rule appears to be the practice in [most] federal circuits."[33] He argues further that

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28. *Id.*

29. *Id.*

30. Tushnet & Jaff, *Critical Legal Studies and Criminal Procedure*, 35 CATH. U. L. REV. 361, 361 (1986).

31. Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. LEGAL EDUC. 307, 309 (1987).

32. *Id.* at 307-08.

33. *Id.* at 312.

> [j]udges' decisions should be reasonably consistent and coherent. When precedents and prior doctrine are disregarded or discarded, judges should be able to explain the reasons for doing so. Some of the explanation may lie in a conflicting body of doctrine. Some may be found in social or economic policy. The cases in which this is done may be the great cases, the textbook cases for the next edition of 'Cases and Materials.' In any court over any term, there are a few. The rest, the cases society lives by almost all of the time, are decided by doctrine. Most of that doctrine comes directly or indirectly from legislation or from the legislature's inaction. And, in a democratic society that is the way it should be. If it were not, then a government by law would be impossible.[34]

In other words, Judge Rubin argues, the expectation is that "judges will enforce [expected rights] according to rules, the rules we know as law."[35]

The Traditionalist judge thinks that all law must be premised on the concept of justice, and that justice is definable outside the law itself and can be used as a standard to measure any law. If the law is unjust, then the law must fall. In the United States, the Traditionalist judge will use the constitutional command to "establish justice" as the mandate to override the law if the law is unjust. The Traditionalist judge believes that justice can be defined, the same as Aristotle believed that justice could be defined. Most United States judges would agree with Aristotle when he wrote: "Justice is the bond of men in states, for the administration of justice, which is the determination of what is just, is the principle of order in political society."[36]

Professor Paul D. Carrington of Duke University Law School is a Traditionalist philosopher. In speaking of lawyers and the CLS Movement he says:

> There are many familiar reasons why lawyers may disbelieve in their own professionalism. Lawyers everywhere and always must have known that the law cannot deliver all that is promised in its behalf. For the law to be applied, facts must be known, and facts can be very elusive. The law is itself obscure in many of its specific applications; its meaning must be found if at all in the conduct of officials. But officials are people and

34. *Id.* at 314.
35. *Id.*
36. ARISTOTLE, *supra* note 8, at 289.

> that means they are vulnerable to the attractions of self-aggrandizement, and to other influences. Even if they are altruistic, they may use power to pursue social and political agendas not embodied in the law. So law will reflect the tastes of that class of persons from whom the officials are drawn. And, if this be so, then perhaps as some of our colleagues may be heard to say, law is a mere deception by which the powerful weaken the resistance of the powerless. Thus, [speaking to the conclusion of the CLS philosopher,] enforcement and even obedience may be morally degenerate.[37]

He continues that

> [a] lawyer who succumbs to legal nihilism faces a far greater danger than mere professional incompetence. He must contemplate the dreadful reality of government by cunning and a society in which the only right is might. Such a fright can sustain belief in many that law is at least possible and must matter.[38]

In fact, Professor Carrington suggests that law professors who espouse the CLS philosophy

> have a substantial ethical problem as teachers of professional law students. The nihilist teacher threatens to rob his or her students of the courage to act on such professional judgment as they may have acquired. Teaching cynicism may, and perhaps probably does, result in the learning of the skills of corruption: bribery and intimidation. In an honest effort to proclaim a need for revolution, nihilist teachers are more likely to train crooks than radicals. If this risk is correctly appraised, the nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy.[39]

Professor Carrington says that there is no shame in the romantic innocence with which to approach the ultimate issue in the profession of law—there is some meaning to the idea of justice.[40] He says, "[f]or safe rivers, the public needs loving pilots. To limit might, the public needs lawyers who acclaim the hope and expectation that rights [justice] will be enforced."[41]

The question then is whether the Traditionalists are simply

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37. Carrington, *Of Law and the River*, 34 J. OF LEGAL EDUC. 222, 226-27 (1984) (citing Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, *passim* (1983)).

38. *Id.* at 227.

39. *Id.*

40. *Id.* at 227-28.

41. *Id.* at 228.

dreamers who refuse to look at reality, or whether the CLS philosophers are nihilists who refuse to accept that there are honest values such as justice out there which, like stars, may never be visited but are nevertheless valid guideposts for which to aim. Does it mean that while justice may never be fully understood or defined the journey toward justice is a worthy venture, or are the CLS philosophers simply looking at reality and telling a hard truth which most of us don't want to hear? Do the CLS thinkers have an ethical obligation to leave law schools and the bench because of the havoc they may cause to the students of law, practitioners of law, and ultimately the public when they deny that there is such a thing as abstract justice?

I have discussed some of the historical and philosophical foundations of the concept of justice as seen in today's modern world. Now let's look at some case law and ask how you, motivated by your own philosophy of interpretation, would decide these cases. They are difficult cases. Compare your decision with that of the judges who decided them. As you read through the facts of the cases, consider how the CLS philosopher judge would analyze the cases. Compare the analysis with that of the Traditionalist judge.

II. Three Difficult Cases

Remember, if you operate as a Traditionalist judge, you probably reason that: (1) there are such things as authoritative rules and precedents; (2) there are ideal purposes, policies, and principles behind the rules and precedents; and (3) there are conceptions of possible and desirable human associations which ought to exist in different areas of social practice.

Whereas, if you are a CLS philosopher judge, you think the following: (1) There should be a "cumulative loosening of the fixed order of society. . . . In this way, no part of the social world can lie secluded from destabilizing struggle."[42] (2) "[L]ife chances and life experiences of the individual should be increasingly freed from the tyranny of abstract social categories. [The individual] should not remain the puppet of his place . . . ."[43] (3) The social world "should be broken down as much as possi-

42. R. Unger, *supra* note 18, at 23.
43. *Id.*

ble; [everyday existence should include] the active power to remake [and] reimagine the structure of social life . . . ."[44]

Some conception of law, justice, and desirable relation to society will necessarily follow your choice of social paradigm.[45] Assume for a moment that both the Traditionalist philosopher and the CLS philosopher agree with David Luban, a research associate at the Center for Philosophy and Public Policy and a professor at the University of Maryland School of Law, when he says, "The great symposium in the law schools must take the *practice of justice* as its theme."[46] Assume also that both schools of philosophy want justice through its own theory of law. How would they arrive at a just result applying their theories to these three difficult cases? You should first decide to which school of thought you belong. Then read the facts of each case and decide how you would reason to a just result through your jurisprudence. Then compare your decision with the opposing philosophy. Finally, read on to see what the judge(s) did in the actual case.

A. *The Case of the Child Scalded by a Steam Vaporizer:* McCormack v. Hankscraft Co., Inc.[47]

The McCormacks bought a vaporizer manufactured by the Hankscraft Company. Mr. and Mrs. McCormack carefully read the instructions included with the vaporizer. The vaporizer was used from time to time for the young children when they were ill. The vaporizer was often used with the children throughout the night.

One night, the vaporizer was placed on a stool and put in use for the benefit of three year old Andrea McCormack. Later during the night, Andrea somehow tipped the vaporizer as she got up in the night to go to the bathroom. The scalding water spilled onto Andrea, causing severe burns to over thirty percent of her body. She was hospitalized for 74 days and was placed in the Mayo Clinic for an additional 102 days. Andrea's injuries at the time of the trial included scar tissue on her chest, stomach,

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44. *Id.*

45. A "paradigm" is an example, model, or pattern. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1770 (2d ed. 1951).

46. Luban, *Against Autarky*, 34 J. LEGAL EDUC. 176, 189 (1984) (emphasis in original).

47. 278 Minn. 322, 154 N.W.2d 488 (1967).

legs, arms, and neck, restricted head movement, and irregular posture. This damage was largely permanent.

The instructions provided by Hankscraft, the manufacturer, did not tell of the scalding temperatures reached in the vaporizer nor did they disclose the dangers presented by an accidental upset of the unit. Rather, the vaporizer was represented as "safe" and "practically foolproof."[48]

Hankscraft claimed that the plaintiff was contributorily negligent in that anyone working with the vaporizer should have been aware of the scalding water generated by the unit and the consequent danger.

Assume the law in Minnesota at the time was that if a plaintiff is in any way contributorily negligent, then the plaintiff cannot recover for injuries from a negligent defendant. How would you decide this case to achieve justice? If you were a CLS philosopher judge, would you decide it any differently than if you were a Traditionalist judge? Let's apply the respective theories of law to this case to see if the result would differ.

Assume that you are a CLS philosopher judge. The fixed order of society in Minnesota in the 1960's (the law) was that a person who was contributorily negligent could not recover for injuries even if the defendant was negligent. But fixed order is always ripe for change as far as you are concerned. You would probably deem the fixed law to be an undesirable mode of human association. Why should a negligent manufacturer escape liability even if the injured person was negligent, you would ask. You would probably also wish to free Andrea McCormack from the tyranny of this abstract social category called contributory negligence, especially since her life chances and life experiences were so catastrophic at such a young age. You would not be afraid to break down the social order and reimagine the structure of a new social life. In fact, you would do this as an everyday part of your existence as a judge. Consequently, because the manufacturer had more power and was probably instrumental in designing a system of law which allowed it to escape liability whenever someone else was contributorily negligent, you would break this "pattern of tyranny." You would probably rule for Andrea McCormack. But how would you write your decision? Would you incorporate the above analysis in your written decision? Would the majority of Americans accept such an analysis?

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48. *McCormack*, 278 Minn. at 330, 154 N.W.2d at 495.

If you were a Traditionalist judge, what would you do and what would be your method of analysis? Remember, in your theory and style of legal doctrine, authoritative rules and precedents are important. You simply cannot willy-nilly throw out and disregard the fact that contributory negligence is an accepted doctrine in the law. When you explored the ideal purposes, policies, and principles behind the doctrine of contributory negligence, you would discover that the lawmakers felt it was improper to allow someone who has been negligent to recover for his or her injuries. "But for" the negligence of the injured person, the injury may not have occurred in the first place.

But you would still face the question of what is just! Your own conceptions of possible and desirable human associations would probably be offended if you let the Hankscraft Company off the hook. Everything about this case grabs at your heart. You want the little girl and her parents to win this case. But how would you go about rationalizing and then explaining your decision to society? You would need to overturn past decisions in order to rule in her favor. When you did this, what would you say? Would you simply say "I am ruling in her favor because she was injured and whenever anyone is injured, she should be compensated for her injury"? If so, what would be the social implications behind such a ruling? Maybe you would say we live in a society which requires that anytime a manufacturer of a product sells that product, and an injury results from the product, the manufacturer should be liable regardless of negligence of the buyer. Would you look out in the ethereal world somewhere to find what the meaning of justice is and then rationalize and explain your decision based on why your policy really is just and the old law is unjust?

What did the Minnesota Supreme Court do? The Court held that the design of the product was unsafe. Because of the defective design, the producer of the product was held liable for the injuries that occurred because of the design defect. It did not matter whether the product was used in a negligent fashion by the parents. In other words, the concept of "products liability" was born in Minnesota. This was the first products liability case in Minnesota and has become a landmark case. The court designed a new common law doctrine called "products liability." It did not even analyze the situation in terms of contributory negligence. It simply said that from then on, including that case, any product which has a design defect and causes injury, the

producer of the product would be liable for the injuries. Which philosophy of justice, do you think, motivated the Minnesota Supreme Court: the Traditional view or the CLS view?

B. The Case of Separate But Equal is Inherently Unequal: Brown v. Board of Education[49]

In 1896, a case came before the United States Supreme Court arguing that the law passed by the General Assembly of the State of Louisiana providing for separate railway carriages for "white" and "colored" races was unconstitutional. The law provided that all railways in the state " 'shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations . . . .' "[50] The United States Supreme Court held that the

> object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.[51]

Ultimately the Court concluded:

> If the two races are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.[52]

But fifty-eight years later, in 1954, the case of *Brown v. Board of Education* was before the United States Supreme Court. In *Brown*, the State of Kansas maintained "separate but equal" public schools for the races. Part of the findings of fact in the *Brown* case, which the Court accepted, was: "[T]here are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings,

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49. 347 U.S. 483 (1954).
50. Plessy v. Ferguson, 163 U.S. 537, 540 (1896).
51. *Id.* at 544.
52. *Id.* at 551.

curricula, qualifications and salaries of teachers, and other 'tangible' factors."[53] So in the *Brown* case, the Court accepted as fact that the schools really were equal though separate.

What would you as a judge do in this case? If you were motivated as a Traditionalist judge, how would you decide and how would you rationalize your decision? If you were a CLS philosopher judge, how would you decide and how would you rationalize your decision?

Again, remember, if you are a Traditionalist judge, your style of legal doctrine is to accept authoritative rules and legal precedents. Without question, *Plessy v. Ferguson* had already decided that separate but equal is legal and constitutional, that social equality can only come about through voluntary consent of the individuals, and that "[l]egislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences."[54] Remember, also, that you will look to the ideal purposes, policies and principles behind the law. Here is your opening. You might argue that the Court was simply wrong in its conception of the ideal purposes, policies, and principles behind such separate but equal laws. In applying the concept of justice, you would probably conclude that from the time of 1896 to the time of 1954, the understanding of the principles of justice and equality had changed. Further, you would probably conclude that within the conception of possible and desirable human associations to be enacted in this area of social practice, separate but equal is a mistake. Thus, you would likely conclude that justice and equality require a new and advanced understanding of the concept "separate but equal."

If you are a CLS philosopher judge, what would you do? Remember, again, your legal theory is to loosen the fixed order of society. You want the individual to be increasingly free from the tyranny of abstract social categories. You are not afraid to break down the social world and to remake and reimagine the structure of social life. This case is probably easy for you! But how would you write your decision to convince the people that you are doing justice?

What did the Court do? It said, "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently une-

53. Brown v. Board of Education, 347 U.S. 483, 492 (1954).

54. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

qual."[55] In other words, the Court determined that it was wrong almost sixty years before, at least in regard to separate but equal in education. The Court did not rationalize its decision very well. It simply concluded that separate but equal is inherently unequal in education. Is this the rationale of the Traditional view, or is it a rationale of the CLS view? Regarding result, it probably doesn't matter which theory of legal interpretation and which rationalization was used. Probably both schools of thinkers would achieve the same result. But does it matter to society in the short and long run which theory of judicial interpretation is used?

C. The Lawyer Who Discovered the Dead Body: People v. Belge[56]

In the summer of 1973, the State of New York charged Robert F. Garrow, Jr. for murder. He was assigned two New York attorneys, Frank H. Armani and Francis R. Belge. Garrow revealed to his lawyers three other murders which he had committed. One of these was in Onondaga County, New York. Mr. Belge investigated what Garrow had told him and located the body of Alicia Hauck in the Oakwood Cemetery in Syracuse, New York. Mr. Belge did not disclose this discovery to the authorities, but it became public during Garrow's trial.[57]

The public was outraged. The District Attorney of Onondaga County caused the Grand Jury of Onondaga County to conduct a thorough investigation. The grand jury indicted Mr. Belge, the attorney for Mr. Garrow, accusing him of having violated a public health law which requires the decent burial of the dead and also requires anyone knowing of the death of a person without medical attendance to report the same to the proper authorities. The lawyer alleged that a confidential privileged communication existed between him and Mr. Garrow which excused the attorney from making full disclosure to the authorities.

How would you deal with this ethical dilemma which results from the conflict between the obligation to the lawyer's client and to the legal system and to society? If you were a CLS philosopher judge, what would you do? How would you rationalize

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55. *Brown*, 347 U.S. at 495.

56. 83 Misc. 2d 186, 372 N.Y.S.2d 798 (1975).

57. The three murders were brought before the jury by defense counsel to establish an affirmative defense of insanity.

your decision? If you were a Traditionalist judge, what would you do?

One last time, remember that if you were a CLS philosopher judge, you would not be afraid to loosen the fixed order of society. You would also want to free the individual from the tyranny of any abstract social category. You would not be afraid to break down as much as possible the structure of social life and to remake and reimagine new structure as part of your everyday existence. How then, would you decide this case if that was your dominant style of legal interpretation? Would you say that the fixed order of society has been that confidences between clients and lawyers cannot be broken? Would you remember that traditionally the rules have said that what is said between a client and lawyer, a patient and doctor, a penitent and minister must be held in confidence by those professionals unless the professional is released from the confidence by the individual?

Just because that is the fixed order, however, would not stop you. You would feel free to enact a new scheme in order to design a new mode of human association. Perhaps you would conclude that Mr. Garrow must be freed from the tyranny of any abstract social category. But in what category is Mr. Garrow? For that matter, in what category is Mr. Belge? Is there a tyranny of lawyers, doctors, and ministers who have protections that no one else has? Should that tyranny be broken? Is it better to remake and reimagine a different structure of social life as part of the everyday existence and to do away with confidentiality in these three areas? How is your CLS philosophy holding up in analyzing this real problem?

If you were a Traditionalist judge, again let me remind you that your dominant style of legal doctrine is to respect authoritative rules and precedents, to look behind the purposes, policies, and principles and see what the ideal is, and to conceive what are possible and desirable human associations in the areas of social practice. Would you look to the definition of justice in your attempt to decide what is right? If there is an abstract ideal called justice, does it help to decide what to do in this case? Does the justice system in the adversary setting mean that a trial is a search for truth? Or is a trial only partly a search for truth? Are there other ideals such as confidentiality, the presumption of innocence, and rules of evidence which frequently keep out absolute truth but nevertheless achieve justice?

What did the New York trial court do?

In the case at bar we must weigh the importance of the general privilege of confidentiality in the performance of the defendant's duties as an attorney, against the inroads of such a privilege, on the fair administration of criminal justice as well as the heart tearing that went on in the victim's family by reason of their uncertainty as to the whereabouts of Alicia Hauck. In this type situation the [c]ourt must balance the rights of the individual against the rights of society as a whole. There is no question but Attorney Belge's failure to bring to the attention of the authorities the whereabouts of Alicia Hauck when he first verified it, prevented bringing Garrow to the immediate bar of justice for this particular murder. This was in a sense, obstruction of justice. This duty, I am sure, loomed large in the mind of Attorney Belge. However, against this was the Fifth Amendment right of his client, Garrow, not to incriminate himself. If the Grand Jury had returned an indictment charging Mr. Belge with obstruction of justice under a proper statute, the work of this [c]ourt would have been much more difficult than it is.

There must always be a conflict between the obstruction of the administration of criminal justice and the preservation of the right against self-incrimination which permeates the mind of the attorney as the alter ego of his client. But that is not the situation before this [c]ourt. We have the Fifth Amendment right, derived from the constitution, on the one hand, as against the trivia of a pseudo-criminal statute on the other, which has seldom been brought into play. Clearly the latter is completely out of focus when placed alongside the client-attorney privilege. An examination of the grand jury testimony sheds little light on their reasoning. The testimony of Mr. Armani added nothing new to the facts as already presented to the Grand Jury. He and Mr. Belge were co-counsel. Both were answerable to the canons of professional ethics. The Grand Jury chose to indict one and not the other. It appears as if that body were grasping at straws.

It is the decision of this [c]ourt that Francis R. Belge conducted himself as an officer of the [c]ourt with all the zeal at his command to protect the constitutional rights of his client. Both on the grounds of a privileged communication and in the interests of justice the Indictment is dismissed.[58]

Which philosophy was this judge following?

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58. People v. Belge, 83 Misc. 2d 186, 190, 372 N.Y.S.2d 798, 802-803 (1975).

III. What Is a Judge to Do?

Professor Duncan Kennedy, one of the founders of the CLS Movement, answers the question, "What is a judge to do?," this way: "My answer to this question is unhelpful: it depends on the circumstances."[59] Professor Kennedy lays out five routes that a judge who follows the CLS philosophy can take. The judge can:

> 1. *Go along with the law.* In spite of my conviction that social justice requires me to deny the [law], I [follow] it, along with an opinion denouncing the law and urging reform. . . . A crucial question is how I explain my obedience, that is, my willingness to act as the instrument of injustice.
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> 2. *Withdraw from the case.* I neither [follow the law] nor deny it. I withdraw, explaining that I think the law is unjust and that my feelings against it make it inappropriate for me to preside and repugnant to me to be involved in administering this regime. A crucial question is how I justify begging off while insisting that someone else do the dirty work, if I intend to stick around for the more attractive assignments.
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> 3. *Decide against the [law] on the basis of what the law should be.* I deny the [law], honestly explaining my inability to come up with a plausible legal argument against it. . . . Accept what consequences my bureaucratic superiors and my colleagues and peers decide to inflict (highly indeterminate). I appeal to them to accept my outcome as the correct one in this and future cases, thereby changing the law. A crucial question is who authorized me to take the law into my own hands.
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> 4. *Decide against the [law] on the basis of an implausible legal argument.* Maybe it will look good to others, even though I think it stinks; I can never be sure in advance. Maybe it will turn out in my own hindsight to be a better argument than I thought. But what about the dishonesty of bad faith argument?
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> 5. *Decide against the [law] on the basis of fact findings I know to be false.* As the trial judge, I decide to pretend to believe an account of the facts of the lie-in that I know to be false and deny the injunction on that basis. This is obviously an extreme measure.[60]

The Traditionalist judge has some of the same problems

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59. Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. Legal Educ. 518, 558 (1986).

60. *Id.* at 558-559.

that the CLS judge has in interpreting the law. According to one commentator, he or she can:

(1) *Apply the law.* "Assuming a moral dilemma . . . [applying the law] is one resolution of the problem, but hardly a moral one."[61] Let's go back to the moral South African judge I started with in this paper. Most judges in South Africa, like most judges in the United States during slavery, would probably resolve the dilemma by applying the law. "Judges, after all, have not only been trained in the law; they have come to live the law. It is understandably hard for a judge to deviate from the dictates even of unjust law."[62] Of course, the judge could use some procedural tricks. But "[e]vading the issue through docket control or procedural niceties only delays the ultimate application of unjust law."[63]

(2) *Resign.* Resignation has impeccable theoretical credentials.

> Gandhi called on the judge who was condemning him to obey the law and apply the maximum possible sentence, or resign. Ghandi, of course, joined Socrates in accepting the penalty bestowed by positive law. . . .
>
> The practical problem with resignation is that it is probably going to be an ineffective means of helping those victimized by unjust laws. . . . If the virtue of resignation is that it avoids both the violation of the judicial oath and the application of oppressive law, the vice is that it probably will be ineffective, because other judges will apply that law.[64]

(3) *Protest or be civilly disobedient.* "Common to both protest and outright civil disobedience is the factor of risk. Whether one protests in court or out of court, or engages in more radical activities such as civil disobedience, sanctions can range from reversal on appeal to criminal charges on contempt or more serious offenses."[65] "Protest is . . . substantively limited. Unless coupled with a just result, [individual] protest achieves little."[66]

(4) *Apply conscience through the judicial lie.* Some argue that "applying conscience through the judicial lie is a moral use

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61. Pitts, *supra* note 2, at 85.

62. *Id.*

63. *Id.* at 86.

64. *Id.* at 86-87 (citing Gandhi, *A Plea for the Severest Penalty Upon His Conviction for Sedition*, in THE LAW AS LITERATURE 459, 465 (E. London ed. 1960)).

65. Pitts, *supra* note 2, at 88.

66. *Id.* at 89.

of legal power against immoral law. . . . Although the judicial lie is also a form of protest, it is less visible and thus more likely to be effective. [Legal philosopher Ronald Dworkin] endorsed the lie as the most attractive solution to the moral-formal dilemma."[67] The problem, of course, is while trying to infuse morality into an unjust legal system, the results are achieved by a lie which clearly has an unsatisfactory theoretical dimension to it.[68]

(5) *Change the law through interpretation.* For the Traditional Western philosopher judge, changing the law through interpretation is the most satisfying way to decide a case which involves an immoral law. This allows the judge to "change the unjust law and make a new, just law."[69] While the Traditionalist judge is very hesitant to declare any law to be unjust, nevertheless he or she feels empowered to interpret the law. For the Traditionalist judge "[i]nterpretation by judges does not exceed the legitimate limits of the judicial function; it is the essence of that function."[70] Not only judging, but the law itself is interpretation. Thus, a moral judge, seeing that a law is immoral, can ask what "ought to be." The judge then can look to the values of the society.

Obviously, justice is a value to any civilized society as far as the Traditionalist judge is concerned. If the foundation documents of the society, such as the constitution, are similar to the United States Constitution, with a call to "establish justice," then the judge has simply to determine what justice is. Since the Traditionalist judge believes that justice can be defined and understood, then the judge compares the law with justice. If the law does not fit the meaning of justice, then the law must fall as being in violation of the mandate to "establish justice." The same result, of course, could come under the "lying" theory, but it is more satisfying to the moral Traditionalist judge to interpret the law on a moral basis.

The rhetoric of this type of interpretation provides great flexibility for implementing justice. But the problem lies in the definition of justice. Whose definition is used? What if the definition and the value of justice has been bastardized as a "tool of

67. *Id.*
68. *Id.* at 89-90.
69. *Id.* at 90.
70. *Id.*

tyranny by the power mongers?" Or will all moral judges thinking deeply enough arrive at the same basic definition of justice?

IV. Conclusion

Modern American legal philosophy struggles with the dilemma between justice and law. How to achieve justice through law, how to achieve just laws, and how to interpret laws in a just manner are arguments interwoven throughout the development of modern American legal philosophy. What role do precedents and rules play on judges in decisionmaking? How do judges interpret a law and what is this overlay called justice? Is there, in fact, such an overlay and can it be found, defined, and applied?

The CLS school of thought says that in modern America "our society is rotten through and through."[71] Professor Kennedy's proposals for reforming and interpreting law are "to dismantle the existing social system, in the hope, though not necessarily with the expectation, that something better would follow."[72]

The Traditionalist judge believes that justice is a definable concept and must always be applied against any law. Law, in fact, must always be interpreted to achieve justice. Justice is not only a concept which can be defined, but a method of interpretation of any law which must overlay the law as it is being interpreted.

The CLS philosopher judge says there is no such thing as justice that is "out there" somewhere. There is, however, a way to continually redefine social structure so that tyranny cannot exist. The CLS philosopher judge sees that in order to have a proper society, the interpreter of cases must make it a dominant style of legal doctrine to continually loosen the fixed order of society to prevent tyranny of abstract social categories over the individual and to break down the social world and remake and reimagine as an everyday part of his interpretation.

The Traditionalist judge is shocked by this style of legal doctrine and feels duty-bound to adhere to the dominant style of placing authority in rules and precedents, striving to achieve ideal purposes, policies and principles behind those rules and

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71. Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. Legal Educ. 591, 611 (1982).

72. Sandalow, *The Moral Responsibility of Law Schools*, 34 J. Legal Educ. 163, 167 (1984).

precedents, and only as a last resort, overthrowing those rules and precedents and only when it can be clearly shown that the law cannot be aligned with the ideals of justice, liberty, and equality. But the problem still exists for the Traditionalist judge to define justice and then interpret and apply it to the specific case.

The CLS philosopher judge would say that the Traditionalist judge is dreaming when he or she says justice can be defined. Justice will really be achieved only when the judge is honest and admits that what exists is not what the judge wishes it were and then changes it. The CLS philosopher judge would ask the Traditionalist judge to look in the dark places and be willing to shed light on what he or she sees there. The CLS philosopher judge says that when light is shined on the system, it is seen to be rotten through and through and it will not be changed through some pie-in-the-sky pink cloud wish that justice be achieved. The only way, say the CLS thinkers, that democratic justice might come about is to adopt the dominant style of legal doctrine that they propose.

If the CLS philosophy is adopted, says Professor Roberto Unger, it will lead to "a social world that can better do justice to a being whose most remarkable quality is precisely the power to overcome and revise, with time, every social or mental structure in which he moves."[73]

Needless to say, the dominant style of legal doctrine which our judges and members of society adopt will make a difference both in our concept of justice and in the ways we attempt to achieve justice. The debate concerning the philosophical foundations of the concept of justice continues in American law schools, the courts, and ultimately, throughout the world.[74] Whichever view predominates will make a significant difference for our future.

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73. R. UNGER, *supra* note 18, at 23.

74. For example, consider the liberation theology movement and various revolutionary movements throughout Third World countries.