

# REVIEW ESSAY

## Legal Realism Now

LEGAL REALISM AT YALE: 1927-1960. By *Laura Kalman*. Chapel Hill and London: University of North Carolina Press 1986. Pp. xii, 314. \$35.00 cloth.

*Reviewed by Joseph William Singer*

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In a contextual type of analysis such as Socrates conducted, there may be clarification and enlightenment, but there are no final answers. The analysis may clarify meanings and truths as they arise in different linguistic contexts or in different human situations, but there are no final answers because there is nothing fixed or final about the contexts or situations that we encounter in actual life.

— Hans Meyerhoff<sup>1</sup>

More than any other time in history, mankind faces a crossroads. One path leads to despair and utter hopelessness. The other, to total extinction. Let us pray we have the wisdom to choose correctly.

— Woody Allen<sup>2</sup>

We are all legal realists now. Or are we? Laura Kalman ends her excellent history of legal realism at Yale by suggesting that legal realism failed. I have a different view. Legal realism has fundamentally altered our conceptions of legal reasoning and of the relationship between law and society. The legal realists were remarkably successful both in changing the terms of legal discourse and in undermining the idea of a self-regulating market system. All major current schools of thought are, in significant ways, products of legal realism. To some extent, we are all realists now.

Yet, if we are all realists, why are some of the insights of the realists so controversial? Why is it still so explosive to claim that law is a form of politics?<sup>3</sup> The answer is that the realists were unable to produce an

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1. Hans Meyerhoff, *From Socrates to Plato*, in *THE CRITICAL SPIRIT: ESSAYS IN HONOR OF HERBERT MARCUSE* 187, 200 (K. Wolf & B. Moore eds. 1967).

2. WOODY ALLEN, *My Speech to the Graduates*, in *SIDE EFFECTS* 57 (1980).

3. See Paul Carrington, *Of Law and the River*, 34 *J. LEGAL EDUC.* 222, 226 (1984) (“[L]awyers like pilots must be always distrustful of themselves, on guard against the risk of mistaking their own political or social preferences for those of the law”); Owen Fiss, *The Death of the Law?*, 72 *CORNELL L. REV.* 1, 12-13 (1986) (arguing that if Duncan Kennedy is right to claim that “all normative concepts are infected with an unresolvable conflict,” then “[e]verything

acceptable alternative to formalism that would enable judges and lawyers to engage in normative argument. Current debates about legal reasoning are best understood as attempts to answer the central question that the realists left unresolved: How can we engage in normative legal argument without either reverting to the formalism of the past or reducing all claims to the raw demands of political interest groups? This is a tough question to answer. It is so hard that judges and scholars often reassert central elements of formalist reasoning they had hoped to discard. Many scholars use a combination of realist and formalist arguments when discussing particular cases or offering decision procedures for deciding cases.<sup>4</sup> Does this mean that the realists went too far or does it mean that current thinkers have not pushed realism far enough?

I propose to comment on the legacy of legal realism today. I will address the question that Professor Kalman raises: to what extent are we all legal realists now? Part I presents a picture of legal realism in historical context. This description is derived in part from Professor Kalman's book; it also includes important aspects of legal realism that she neglects. In Part II, I explore how current theorists accept legal realism and how classical formalism creeps back into our discourse. In Part III, I describe some of the fundamental conflicts underlying current debates about legal theory. This exercise will reveal, in the midst of disagreement, some substantial points of commonality. My goal is to answer the question: what are we really disagreeing about? I hope neither to exaggerate, nor to understate, the extent of our disagreement. We need to know exactly what is at stake in our choice of paradigms for legal reasoning. In Part IV, I argue that it is essential for theorists with differing views of moral argument to communicate with each other. We have a mutual interest in sharing our images of social justice.

## I

### WHAT IS LEGAL REALISM?

#### A. *Kalman's Story: Legal Realism as Functionalism*

Professor Kalman describes legal realism as an approach to legal reasoning and education which comprises two major facets. First, it is a form of functionalism or instrumentalism. The original realists sought to understand legal rules in terms of their social consequences (p. 3). To better their understanding of how law functions in the real world, they attempted to unify law and the social sciences (pp. 17-18). They believed

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normative must go. There can never be a right answer in morals, just as certainly as there can never be a right answer in law."'). Also, see generally *Symposium on Legal Culture: Legal Education and the Spirit of Contemporary American Law*, 8 HARV. J.L. & PUB. POL'Y 225 (1985) (debate on the nature of legal theory).

4. See *infra* text accompanying notes 128-234.

that this knowledge would enable them to reform the legal system to achieve efficiency and social justice (pp. 17-18, 31).

Second, the realists proclaimed the uselessness of both legal rules and abstract concepts (pp. 3-4). Rules do not decide cases; they are merely tentative classifications of decisions reached, for the most part, on other grounds (pp. 5-7). They are, therefore, of limited use in predicting judicial decisions (pp. 4-5). Thus, the realists rebelled, to some extent, against Langdell's case method. They taught their students that it was impossible to abstract general principles from cases and deduce specific rules from those principles. Nor could one determine in an objective fashion "the rule the case stands for" and then apply that rule in a determinate fashion to other fact situations (p. 17). Rather, according to Kalman, the realists emphasized the role of "idiosyncrasy" in judicial decisionmaking (pp. 6-7). At the same time, they hoped to make judicial decisionmaking more predictable by focusing on both the specific facts of cases and social reality in general, rather than on legal doctrine. They sought to organize judicial decisions around situations rather than legal concepts (pp. 6, 29-30, 70). By close attention to facts and to conventions of social institutions rather than abstract concepts, they hoped to discover what really animated judicial decisions (pp. 33-34). By making connections between law and actual life experience, they sought to make law less abstract and link it more closely to social reality (p. 70). They believed that this would enable them both to predict judicial decisions more accurately and to promote just social reforms (pp. 8-9, 21, 131).

Kalman's description of legal realism is substantially correct, but it is also somewhat misleading.<sup>5</sup> She oversimplifies the realists' views on legal rules, judicial decisionmaking, and legal reasoning. Kalman argues, for example, that the realists believed that judicial decisions were "idiosyncratic" because they could not be explained as objective applications of preexisting rules (pp. 20, 42, 79). At the same time, the realists hoped to make law both more predictable and better suited to achieving social goals. Kalman views this combination of commitments as paradoxical: "If decision making was inherently idiosyncratic," she reasons, "what could they gain by taking conceptualistically defined legal rules and redefining them functionally" (p. 42)? This seeming contradiction is based on Kalman's willingness to accept the view that the realists believed that it

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5. Kalman, however, does not attempt to give an exhaustive discussion of legal realism as an intellectual movement. Rather, her discussion of legal realism as a movement in legal thought focuses on the institutional settings at Yale and Harvard where some of the legal realists were based. Thus, most of her book deals with internal struggles among the Harvard and Yale professors over the proper goals and contours of legal scholarship and the proper methods of legal education, including what to include in casebooks and what to do in the classroom. Her book is not primarily an intellectual history nor a work on the development of legal ideas as much as it is about people at particular places having particular arguments and struggles to run their institutions.

was impossible to generalize about judicial decisions because every judge was different and only "the personalities of judges" could explain their decisions (p. 164).<sup>6</sup> This view—summarized as "what they ate for breakfast"—is a caricature of what most of the realists thought.

The legal realists did argue that lawyers could not use legal rules alone to predict judicial decisions. They gave at least three separate reasons for this claim.<sup>7</sup> First, they argued that legal rules were often vague and therefore ambiguous. Since these rules often contained abstract and contestable concepts, such as "reasonableness," "duress," "title," or "privity of estate," they were subject to broad interpretation. Reasonable persons could disagree about what these concepts meant; thus judges could not apply them mechanically.<sup>8</sup> Second, the realists argued that judges could not determine, in a nondiscretionary way, the holdings of decided cases. Any case could be read in at least two ways: it could be read broadly to establish a general rule applicable to a wide range of situations, or it could be read narrowly to apply only to the specific facts of the case.<sup>9</sup> Third, the realists argued that, because of the indeterminacy of abstract concepts and the manipulability of precedent, it was almost always possible to appeal to competing and contradictory rules to decide any interesting contested case.<sup>10</sup>

The realists did not believe, however, that the indeterminacy of legal rules meant that all generalizations are meaningless and that decisions are controlled only by the psychological make-up of the judge. Social context, the facts of the case, judges' ideologies, and professional consensus critically influence individual judgments and patterns of decisions over time. The realists felt that study of such factors could improve pre-

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6. She attributes this view to Jerome Frank and emphasizes his importance, calling him "the father of legal realism" (p. 164). In my view, Frank was a peripheral figure in legal realism; his emphasis on individual psychology as a way to explain judicial decisions and his preoccupation with Freudianism were not adopted by other realists, as Kalman herself recognizes (pp. 18-19). As central figures, I would choose such scholars as Morris and Felix Cohen, Robert Hale, Walter Wheeler Cook, Leon Green, and Karl Llewellyn. *See infra* note 40.

7. *See* Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 208-09 (1986).

8. *Id.* at 208; Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809-21, 838-42 (1935).

9. Altman, *supra* note 7, at 208 (explaining that one could not mechanically distinguish holding from dictum in judicial opinions); KARL LLEWELLYN, *THE BRAMBLE BUSH* 73-76 (Oceana Edition 1960) (originally published in 1930).

10. As Altman explains:

Depending upon how a judge would read the holdings in the cases deemed to be precedents, she would extract different rules of law capable of generating conflicting outcomes in the cases before her. In the common-law system, it was left undetermined as to which rules, of a number of incompatible rules, were to govern a case.

Altman, *supra* note 7, at 209.

dictability of decisions.<sup>11</sup> Moreover, they sought to develop new kinds of general rules that would be useful in predicting legal outcomes and in shaping the law better to serve the needs of society. One goal of realism was to make rules more specific, for example, by creating different rules for contracts between merchants and contracts with consumers (p. 53).<sup>12</sup> Another way was to replace formalistic deduction of consequences from abstract concepts with explicit policy, moral, and institutional analysis (pp. 176-81). The realists thought that restructuring law and legal reasoning along these lines would both make the legal system more predictable and make the rules better conform to social needs.<sup>13</sup>

Kalman also oversimplifies when she argues that some realists viewed judicial opinions as nothing but post hoc rationalizations (pp. 6-7).<sup>14</sup> Joseph Hutcheson had argued that judges decide cases based on "hunches" and then wrote opinions to justify those hunches (p. 6). Kalman views this characterization of judicial decisionmaking as an attack on the validity and importance of legal rules. "Legal realists, . . . in their quest to lessen faith in legal rules often seemed to be saying that legal rules had no impact on the judicial process" (p. 107). And if legal rules have no impact on judicial decisionmaking, nothing prevents judges from acting arbitrarily and oppressively. "The realists' exposure of the judge as a human being who reasoned from the gut and manipulated legal rules to cover it up cast judicial subjectivity in a frightening light" (p. 121).

This vision of opinions as nothing but post hoc rationalizations seriously misrepresents what most legal realists argued. The most convincing legal realists argued that the reasoning demanded by judicial opinions substantially constrained judges. For example, John Dewey argued that judges must combine and balance two different goals. The first goal is to choose legal rules that have desirable social consequences.<sup>15</sup> To some extent, this goal is independent of precedent, and requires a type of reasoning characteristic of social science. The second goal is "to enable persons in planning their conduct to foresee the legal import of their acts"<sup>16</sup> by judicial decisions that "possess the maximum possible . . . stability and regularity."<sup>17</sup> To accomplish this, judges must announce their deci-

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11. KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 19-61, 121-32, 178-219 (1960).

12. See Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 503 (1987)(arguing that Llewellyn "had long advocated the separation of the law of nonmerchant sales").

13. "Further, appreciation of the particularities of a factual situation and the relevance of the social sciences would illuminate the issues of social policy legal problems raised" (p. 68).

14. "Freud's notion of the rationalization, which the realists so persistently used, demonstrated human idiosyncrasy in decision making" (p. 20).

15. John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 26 (1924).

16. *Id.* at 25.

17. *Id.* at 24.

sions in the form of rules that citizens can use to plan their conduct. They therefore write opinions that seek to elaborate general principles that can be applied in a regular way to new situations. Yet the judge may not have decided the case by applying these principles; instead, the judge searched for principles worthy to serve as underpinnings for the decision. Judges therefore use one form of reasoning to reach the decision and another, independent, form of reasoning to justify the decision. "The logic of exposition is different from that of search and inquiry."<sup>18</sup> But Dewey noted that these two types of reasoning must inform and constrain each other precisely to achieve the competing goals of regularity and predictability on the one hand, and promotion of justice and social welfare, on the other.<sup>19</sup>

Similarly, Karl Llewellyn argued that although precedent is highly manipulable, it substantially constrains judges in decisionmaking.<sup>20</sup> A judge can almost always construct arguments for a ruling "on *either* side of a new case."<sup>21</sup> At the same time, the judge must construct an argument based on existing principles of law, and "*there are not so many that can be built defensibly.*"<sup>22</sup> This is because it is not always possible to construct an argument that will be plausible—meaning persuasive—to other judges and lawyers familiar with the relevant precedents. To be persuasive, the argument must tie the proposed result to existing practice in a way that appears not to deviate from fundamental principles underlying prior law; this is determined partly by professional consensus, partly by community views, and partly by the substantive content and

18. *Id.*

19. *Id.* at 27. Professor Archibald Cox recently explained the dilemma of stare decisis: I think [stare decisis] is important. I think the court faces a dilemma. It's governed by an antinomy—two propositions that can't both stand if you carry either to its logical extreme. Judge Learned Hand expressed it better than anyone else I knew. He wrote once that the judge on the one hand in order to maintain his authority and power must look to authority, must wrap himself in the majesty of an overshadowing past if his decisions are to be effective. On the other hand, the law must meet the needs of men. And he must achieve some composition with the needs and, I add, the aspirations of his time. The great art of the truly great judge is reconciling those two and striking a balance in between.

*Interview with Archibald Cox: On Law, the Constitution, and the Supreme Court*, LAW. MONTHLY 3 (August 1987) (publication of Massachusetts Lawyers Weekly).

20. "Rules are not to control, but to guide decision." K. LLEWELLYN, *supra* note 11, at 179. Like Llewellyn, Felix Cohen argued that manipulability or indeterminacy of rules and precedent was compatible with both predictability and a belief that doctrine was more than a post-hoc rationalization of decisions reached on other grounds. "Every decision is a choice between different rules which logically fit all past decisions but logically dictate conflicting results in the instant case." FELIX COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* 35 (1933). Thus it is by reference to ethics that judges must choose between competing interpretations of precedent. *Id.* at 33-36. "[T]he instrumental value of law is simply its value in promoting the good life of those whom it affects . . . ." *Id.* at 42. Ethical principles are not completely external to judicial decisions and precedent but instead, substantially inform the rules themselves; legal doctrine thus elaborates ethical judgments made by courts in the course of particular disputes about right and wrong.

21. K. LLEWELLYN, *supra* note 9, at 69 (emphasis in original).

22. *Id.* at 73 (emphasis in original).



organization of existing law.<sup>23</sup> Thus, the fact that the judge must justify the decision by conventional legal arguments constrains her, not because the law itself logically requires the result, but because the argument for a change in the law must appear to fit with existing practice, and more importantly, the argument must persuade a particular audience that is likely to be conservative about such matters. Existing doctrine may therefore be very manipulable, ambiguous, and contradictory, yet still substantially constrain judges' decisions.<sup>24</sup>

Kalman not only oversimplifies legal realism, but also she underestimates its impact; this is a result of her defining the realists' goals too narrowly. For example, Kalman concludes wrongly that there was little change in legal education between 1920 and 1960 because law schools retained a focus on appellate cases,<sup>25</sup> and because most casebooks continued to be organized around legal doctrine rather than situation-types.<sup>26</sup> It is correct to conclude that in certain ways, little had changed by 1960. Even today, we still rely almost entirely on appellate decisions in law school classes. But it is erroneous to conclude that most professors are therefore conceptualists. In fact, the realists turned the case method on its head. Rather than using it as a tool for deducing grand principles from the cases, they used it to demonstrate the incoherence of the law. Kalman herself recognizes that realists could use the case method to show, not that cases were consistent applications of general principles, but that they were inconsistent applications of competing principles (p. 55).<sup>27</sup>

There is more than one way to teach a case. Some law professors continue to generate "the rule of the case" and seek to explain its determinate application to a range of hypothetical fact situations. It is also true, however, that many professors who say they use the case method actually employ a combination of methods of analysis, many of which

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23. K. LLEWELLYN, *supra* note 11, at 19, 59-61, 121-28, 213-19 (1960) (elaborating the factors that push toward "reasonable regularity" in judicial decisions).

24. See Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986) (explaining how legal doctrine constrains judges in deciding cases even though it is very manipulable).

25. Kalman quotes Dean Roscoe Pound, who proclaimed in 1928 that "[t]here has been no essential change in our teaching methods from those developed under Langdell and Ames" (p. 56). Kalman further argues: "Legal education at Harvard underwent no revolution between the 1920s and 1960" (p. 228).

26. For example, Kalman argues that Harry Shulman and Fleming James's 1942 torts casebook "surrendered the functional approach to the conceptual" because it was organized around the traditional categories of intentional harm, negligence, and strict liability (p. 150).

27. Kalman notes that Kessler and Sharps' 1953 contracts casebook focused on the competing principles of freedom of contract and regulation (p. 190). See Altman, *supra* note 7 at 211 (noting the "crucial realist point regarding the availability of competing rules: let each legal rule be as precise as is humanly possible, the realists insist that the legal system contains competing rules which will be available for a judge to choose in almost any litigated case").

can be traced directly to the legal realists. Some professors explain the results in cases partly by reference to situation-types. For example, they might use cases to show that residential tenants often receive greater legal protection than commercial tenants, and then explain that judges make this distinction for a variety of policy reasons. The use of situation-types to understand, classify, and justify judicial decisions is a legal realist device. Similarly, professors can use the case method to criticize formalistic reasoning in the cases and bring out the policy and moral implications of rule choices that are ignored or suppressed by some judges. As Kalman herself notes, realist casebooks often focus on social problems and the social consequences of alternative legal rules despite organization around doctrinal categories (pp. 150-51). Today, some professors use contemporary casebooks to promote analysis of economic efficiency; others look at cases as a means to identify social problems in need of legislative or administrative regulation; still others as a means to demonstrate that the law serves the needs of the rich and powerful. In short, continued use of the case method is compatible with the fundamental variations in approaches to legal reasoning that flourish in the post-formalist age.<sup>28</sup>

Kalman also understates the impact of realism by overemphasizing the legal realists' attempt to create a functional organization for casebooks and to unify law and social science (pp. 74, 229).<sup>29</sup> By defining these projects as the primary objectives of the legal realist movement, she is able to conclude that realism was a substantial failure. But this analysis conceives of legal realism too narrowly.

I see legal realism as a larger enterprise. The legal realists wanted to replace formalism with a pragmatic attitude toward law generally. This attitude treats law as made, not found. Law therefore is, and must be, based on human experience, policy, and ethics, rather than formal logic. Legal principles are not inherent in some universal, timeless logical system; they are social constructs, designed by people in specific historical and social contexts for specific purposes to achieve specific ends. Law and legal reasoning are a part of the way we create our form of social life.

Legal realism should be understood as the pragmatic movement in law. As such, it is clear that legal realism was far more successful than

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28. Compare the development of the legal case method to an analogous—but quite different—case method used in business schools, which is premised on the view that only contextual learning can produce practical knowledge.

29. By functional organization for casebooks, Kalman means organizing cases around situation-types rather than around legal doctrines. This itself is an overly narrow definition of a functional casebook. Kalman herself recognizes that casebooks organized around doctrinal categories (such as intentional harm, negligence, and strict liability) could focus on how law responds to social problems and whether existing law creates appropriate incentives for socially desirable behavior (pp. 150-51).

Kalman admits. The slaying of conceptualism has been quite successful (p. 229). It is common practice for law professors to discuss "policy considerations" in class. Moreover, it is no longer possible to respond convincingly to an argument to make landlords strictly liable for harms to tenants by saying that "it is in the nature of a lease to be a conveyance of property and therefore the tenant, as owner of the leasehold, is responsible for looking out for herself." Although this was standard legal reasoning in 1890, it simply does not fly anymore as a convincing legal argument. The terms of legal discourse have shifted from the deduction of consequences from abstractions to the attempt to justify the law in terms of policy, morality, and institutional concerns. This revolutionary change in legal discourse represents a monumental achievement.

Kalman's narrow view of realism also fails to consider the legal realists' attack on the public/private distinction or the attack on the idea of the self-regulating market.<sup>30</sup> The realists' concern about the relationship between law and the market was consistent and long-lasting. We can trace this concern from Oliver Wendell Holmes' *Privilege, Malice, and Intent*, written in 1894,<sup>31</sup> to Roscoe Pound's *Liberty of Contract*, written in 1909,<sup>32</sup> to Walter Wheeler Cook's *Privileges of Labor Unions in the Struggle for Life*, written in 1918,<sup>33</sup> to Robert Hale's *Law Making by Unofficial Minorities*, written in 1920<sup>34</sup> and *Coercion and Distribution in a Supposedly Non-Coercive State*, written in 1923,<sup>35</sup> to Morris Cohen's *Property and Sovereignty*, written in 1927<sup>36</sup> and *The Basis of Contract*, written in 1933,<sup>37</sup> to Hale's *Bargaining, Duress, and Economic Liberty*, written in 1943,<sup>38</sup> and finally, John Dawson's *Economic Duress*, written in 1947.<sup>39</sup> In my view, this aspect of legal realism is at least as significant, and possibly more significant, than the realists' critique of formalism. A complete assessment of the advancements of the realists must take into account these broader goals.

### B. Another Story: Legal Realism As a Pragmatic Critique of Power

It is impossible to understand legal realism without placing it in historical context. This context includes understanding both the form of

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30. See *infra* text accompanying notes 60-98.

31. Oliver Wendell Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

32. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

33. Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779 (1918).

34. Robert Hale, *Law Making by Unofficial Minorities*, 20 COLUM. L. REV. 451 (1920).

35. Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

36. Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

37. Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933).

38. Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

39. John Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947).

thought against which the realists were reacting and the political context in which legal realism was invented and elaborated. Realism was a reaction against classical legal thought, which in turn was a reaction against preclassical thought. What follows is a brief sketch of this history.<sup>40</sup> This story has been told before. I retell it here because Professor Kalman's version of legal realism fails to address certain key aspects of legal realism. In particular, Kalman fails to acknowledge the central impor-

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40. My version of legal realism is based on quite specific persons and articles. My primary sources are: WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942) (containing articles dating from 1924); John Dewey, *My Philosophy of Law*, in *MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS* (1941); Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 *YALE L.J.* 201 (1931) [hereinafter F. Cohen, *Ethical Basis*]; F. Cohen, *supra* note 8; M. Cohen, *supra* note 37; M. Cohen, *supra* note 36; Walter Wheeler Cook, *Logical Method and the Law*, 13 *A.B.A. J.* 303 (1927); Cook, *supra* note 33; Dawson, *supra* note 39; Dewey, *supra* note 15; Leon Green, *The Duty Problem in Negligence Cases*, 28 *COLUM. L. REV.* 1014 (1928), 29 *COLUM. L. REV.* 255 (1929); Leon Green, *The Palsgraf Case*, 30 *COLUM. L. REV.* (1930); Hale, *supra* note 38; Hale, *supra* note 35; Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913); Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457 (1897) [hereinafter Holmes, *The Path of the Law*]; Holmes, *supra* note 31; Pound, *supra* note 32; Roscoe Pound, *Mechanical Jurisprudence*, 8 *COLUM. L. REV.* 605 (1908) [hereinafter Pound, *Mechanical Jurisprudence*]; Hessel Yntema, *The Hornbook Method and the Conflict of Laws*, 37 *YALE L.J.* 468 (1928).

Karl Llewellyn is in a class by himself. His concerns were somewhat different from those of the scholars listed above, and his scholarship and contributions to law reform are unique. K. LLEWELLYN, *supra* note 9; K. LLEWELLYN, *supra* note 11; Karl Llewellyn, *On the Good, the True, the Beautiful in Law*, 9 *U. CHI. L. REV.* 224 (1962); Karl Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 *COLUM. L. REV.* 581 (1940); Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 *COLUM. L. REV.* 431 (1930); Karl Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 *YALE L.J.* 1243 (1938); Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 *HARV. L. REV.* 1222 (1931).

Secondary sources include: GRANT GILMORE, *THE AGES OF AMERICAN LAW* (1977); GRANT GILMORE, *THE DEATH OF CONTRACT* (1974); LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); EDWARD PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973); ROBERT SAMUEL SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973); G. EDWARD WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* (1978); G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* (1980); Robert Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* 70 (G. Geison ed. 1983); Thomas Grey, *Langdell's Orthodoxy*, 45 *U. PITT. L. REV.* 1 (1983); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 *RES. L. & SOC.* 3 (1980) [hereinafter Kennedy, *Legal Consciousness*]; Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW* 18 (D. Kairys ed. 1982); Gary Peller, *The Metaphysics of American Law*, 73 *CALIF. L. REV.* 1151 (1985); John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 *BUFFALO L. REV.* 459 (1979); John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 *BUFFALO L. REV.* 195 (1980); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 *WIS. L. REV.* 975; William Twining, *Talk About Realism*, 60 *N.Y.U. L. REV.* 329 (1985); Wiseman, *supra* note 12; William Fisher, *The Agenda of Legal Realism* (1987) (unpublished manuscript on file with the author); Duncan Kennedy, *The Rise and Fall of Classical Legal Thought: 1850-1940* (unpublished manuscript on file with the author).

tance of the debate about the utility of the public/private distinction—by which I mean the conceptualization of the relation between law and society. I hope to demonstrate that current debates in legal theory are, to a large extent, efforts to deal with these controversial aspects of legal realism.

### 1. *The Public/Private Distinction*

#### a. *The Self-Regulating Market: Power Mystified*

It is a monstrous thing to cover two hundred years of history in a dozen pages, but here goes.<sup>41</sup> A major goal of the legal realists was to undermine laissez-faire ideology by attacking the idea of a self-regulating market system based on free contract, which operated largely outside state influence and control. In the preclassical period during the first half of the nineteenth century, almost all of law was incorporated into the contractual model. But freedom of contract was a dim dream; rather, the market was heavily regulated by custom and law. All private relationships included implicit obligations that were enforceable by the state. These obligations varied depending on the kind of relationship involved.<sup>42</sup> Almost everyone appeared to occupy a status most of the time, as master or servant, as attorney or client, as bailor or bailee, as husband or wife, as landlord or tenant. One could voluntarily enter one of the regulated relationships, but once one entered the relationship, the terms and obligations accompanying it were substantially predefined by the state through the common law. The parties had little or no power to alter the terms of the relationship by contract. In this sense, no aspect of life was conceptualized as free from state control.

The legal rules governing each of these stereotypical relationships imposed normative ideas of fairness. And lawyers in the preclassical period were seen as experts in divining what was fair.<sup>43</sup> The principles of

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41. This history of preclassical and classical legal thought is to a large extent a summary of Duncan Kennedy's unpublished manuscript, *The Rise and Fall of Classical Legal Thought: 1850-1940*, *supra* note 40, the most cited unpublished manuscript since Henry Hart and Albert Sacks, *The Legal Process* (tentative ed. 1958) (unpublished manuscript). I have also relied heavily on the work of Robert Gordon, *supra* note 40, Elizabeth Mensch, *supra* note 40, and Gary Peller, *supra* note 40.

42. For example, Theophilus Parsons' 1853 treatise on contracts, see THEOPHILUS PARSONS, *THE LAW OF CONTRACTS* (1853), devoted only 60 pages to general discussions of consideration and mutual assent, 2 *id.* at 351-408, but gave 350 pages to specialized rules applying to specific parties (such as agents, factors and brokers, servants, attorneys, trustees, executors and administrators, guardians, corporations, joint stock companies, partnerships, parties by novation, parties by assignment, parties to negotiable instruments, infants, married women, bankrupts, lunatics, aliens, slaves, and outlaws), 2 *id.* at 9-349, and 320 pages to various subject matters of contracts embodying special rules (such as sales of real estate, sales of goods, hiring of persons, marriage, and bailment), 2 *id.* at 409-722. Each of the types of parties and subject matters was considered a social entity with a body of expectations and obligations. These contracts were heavily regulated by specific common law obligations that varied depending on the social context and type of relationship involved.

43. Gordon, *supra* note 40, at 88-89.

law blurred into the principles of morality or virtue; lawyers identified as moral obligations prevailing community practices, and then assumed that, as far as possible, the law would enforce these moral obligations. There was no general notion of freedom of contract; rather, the parties were thought to have implicitly accepted the moral and legal obligations customary to the relationships in which they entered or otherwise found themselves.<sup>44</sup>

From the standpoint of the later classical thinkers, preclassical law confused the understanding of both law and social life by failing to distinguish vigilantly between contracts implied-in-fact (implicitly agreed to by the parties) and contracts implied-in-law (imposed on them by the state regardless of their actual intent to be legally bound). Rather than distinguish voluntarily assumed duties from those imposed by the state, the preclassical theorists described both by the concept of implied intent. Implied intent blurred what to the classical theorists was a fundamental distinction between the actual intent of the parties and what they should have intended. Implied intent characterized as voluntary obligations ones that the classical theorists thought were properly understood as state-imposed regulation of private conduct. In so doing, the preclassical theorists failed to separate and vigilantly protect individual freedom from state power.

In contrast, legal theorists in the classical period (1860-1940) tried to separate strictly the private sphere of individual contractual freedom from the public sphere of government regulation. They divided actors into two types: public officials who exercised state power and private citizens who exercised rights. Each actor had power within its sphere and no power outside.<sup>45</sup> This system attempted to separate rigidly public and private law<sup>46</sup> by adopting the idea of a self-regulating market system.

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44. The notion of implied intent, according to the theorists of this period, meant that, the parties voluntarily accepted the obligations that inhered in the stereotypical social relationships, as the state defined them. Moreover, because this notion of implied intent blurred the distinction between privately assumed and publicly imposed obligations, all of law (other than real property) could be assimilated into this model. Even tort law could be reinterpreted in this way; citizens impliedly agree to compensate others for negligently inflicted injury as part of the social contract in which they become members and beneficiaries of civil society.

45. This image was based on an analogy to the concept of state sovereignty, which considered governmental power as absolute within its territorial boundaries and void outside those boundaries, and to the concept of private property, which considered property use within territorial boundaries as free, with no freedom to use or harm property of others without their consent. This analogy applied to all other conflicts, including federal versus state power, state power versus individual rights, and legislative versus executive power. The spheres of authority were defined and enforced by judges who alone did not exercise free will; they used the "science" of legal reasoning to define the boundaries between the spheres and then enforced the will of whatever actor had the legal authority to operate freely within that sphere.

46. Public law was concerned with federalism (state power v. state power, federal power v. state power), separation of powers (executive v. legislative v. judicial powers), and rights against the state (constitutional rights). Private law concerned relations among citizens, including contracts,

By 1880, legal theorists no longer conceived of the market as composed of a small number of preexisting types of standard contracts, regulated by the state. Instead, their basic model assumed that the parties were free to agree on whatever terms they wanted. Freedom of contract meant that the parties were free to make or not make contracts, and that when they made contracts the courts would enforce the terms to which the parties had agreed.

Classical theorists considered three principles to be central to a free contract system. First, you cannot be forced to contract against your will. This principle implied defenses against contractual liability when there was a defect in free will, such as fraud, duress, or incapacity, and rules about what constitutes free agreement, including rules of offer and acceptance and consideration as evidence of intent to be legally bound. Second, you are free to contract if you wish to do so. This principle implied rules specifying what conduct creates a binding obligation, and rules concerning what constitutes a breach of that obligation and the consequences of a breach. Third, if you do contract, your agreement will be enforced in accordance with its terms. The state refuses to regulate the substantive terms of private relations.<sup>47</sup> Henry Maine's slogan "from status to contract"<sup>48</sup> meant that the legal system had progressed by moving away from relationships regulated by customary moral duties imposed and enforced by the state toward contracts that—at least theoretically—were under the complete control of the parties. Courts would no longer regulate the substantive content of contracts—the mutual obligations in market relationships. Ultimately the courts interpreted the constitutional protection of liberty and property to prohibit regulation of market relations by the legislature as well.<sup>49</sup> The preclassical theorist Theophilus Parsons labelled as "contractual,"<sup>50</sup> obligations that Maine labelled with the derogatory term "status."<sup>51</sup> To Maine, "contract" meant "freedom of contract," which meant "free will" as opposed to state regulation. Thus the progress in law, according to Maine, meant

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torts, property, and family law. Corporations were divided into public entities (cities) with severely restricted powers (Dillon's Rule); and private entities (such as business corporations) with complete freedom of action like other "persons." The law also recognized a narrow middle category of private corporations affected with a public interest, which could be legislatively regulated to promote social goals.

47. Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 568-69 (1982).

48. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 165 (Beacon ed. 1961) (originally published 1861) ("The movement of the progressive societies has hitherto been a movement *from Status to Contract*." (emphasis in original)).

49. See, e.g., *Coppage v. Kansas*, 236 U.S. 1 (1915); *Lochner v. New York*, 198 U.S. 45 (1905).

50. See 2 T. PARSONS, *supra* note 42.

51. See H. MAINE, *supra* note 48, at 165.

that evolution begins with state regulation of obligations in standard status relationships and progresses to a laissez-faire system where parties have free reign to establish whatever relations they desire among themselves.<sup>52</sup>

The sanctification of freedom of contract created a dichotomy between privately created and state imposed obligations. This dichotomy led legal scholars to separate quasi-contract, torts, real property, and status from contracts. Hilliard's 1859 torts treatise was the first to treat torts as a separate subject covering state-imposed obligations.<sup>53</sup> Scholars viewed property law as a collection of special rules for regulating land and buildings.<sup>54</sup> William Keener's 1893 treatise on quasi-contracts separated contracts implied-in-fact (and so voluntarily agreed to by the parties) from contracts implied-in-law (imposed by the state to promote fairness and prevent unjust enrichment).<sup>55</sup>

Classical lawyers also separated status from contracts. Status became the sole subject of the law of persons, which ultimately became family law. In the preclassical era, almost everyone occupied some status most of the time. But in the classical era, status became abnormal; Thomas Holland changed the name of "the law of persons" to "the law of abnormal persons."<sup>56</sup> Under this new analysis, the only persons who occupied a status were those with decreased legal capacity (children, married women, the insane), members of a family (husbands and wives, parents and children), and (for awhile) masters and servants. In con-

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52. *Id.* at 163-65.

53. FRANCIS HILLIARD, *THE LAW OF TORTS OR PRIVATE WRONGS* (1859).

54. Property law limited the options available to parties forming private arrangements. For example, the estate system defined only a limited number of ways to split up property interests, and prohibited the creation of new types of ownership bundles. Similarly, rules about easements, licenses, profits, covenants, and servitudes limited the ways in which parties could divide up present land use among different persons. Property law also regulated a grantor's ability to create and control future interests, and to transfer or convey property. Finally, it presented formalities, such as witnesses to a will and recording of deeds, both to caution the parties on entering these significant transactions and to provide evidence in case of dispute that the party intended to be bound. These rules expressly limited freedom of contract to achieve such social goals as promoting alienability of property, preventing complexity, freeing up land use, promoting stability of expectations, and promoting care in important transactions.

55. WILLIAM KEENER, *A TREATISE ON THE LAW OF QUASI-CONTRACTS* (1893). Keener defined quasi-contract to include a variety of obligations that had been treated previously as contractual, including the duties of common carriers and innkeepers to their patrons, the duties of incapacitated persons to pay for benefits received, the duties of parents to children and husbands to wives, and the restitution of benefits received when the contract was void or not formally completed. See 2 T. PARSONS, *supra* note 42 (defining these obligations as contractual). Keener described these obligations as noncontractual because they arose regardless of the actual subjective intent of the parties; they were therefore imposed by the state (implied-in-law) rather than voluntarily assumed by the parties (implied-in-fact).

56. THOMAS HOLLAND, *THE ELEMENTS OF JURISPRUDENCE* 97-107 (1880); see also Martha Minow, *When Difference Has its Home: Group Homes for the Mentally Retarded, Equal Protection, and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 141-52 (1987).



trast, classical theorists conceptualized "normal" persons as free and equal citizens governed only by the general rules of tort law and freedom of contract.<sup>57</sup>

Simultaneously, the basis of property and tort law gradually shifted from strict liability<sup>58</sup> to negligence. The theory behind the classical division between torts and contracts suggested that one had no affirmative duty to act to help others unless one had voluntarily assumed those obligations by contract. In the absence of such voluntarily assumed duties, one simply had an obligation to act reasonably so as to not foreseeably harm others.<sup>59</sup> Accordingly, the duty to compensate others for injuries caused to them was replaced with the notion that one had no duty to others beyond acting reasonably.

Contract law thus became the core of the private law system. In this core area, people were free to act in a self-interested manner, without regard to the interests, needs, or expectations of others. Social relations were immune from state regulation, and free will prevailed against state power. Classical theorists viewed the remaining, state-imposed obligations as peripheral. They segregated these obligations to the subjects of torts, property, quasi-contract, and status. The separation of torts and status from contract also served to isolate the few remaining altruistic duties left in the legal system; the duty to affirmatively act to help others absent a prior agreement to do so was restricted to family members and to quasi-contractual relations, such as obligations of common carriers and innkeepers. In these peripheral areas, the state imposed affirmative obligations on persons to act reasonably, to take care of family members, and to preserve the free alienability of property.

The ultimate result of this reorganization and reconceptualization of private law was to portray the market as largely self-regulating and outside government control. According to this scheme, the government was not fundamentally implicated in the processes and outcomes of private life. Instead, society was governed by individual free decisions and voluntary collaborative efforts. Individual autonomy prevailed in the market. Free individuals could choose to bind themselves to create secured expectations. The state would protect and enforce these expressions of autonomy as property rights. This view ultimately prompted

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57. From the standpoint of the legal realists, one of the biggest issues in this period was the issue of whether to categorize master/servant law as a status or a contract. Classical lawyers classified it as a contract, thereby removing what they felt was demeaning, paternalistic regulation from the employer/employee relationship. This classification became a central aspect of the freedom of contract ideology.

58. See MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 85 (1977).

59. Analytical jurists distinguished between positive contractual duties and negative tort duties. See Singer, *supra* note 40, at 1044.

courts to limit legislative regulation of the terms and conditions of employment and the operation of the market.

*b. The Market as a Regulatory System: Power Revealed*

*i. The Role of the State in Private Life: Laissez Faire as a Regulatory System*

The legal realists<sup>60</sup> criticized the idea of a self regulating market system which was immune from state involvement or control. They challenged the classical period's careful distinction between public and private spheres. The realists asserted that state and society could not be completely separated either logically or experientially. Once the state had been created, it altered (or was intended to alter) the distribution of power and wealth in society. Indeed, the whole purpose of legal rights was to impose collective limits on individuals' freedom of action in order to protect the interests of others. Moreover, even by failing to intervene in "private" transactions, the state effectively altered contract relations; it delegated to the more powerful party the freedom to exercise her superior power or knowledge over the weaker party. Thus, the state determined the distribution of power and wealth in society both when it acted to limit freedom and when it failed to limit the freedom of some to dominate others.

From this perspective, a free market system could not be distinguished in a significant sense from a regulatory system. All market systems distribute power, and thus constitute regulatory systems. The rules in force have the effect of privileging the interests of some persons over the interests of others. It is impossible for a legal system not to so distribute power and wealth. Any definition of property and contract rights necessarily requires the state to determine the character of relations among citizens in the marketplace. For the realists, the important questions were not how to define the limits of state power or the boundaries of a private realm beyond state power, but instead, whose interests market regulations should protect, and what distribution of power the rules in force should foster.

*ii. Contracts, Economic Coercion, and Bargaining Power*

The legal realists criticized the classical claim that contract law protected the will of the parties as being both misleading and largely incor-

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60. Again, by "legal realists," I am referring to the specific group of scholars and the specific collection of articles and books listed in note 40. Other scholars often associated with legal realism—or even these same scholars in other works—may have had other concerns. William Twining has emphasized (although in my opinion overemphasized) the dangers of generalizing about large numbers of scholars or scholarly works in ways that mask significant differences or disparate concerns and approaches. Twining, *supra* note 40, at 343-47.

rect.<sup>61</sup> Their critique included both a public and a private law component. The public law argument suggested that the classical claim was incorrect because contract law—and contracts themselves—were public, rather than private, phenomena. The private law argument contended that the principle of freedom of contract was indeterminate; it was too abstract to determine, in a nondiscretionary fashion, the specific rules of contract law. Instead, contract law requires judges to confront and adjudicate a variety of value choices. Together, these arguments characterized contract law as a matter of social policy and morality, rather than the logical embodiment of the concept of liberty of contract.

*The public law argument.* The legal realists claimed that contract law was public rather than private. They argued that the state did not merely facilitate the will of the parties to consensual transactions in the private sphere, as the classical theorists had maintained. Rather, it implemented social decisions about the moral character of market relations and the fair distribution of power in the market. The state, they argued, permits and enforces contracts partly to achieve social goals of efficiency in production and fairness in the distribution of wealth.

Contracts are public because the state enforces them. Contract law not only allows people the privilege to make agreements; it delegates to them the power to invoke the aid of the state to enforce those agreements when one party decides to breach.<sup>62</sup> As Morris Cohen remarked:

A contract . . . between two or more individuals cannot be said to be generally devoid of all public interest. If it be of no interest, why enforce it? For note that in enforcing contracts, the government does not merely allow two individuals to do what they have found pleasant in their eyes. Enforcement, in fact, puts the machinery of the law in the service of one party against the other. When that is worthwhile and how that should be done are important questions of public policy.<sup>63</sup>

Enforcement of contracts constitutes a social decision to protect the expectations of the promisee by curtailing the liberty of market participants to change their minds.

The law of contract, then, through judges, sheriffs, or marshals puts the sovereign power of the state at the disposal of one party to be exercised over the other party. It thus grants a limited sovereignty to the former. . . .

From this point of view the law of contract may be viewed as a subsidiary branch of public law, as a body of rules according to which the

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61. This section summarizes several specific articles, including M. Cohen, *supra* note 37; Cook, *supra* note 33; Hale, *supra* note 38; Hale, *supra* note 35; Holmes, *supra* note 31; Pound, *supra* note 32.

62. Hohfeld explained the distinction between privilege and power. See Hohfeld, *supra* note 40, at 32-54; see also M. Cohen, *supra* note 37, at 556; Singer, *supra* note 40, at 986-94.

63. M. Cohen, *supra* note 37, at 562.

sovereign power of the state will be exercised as between the parties to a more or less voluntary transaction.<sup>64</sup>

The realists demonstrated the public nature of contract law by examining the moral and political implications of state enforcement of contracts. Contract law chooses between competing moral principles by subordinating the freedom to change one's mind to the right to rely on promises.<sup>65</sup> Moreover, this choice forges a compromise between the more fundamental moral principles of autonomy and paternalism. Contract law protects individual autonomy by allowing citizens to engage in mutually beneficial transactions. Paradoxically, state enforcement of contracts paternalistically protects the promisee's expectations, thereby delegating to one party the power to control the other's behavior. A more individualistic legal system would not protect the promisee from mistakenly contracting with someone who later reneges on her promise. An absolutely individualistic legal system would relentlessly encourage self-reliance by refusing to enforce contracts; such a system would allow people to enter into contracts but refuse to enforce them if agreement faltered and the losing party lacked power to compel enforcement. In such a system, contracting parties would have to look out for themselves.

The social policy behind holding people to their promises is to encourage market transactions by creating a desirable amount of security.<sup>66</sup> The state, however, achieves this goal by preventing market participants from breaching contracts that no longer maximize their personal utility. This policy reflects a social decision, not a law of nature. That decision is based on a prediction of what sort of legal regime will maximize the general welfare: It predicts that the kind and amount of economic activity encouraged by enforcement of contracts will contribute more to the general welfare than the economic activity lost by preventing parties from freely rearranging their affairs.

Courts and legislatures might instead choose to allow, but not enforce, agreements. In such a system, people would still enter contracts when it would be mutually advantageous to do so. They would probably (but not certainly) be more likely to breach than if contracts were enforced. At the same time, there would be incentives not to breach in order to avoid a reputation as someone who reneges; such a reputation might hinder the ability of that individual to enter into agreements with others in the future. It is an empirical question whether enforcement of contracts does or does not maximize social utility by encouraging and

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64. *Id.* at 586.

65. PATRICK ATIYAH, *ESSAYS ON CONTRACT* 29 (1986).

66. "Agreements and promises are enforced to enable people to rely on them as a rule and thus make the path of enterprise more secure . . ." M. Cohen, *supra* note 37, at 591.

discouraging the right kinds and amounts of conduct to achieve the best mix of economic activity.

The realists also saw contract law as public because it incorporates social decisions about *which* contracts to enforce. Cohen argued: "A large number of important agreements, even in business, as in social, political, and religious matters, are left to be directly regulated by other agencies, such as the prevailing sense of honor, individual conscience, or the like."<sup>67</sup> Moreover, the state does regulate the substantive terms of some contracts through usury laws, recording statutes, the Statute of Frauds, implied warranties, the Rule against Perpetuities, or the like. The substantive regulation of contract terms is expanding today. We have substantial regulation of the terms of insurance contracts, and contracts involving landlord/tenant law, family law, securities regulation, antitrust law, secured transactions, environmental regulation, sale of goods, condominiums, consumer protection law, and employment and labor law.

Finally, the realists argued that contracts were matters of public law because courts had to "settle controversies as to the distribution of gains and losses that the parties did not anticipate in the same way."<sup>68</sup> Gaps in contract language are common. Where gaps exist, courts must determine the rights of the parties with little or no guidance from the parties themselves. It is no answer to say that courts should imply the term to which the parties would have agreed had they anticipated the source of controversy. Courts will never have enough information to answer this question. Moreover, supplying terms based on customary practice in the market is an inadequate proxy for individual intent because the parties may not have intended to adopt customary practice and because the particular market may have a variety of customary practices. In such cases, the court must judge which is the better practice or which practice the parties most likely contemplated. Gap-filling thus necessarily requires the court to make value judgments and public policy judgments about which customary practices to use as a reference in contract interpretation.<sup>69</sup>

*The private law argument.* The realists also criticized the internal coherence of the concept of freedom of contract by arguing that it was too abstract to generate specific conclusions of law. Freedom of contract necessarily includes the freedom *not* to contract, which requires courts to distinguish between contracts that were voluntarily entered into and contracts obtained through the coercive imposition of power by one party on

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67. *Id.* at 585.

68. *Id.* at 591.

69. See generally Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1014-24 (1984) (discussing the public nature of quasi-contracts).

the other. The classical lawyers believed that it was possible to make this distinction in a scientific, objective manner by deduction from the concept of "will." The realists argued, in contrast, that this was impossible; reasonable persons could disagree about whether a contract had been entered into voluntarily or as a result of duress. Defining what constituted a free contract, then, required judges to make value judgments about where to draw the line between freedom and necessity.

Robert Hale argued that coercion could not be distinguished from freedom. *All* contracts involve mutual coercion, because each of the parties has been delegated the legal power to withhold from the other party what it needs. The owner of the factory has the right to withhold wages from the employee, and the employee has the right to withhold his labor from the employer. "[I]t seems to follow that the income of each person in the community depends on the relative strength of his power of coercion . . . ."<sup>70</sup> Whether unequal bargaining power amounts to "duress" is thus a matter of degree; to determine whether relative bargaining power is sufficiently unequal to constitute an illegitimate imposition of power, judges must choose between competing conceptions of liberty. As John Dawson noted, "doctrines of undue influence were attempting to 'free' the individual by regulating the pressures that restricted individual choice," while "theories of economic individualism aimed at an entirely different kind of freedom, a freedom of the 'market' from external regulation."<sup>71</sup> And laissez-faire ideology left "individuals and groups [free] to coerce one another, with the power to coerce reinforced by agencies of the state itself."<sup>72</sup>

The realists concluded that contract doctrine inescapably engages courts in making moral and policy decisions about the legitimate distribution and use of power in the market. The manipulability of the concepts of duress and liberty allows courts to use the concept of freedom of contract either to defer to the terms of a particular market transaction or to reject them. As Duncan Kennedy, an heir to the realists, argues:

It is possible, for example, to argue on the most technical grounds for strict scrutiny of the voluntariness of consumer agreements, and for com-

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70. Hale, *supra* note 35, at 477.

71. Dawson, *supra* note 39, at 266.

72. *Id.* Dawson described the law of duress as seeking to identify "situations in which an unequal exchange of values has been coerced by taking advantage of a superior bargaining position." *Id.* at 285. "Doctrines of duress are intended to raise precisely the question whether it is 'rightful' to use particular types of pressure for the purpose of extracting an excessive or disproportionate return." *Id.* at 288.

[C]hange has been broadly toward acceptance of a general conclusion—that in the absence of specific countervailing factors of policy or administrative feasibility, restitution is required of any excessive gain that results, in a bargain transaction, from impaired bargaining power, whether the impairment consists of economic necessity, mental or physical disability, or a wide disparity in knowledge or experience. *Id.* at 289.

pulsory terms and set prices wherever voluntariness is in doubt. If one takes this approach seriously, there is little of the reformers' program that can't be restated as the implementation of freedom of contract, rather than its displacement by a new regime.<sup>73</sup>

By defining when unequal bargaining power vitiated the voluntariness of the contract, contract law helped determine the relative bargaining power of the parties. Enforcing a contract despite economic duress favored the stronger party by giving it the power to coerce the weaker party to comply with onerous terms; voiding contracts for economic duress strengthened the weaker party by granting freedom from forced compliance with unfair terms they negotiated with the stronger party. Thus, the public law argument and the private law argument meet: the definition of free contract requires a public, social decision about the legitimate distribution of private power in the marketplace.

The realists therefore reversed the classical imagery. The classical free market theorists had described contract law as private—respecting the will of the parties and reinforcing or facilitating individual autonomy. State regulation interfered with private freedom, and thus should be narrow and exceptional. In contrast, the realists showed, first, that contract law is a public phenomenon that uses public power to achieve social goals, and, second, that state regulation of contracts could be understood as private—because regulation of coercive contracts enhanced the autonomy of both parties by enforcing the agreement they would have reached had they possessed adequate information and relatively equal bargaining power.<sup>74</sup>

### iii. *Property as Delegation of Sovereign Power*

*The public law argument.* The classical lawyers assumed that property rights were created either by individual effort in the private sphere or by free exchanges between equal market participants.<sup>75</sup> The state was not fundamentally implicated in the creation or distribution of property rights. In contrast, the realists understood property rights as delegations of public power. As Morris Cohen argued:

[T]he law of property helps me directly only to exclude others from using the things which it assigns to me. If then somebody else wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent. To the extent that these things are necessary to the life

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73. Kennedy, *supra* note 47, at 583.

74. See Robert Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U.L. REV. 195 (1987).

75. See generally *Coppage v. Kansas*, 236 U.S. 1 (1915) (statute outlawing yellow dog contracts an unconstitutional deprivation of property and liberty). See also *infra* text accompanying notes 106-13.

of my neighbor, the law thus confers on me a power, limited but real, to make him do what I want. . . .

The character of property as sovereign power compelling service and obedience may be obscured for us in a commercial economy by the fiction of the so-called labor contract as a free bargain and by the frequency with which service is rendered indirectly through a money payment. But not only is there actually little freedom to bargain on the part of the steel worker or miner who needs a job, but in some cases the medieval subject had as much power to bargain when he accepted the sovereignty of his lord. Today I do not directly serve my landlord if I wish to live in the city with a roof over my head, but I must work for others to pay him rent with which he obtains the personal services of others. The money needed for purchasing things must for the vast majority be acquired by hard labor and disagreeable service to those to whom the law has accorded dominion over the things necessary for subsistence.<sup>76</sup>

If nonowners want access to property to satisfy their fundamental needs, they must obtain the consent of the owner. The legal system will enforce the owner's right to exclude others from her property. The distribution of market power is thus only partly a function of private decisions of market actors; to a substantial extent, it is determined by the legal definition and allocation of property rights.

Ownership of property also significantly affects the future distribution of wealth and income from the use of property. The ability of owners to use their property rights to collect revenue from nonowners gives them power that is effectively similar to the power of government to tax citizens. Cohen explains:

The extent of the power over the life of others which the legal order confers on those called owners is not fully appreciated by those who think of the law as merely protecting men in their possession. Property law does more. It determines what men shall acquire. Thus, protecting the property rights of a landlord means giving him the right to collect rent, protecting the property of a railroad or a public service corporation means giving it the right to make certain charges. Hence the ownership of land and machinery, with the rights of drawing rent, interest, etc. determines the future distribution of the goods that will come into being—determines what share of such goods various individuals shall acquire. . . .

Thus not only medieval landlords but the owners of all revenue-producing property are in fact granted by the law certain powers to tax the future social product. When to this power of taxation there is added the power to command the services of large numbers who are not economically independent, we have the essence of what historically has constituted political sovereignty.<sup>77</sup>

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76. M. Cohen, *supra* note 36, at 12.

77. *Id.* at 13; *see also id.* at 18 ("the major effect of property in land, in the machinery of



Enforcing the right to collect rents from those to whom the property owner grants access entails the exercise of substantial state power. The state delegates to the owner the power to tax a portion of the valued resources created by collaborative efforts in the market.

The terms of the bargains made between owners and workers depend on the relative bargaining power of the parties. Relative bargaining power is largely determined by the parties' relative abilities to do without the resources of the other for an extended period. Those with greater property rights have greater bargaining power because they may live longer without agreeing to the demands of others.<sup>78</sup>

By determining relative bargaining power, property rights substantially determine the terms of contracts, which in turn determine the income and additional property that market participants acquire. Thus the definition and enforcement of property rights, in conjunction with the definition and enforcement of contract rights, determines, to a large extent, the distribution of power and wealth.

Bargaining power would be different were it not that the law endows some with rights that are more advantageous than those with which it endows others.

It is with these unequal rights that men bargain and exert pressure on one another. These rights give birth to the unequal fruits of bargaining. There may be sound reasons of economic policy to justify all the economic inequalities that flow from unequal rights. If so, these reasons must be more specific than a broad policy of private property and freedom of contract. With different rules as to the assignment of property rights, particularly by way of inheritance or government grant, we could have just as strict a protection of each person's property rights, and just as little governmental interference with freedom of contract, but a very different pattern of economic relationships. Moreover, by judicious legal limitation on the bargaining power of the economically and legally stronger, it is conceivable that the economically weak would acquire greater freedom of contract than they now have—freedom to resist more effectively the bargaining power of the strong, and to obtain better terms.<sup>79</sup>

To the extent property law allows and enforces unequal access to

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production, in capital goods, etc., is to enable the owner to exclude others from *their necessities*, and thus to compel them to serve him" (emphasis in original)).

78. As Robert Hale argued:

Those who own enough property have sufficient liberty to consume, without yielding any of their liberty to be idle. Their property rights enable them to exert pressure of great effectiveness to induce people to enter into bargains to pay them money. The law endows them with the power to call on the governmental authorities to keep others from using what they own. For merely not exercising this power, they can obtain large money rewards, by leasing or selling it to someone who will utilize it.

Hale, *supra* note 38 at 627.

79. *Id.* at 627-28.

resources people need, it creates and confirms power relationships among market participants. Property law, when combined with contract law, delegates to property owners the power to coerce nonowners to contract on terms imposed by the stronger party. That power of coercion is not absolute, because nonowners have some power to withhold their labor. It is real, nonetheless. Property law thus limits freedom of contract, since some people have more freedom of contract—ability to obtain what they want on terms agreeable to them—than others.

The Justices who decided *Coppage v. Kansas*<sup>80</sup> realized this.

No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. . . . [W]herever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none . . . .<sup>81</sup>

Nevertheless, Justice Pitney erroneously concluded:

[S]ince it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.<sup>82</sup>

The *Coppage* Court drew the wrong conclusion from the fact that some inequalities are inevitable in any market system as a result of free exchanges. The courts need not tolerate *all* inequalities. Some are so severe, and the resulting bargains so unfair, that they represent illegitimate impositions of power rather than free bargains. To maintain a system of freedom of contract, courts *must* distinguish between free contracts and coerced contracts, between contracts whose terms are fair and contracts whose terms are onerous or unconscionable. The important questions are how courts should make such distinctions and where they should draw the lines. Classical judges like Pitney pretended to draw the lines in a relatively objective manner; but they gave no reason for excluding economic coercion as a form of duress that might justify judicial regulation in egregious instances. The realists argued that, in such cases, the court should enforce the terms the parties would have agreed upon had their relative bargaining power been sufficiently equal to satisfy the requirements of a genuinely free contract.<sup>83</sup>

Classical lawyers portrayed contracts as the expression of the will of

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80. 236 U.S. 1 (1915).

81. *Id.* at 17.

82. *Id.*

83. Robert Hale has explained:

the private parties. The realists argued, in contrast, that the state is fundamentally implicated in all market transactions; by defining property and contract rights, it determines the relative bargaining power of the parties, and hence, to a large extent, the terms of their bargain. The realists thus assumed that the market constituted a form of state regulation. The question was not whether the state should regulate the market; the market was inherently a mixture of public regulation and private activity. For them, the crucial questions were: What form should the market take? What should the distribution of power in the market be? How do we draw the line between property and free contract? When is the use of economic power legitimate and when is it illegitimate? These questions can be answered only by reference to moral and policy considerations; they cannot be answered merely by reference to the general principles of private property or freedom of contract.

*The private law argument.* The realists argued that the concept of private property, like the concept of freedom of contract, encompassed competing values and principles. Courts therefore could not deduce specific legal rules from the abstract concept of property. Rather, when defining property rights, judges had no choice but to engage in normative discourse about the proper balance between freedom and security. And reasonable persons could disagree about such choices.

The realists explained the policy and value choices implicated in the rules of property law. For example, Morris Cohen argued that courts

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[Contractual] rights and duties are created at the initiative of private individuals. But they are created (or modified or extinguished) by virtue of the power of mutual coercion (in the form of pre-existing rights) vested by the ordinary law in the two contracting parties. It will not do to say that the party to a contract is a voluntary agent merely. He makes the contract in order to acquire certain legal rights he does not now possess, or to escape certain legal obligations with which he is now burdened. Were his liberty not restricted by these obligations imposed on him by the law and enforced in the ordinary courts, he might never submit himself to the new obligations of the contract. Thus in a sense each party to the contract, by the threat to call on the government to enforce his power over the liberty of the other, *imposes* the terms of the contract on the other. When the rights and privileges which one party possesses are vastly superior in strategic importance to those possessed by the other (when the restraints on his liberty, in other words, are vastly less burdensome than those on the liberty of the other), the other party may in effect be compelled to submit by contract to almost any terms imposed by the stronger party. That is, the weaker party, whose previous legal restrictions are intolerable, may incur new restrictions as the price of escape from the old. For instance, if a single employing company owns all the land in a town and all the local food supplies, any property-less inhabitant, without even the price of a railroad ticket, is at the outset under a legal duty (enforceable in the courts) to refrain from eating or from lodging under a roof. This duty he is manifestly compelled by necessity to escape; but he cannot escape without obtaining the consent of the company. That consent may perhaps be obtainable only by contracting to submit to rules made by the company, any subsequent violation of which will be an unlawful breach of contract, of which the courts will take cognizance. Under such extreme circumstances it is literally true that the company can make rules which the inhabitants will be forced by the governmental authorities to obey—rules which, in their legal effects, are indistinguishable from governmental acts.

Hale, *supra* note 34, at 452-53 (emphasis in original).

must limit the free use of property to prevent owners from unreasonably interfering with the legitimate interests of nonowners. This principle underlies nuisance law.<sup>84</sup> Both Cohen and Hale also argued that judges must reconcile the competing principles of property and free contract. If property rights are absolute, then owners may exclude others from their property unless they agree to the terms imposed by the owner; however, by granting property owners' rights that make them significantly more powerful than nonowners, the courts might invite the creation of contracts that are so coercive as to be unenforceable. Any system of private property and freedom of contract must address the tension between granting unequal bargaining power to property owners and placing limits on illegitimate coercion in market relations.

In defining property rights, courts must also determine the contours of fair competition in the market place. In *Vegeahn v. Guntner*,<sup>85</sup> the Supreme Judicial Court of Massachusetts enforced an injunction preventing workers from picketing in front of their employer's property. The court held that the two-person patrol infringed on the employer's contract and property rights by interfering in the employer's ability to hire replacement workers during the strike.<sup>86</sup> Writing for the majority, Justice Allen argued that "a combination to do injurious acts expressly directed to another, by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him, is outside of allowable competition, and is unlawful."<sup>87</sup> In dissent, Justice Holmes argued that peaceful picketing should be recognized as lawful behavior. He analogized peaceful picketing to economic competition.

[I]t has been the law for centuries that a man may set up a business in a country town too small to support more than one, although he expects and intends thereby to ruin some one already there, and succeeds in his

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84. The state . . . must interfere [with private property] in order that individual rights should become effective and not degenerate into public nuisances. To permit anyone to do absolutely what he likes with his property in creating noise, smells, or danger of fire, would be to make property in general valueless. To be really effective, therefore, the right of property must be supported by restrictions or positive duties on the part of owners, enforced by the state as much as the right to exclude others which is the essence of property. . . .

. . . .  
 . . . Our students of property law need, therefore, to be reminded that not only has the whole law since the industrial revolution shown a steady growth in ever new restrictions under use of private property, but that the ideal of absolute *laissez faire* has never in fact been completely operative.

M. Cohen, *supra* note 36, at 21-22.

85. 167 Mass. 92, 44 N.E. 1077 (1896).

86. The patrol was . . . one means of intimidation indirectly to the [employer], and directly to persons actually employed, or seeking to be employed, by the [employer], and of rendering such employment unpleasant or intolerable to such persons. Such an act is an unlawful interference with the rights both of employer and of employed.

*Id.* at 97, 44 N.E. at 1077.

87. *Id.* at 99, 44 N.E. at 1077.

intent. . . . The reason, of course, is that the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged. . . .

[T]he policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business by some means, when the damage is done, not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade.<sup>88</sup>

The majority opinion in *Vegeahn* demonstrates the conflict between the free market principle and unlimited property rights. The free market requires courts to allow individual economic activity that harms one's competitor, even though it interferes with property interests otherwise protected by law. Holmes argued that, when defining property rights, the courts must articulate the fair limits of struggle among market participants. In doing so, they must determine the socially desirable balance between free activity and limits on competition to protect legitimate vested interests.

The United States Supreme Court also ignored the conflict between free market competition and property rights in *Hitchman Coal & Coke Co. v. Mitchell*.<sup>89</sup> There, the Court upheld a lower court order enjoining the United Mine Workers from organizing workers at certain mines and factories because union organizing interfered with the employer's property rights. The Court reasoned:

[T]he employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union, and . . . this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power. . . .

[The employer], having in the exercise of its undoubted rights established a working agreement between it and its employees, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right.<sup>90</sup>

Walter Wheeler Cook criticized the court for assuming that the case could be decided by appealing to the abstract nature of property rights. The Court's reasoning failed to recognize that all property rights are limited by the rights of competing market participants to pursue their interests in the marketplace.<sup>91</sup> The right question, according to Cook, was: "Against what kinds of acts ought protection as a matter of policy to be

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88. *Id.* at 106, 44 N.E. at 1080-81 (Holmes, J., dissenting); see also Holmes, *supra* note 31, at 3 (discussing various acts as privileged due to recognized importance of competition).

89. 245 U.S. 229 (1917).

90. 245 U.S. at 251. The Court further argued that the company was "entitled to the good will of its employees" and that the union's organizing attempts interfered with the company's property interests in that good will. *Id.* at 252.

91. Cook, *supra* note 33, at 790.

given?"<sup>92</sup> Policy considerations, rather than deductive logic, should determine where to draw the line between property and competition.

The realists also argued that policy considerations should help dictate whether and to what extent an interest should be protected as property in the first place. Classical judges, in contrast, failed to recognize that the legal system sometimes does, and sometimes does not, protect individual property rights over valuable resources. In *International News Service v. Associated Press*,<sup>93</sup> the Court, citing *Hitchman*,<sup>94</sup> prohibited one news service from copying news items generated by its competitor and selling them on the market on the grounds that the activity constituted unfair competition. Justice Pitney justified creating such a property interest against an economic competitor partly on the grounds that news was valuable. He also reasoned that the news items should be protected because they were the result of the expenditure of labor, skill, and money.<sup>95</sup>

Justice Brandeis dissented, noting: "He who follows the pioneer into a new market, or who engages in the manufacture of an article newly introduced by another, seeks profits due largely to the labor and expense of the first adventurer; but the law sanctions, indeed encourages, the pursuit."<sup>96</sup> Property rights are often limited by the rights of competitors to appropriate the benefits of individual labor. In a concurring opinion, Holmes further argued that resources are valuable not only because they are useful to people, but also because the legal system protects the owner's interest in controlling their use. Thus, the value of resources depends on the extent to which individual control over them is protected by the legal system.<sup>97</sup> It is circular to argue that an interest should be protected because it has exchange value, when the existence and amount of exchange value depends on the extent to which the interest will be legally protected. Courts must decide whether to create exchange value by protecting an interest through property law. In making their decisions, courts must consider whether protection in this circumstance is fair or if it will generate the optimum amount of productive activity.

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92. *Id.*

93. 248 U.S. 215 (1918). It is not surprising that Justice Pitney wrote the majority opinions in *Coppage*, *Hitchman*, and *INS v. AP*.

94. *Id.* at 236.

95. *Id.* at 238.

96. *Id.* at 259 (Brandeis, J., dissenting).

97. Property, a creation of law, does not arise from value, although exchangeable—a matter of fact. Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference, and a person is not excluded from using any combination of words merely because someone has used it before, even if it took labor and genius to make it.

*Id.* at 246 (Holmes, J., concurring).

*iv. Summary*

The classical theorists sought to define property and contract rights in ways that legitimated the use of market power. On the contract side, the Supreme Court in *Coppage* argued that contracts were the result of “the will of the parties” and thus voluntary, as long as they had been entered into in the absence of physical duress—a gun to the head. Economic duress did not vitiate the voluntariness of the contract. On the property side, the courts in *Vegeahn* and *Hitchman* defined both the company’s right to hire workers and its existing employment contracts as property rights. They assumed that anyone who interfered with the company’s power to hire workers on its own terms infringed on the company’s property rights. Classical lawyers identified the employer’s market power as unimportant and workers’ or unions’ activities as oppressive interferences with the employer’s property and contract rights.

The realists reversed these images. They identified the company’s market power as potentially so oppressive that labor contracts might not be sufficiently voluntary to allow enforcement in accordance with their terms. They also identified worker and union activity as legitimate exercises of freedom to contract and freedom to compete in the marketplace. Where the classical thinkers saw freedom, the realists saw coercion, and where the classical thinkers saw coercion, the realists saw freedom.<sup>98</sup>

The realists argued that the state is fundamentally implicated in all “private” transactions. Indeed, they saw no clear separation of state and society. Defining contract and property rights requires a balancing of competing values and principles. By defining the rules of the market, the state determines the distribution of economic power and thus the distribution of wealth and income. The state necessarily involves itself in the creation of a regulatory system by establishing and enforcing these market entitlements. The realists thus exposed the idea of a self-regulating market system immune from government control as a sham. The market allocates and distributes power and wealth, and its mechanisms and institutional structures are created and enforced by law. In the midst of every transaction sits the state, determining the relative bargaining power of the parties, and hence, to a large extent, the structure of “private” relations.

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98. Abraham Lincoln once noted: “The shepherd drives the wolf from the sheep’s throat, for which the sheep thanks the shepherd as his liberator, while the wolf denounces him for the same act. . . . Plainly the sheep and the wolf are not agreed upon a definition of liberty.” Abraham Lincoln, Address at the Sanitary Fair, Baltimore (April 18, 1864), quoted in J. BARTLETT, FAMILIAR QUOTATIONS 523 (15th ed. 1980).

## 2. Legal Reasoning

### a. Formalism

Legal reasoning in both treatises and judicial opinions during the preclassical era was characterized by what Karl Llewellyn called the "Grand Style."<sup>99</sup> It consisted of a mixture of argumentative techniques based on implied intent, morality, policy, precedent, and liberality. The legal community understood the law to impose moral obligations on citizens. Lawyers were experts in using reason to identify such moral obligations, and in shaping the law to advance the general welfare.<sup>100</sup> The goal of legal rules was not only to induce citizens to live up to their moral obligations, but also to attain commercial convenience.<sup>101</sup> Judges and scholars also appealed to precedent, both because it was the source of the law and because it reflected established community standards regarding morality and social policy. At the same time, judges modernized many rules or interpreted them "liberally" to fit current ideas about morality and policy.<sup>102</sup> This complex collection of reasoning techniques required judges to engage in grand theorizing about the proper goals of the legal system, the fair and customary obligations of citizens in social relationships, the proper limits on free contract, and the meaning and mutability of precedent.

In contrast, the classical era was the era of formalism. Formalism, sometimes called "mechanical jurisprudence,"<sup>103</sup> has been used in many different ways. I will note several different aspects of legal reasoning generally associated with formalism. First, the classical thinkers like Langdell, Williston, and Beale believed that the entire legal system could be reduced to a very small number of general principles. For example, the basic principle of contract law is that contracts protect the will of the parties; the basic principle of tort law is liability for fault; the basic policy of the estate system is promoting the alienability of land. Lawyers could discern these principles and policies by induction from appellate cases.

Second, the classical theorists believed that these general principles contained legal concepts that could be rigidly separated. Distinctions

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99. K. LLEWELLYN, *supra* note 11, at 62-72; *see also* Wiseman, *supra* note 12, at 492-503.

100. As Robert Gordon argues, principles of legal science were not significantly different in kind from principles of morality; judges and lawyers were experts in both, and used principles of morality to inform the development of the law. Gordon, *supra* note 40.

101. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 211, 328-32 (1979); *see also* M. HORWITZ, *supra* note 58, at 140-59; J. WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM THE NINETEENTH-CENTURY UNITED STATES* 6-9, 96 (1956).

102. One argument technique appealed to the need for liberal rules to replace technical ones. The goal of liberality meant that legal rules should be more closely related to the substantive goals of the legal system rather than revolving around technical pleading categories and writs, that the rules should be more predictable, and that they should be modernized to fit a commercial society.

103. *See* Pound, *Mechanical Jurisprudence*, *supra* note 40.



between concepts were analogized to boundary lines between two pieces of property; either you are on my property or you are on your property—there is no gray area. Either there is a contract with all its attendant legal obligations or there is no contract and there are no affirmative obligations; either a state has personal jurisdiction or it does not; either you have acted unreasonably or you have acted reasonably. Our current view of concepts as shading into each other was almost completely absent in this period.

Third, lawyers used these general principles composed of rigidly defined concepts to generate specific legal conclusions by a logical, objective, and scientific process of deduction. Highly abstract concepts were thought to be operative, or capable of generating specific consequences by their very nature.<sup>104</sup> For example, John Austin used the concept of “law” to determine that there could be no liability without fault. His reasoning went like this: Law is defined as commands of the sovereign to do or refrain from doing an act; the goal of law, so defined, is to affect behavior by imposing sanctions for disobedience; and sanctions can induce people not to intentionally harm others and to act reasonably. But people cannot refrain from inadvertently harming others unless they do nothing. Strict liability imposes a legal obligation on someone who, by definition, was not intentionally or unreasonably posing a risk of harm to others. Any sanction for harm so inflicted could not influence that person’s behavior; it therefore serves no purpose. Thus, anyone who favors the rule of law must object to liability in the absence of fault.<sup>105</sup>

The *Coppage v. Kansas*<sup>106</sup> decision contains similar deductive reasoning. The Court there held that a statute outlawing “yellow dog”<sup>107</sup> contracts unconstitutionally interfered with liberty and property in violation of the fourteenth amendment. The Kansas legislature had sought to prohibit employers from insisting that employees promise not to join a union as a condition of accepting employment. According to the legislature, this condition by the employer constituted an act of coercion.<sup>108</sup>

104. See Kennedy, *Legal Consciousness*, *supra* note 40.

105. [W]e cannot be obliged to *that* which depends not on our desires, or which we cannot fulfill be desiring or wishing it. A stupid or cruel legislator may affect to command *that*, which the party cannot perform, although he desire to perform it. But though he inspire the party with a wish of fulfilling the command, he cannot attain his end by inspiring those wishes.

2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 136 (S. Austin 2d ed. 1861-1863) (emphasis in original).

106. 236 U.S. 1 (1915).

107. Yellow dog contracts are agreements in which employees promise, as a condition of employment, that they will not join a union.

108. The statute made it

“unlawful for any individual or member of any firm, or any agent, officer or employé of any company or corporation, to coerce, require, demand or influence any person or persons to enter into any agreement, either written or verbal, not to join or become or remain a

The Court, however, interpreted the rights of "liberty" and "property" protected by the Constitution to include the right of freedom of contract.<sup>109</sup> The right to make contracts meant both that voluntary contracts would be enforced in accordance with their terms, and that the legislature possessed no power to outlaw contracts voluntarily adopted. According to Justice Pitney's majority opinion, the fact that employers possess greater bargaining power than employees was not inherently coercive. Indeed, he considered employment contracts to be "entirely devoid of any element of coercion, compulsion, duress, or undue influence."<sup>110</sup> Nor could reasonable persons differ about the meaning of "voluntariness" or "duress." The Court deduced the meaning of these concepts from the concept of "free will." Agreements were considered voluntary absent "actual or implied coercion or duress, such as might overcome the will of the employee."<sup>111</sup> This definition of "duress" actually came from the common law and did not include coercion resulting from unequal bargaining power. By deducing a definition of "coercion" or "duress" from the concept of "will" and identifying that definition with the constitutional principle of liberty of contract, the Court treated its decision as a logical question about the inherent meaning of established law. This meant that the legislature could not, "by designating as 'coercion' conduct which is not such in truth, render criminal any normal and essentially innocent exercise of personal liberty or of property rights."<sup>112</sup> To outlaw such a contract would interfere with the liberty of both employers and employees to agree on terms that are mutually advantageous.<sup>113</sup> The legislature's attempt to define as coercion that which was not "actual coercion" was a sham attempt to redistribute property rights and limit liberty in the guise of promoting liberty.

Finally, formalism included a commitment to objective standards.

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member of any labor organization or association, as a condition of such person or persons securing employment, or continuing in the employment of such individual, firm, or corporation."

236 U.S. at 6 (quoting 1903 Kan. Sess. Law, ch. 222, § 1).

109. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property.

*Id.* at 14.

110. *Id.* at 15.

111. *Id.* at 8.

112. *Id.* at 16.

113. "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. . . . In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

*Id.* at 10-11 (quoting *Adair v. United States*, 208 U.S. 161, 174-75 (1908)).

This commitment signified a willingness to ignore the actual intent of the parties, their particular characteristics, abilities, and needs, and the social context in which the event or transaction occurred. In tort law, negligence was defined by a reasonable person standard, not by how one expected the specific defendant to act. In contract law, obligations imposed by mutual agreement were judged by objective manifestations of assent rather than by seeking to determine the parties' actual intent.

In summary, the classical era started with the notion of a self-regulating market system, a private sphere insulated from government interference, influence, and control. It then added the belief in a formalistic method of legal reasoning. Roscoe Pound called formalism "mechanical jurisprudence" because the classical lawyers had a tendency to apply their general principles relentlessly—regardless of the underlying policies or the consequences of these policies in specific cases. Judicial method was seen as scientific, apolitical, principled, objective, logical, and rational. Legal argument was pervaded with a sense of certainty. This sense of certainty, coupled with a commitment to the self-regulating market ideal, allowed classical judges to nullify hundreds of pieces of regulatory legislation to protect "property," "freedom of contract," and "liberty." They seldom recognized that these same concepts could be used to justify market regulation of exactly the sort that was being struck down. Nor did they recognize that their own definitions of property and contract embodied forms of government regulation and involvement in the market system. The legal realists made it their task to instruct classical lawyers on these points.

#### *b. Legal Realism As Pragmatism*

I have already discussed the legal realists' approach to legal reasoning. It assumes new significance, however, when viewed in conjunction with the critique of the self-regulating market. The realists criticized formalism largely, although not entirely, in the context of developing arguments about the role that law played in the market. In so doing, the legal realists sought to base legal reasoning on pragmatism. Pragmatic legal reasoning—what Llewellyn called "Grand Style judging"—encompassed four broad propositions.<sup>114</sup>

First, the realists argued that it is impossible to induce a unique set of legal rules from existing precedents. Llewellyn argued that it is always possible to generate both broad and narrow holdings from cases,<sup>115</sup> and to construct competing lines of precedent on either side of every controversial issue of law.<sup>116</sup> Felix Cohen further argued that every case was

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114. K. LLEWELLYN, *supra* note 11, at 62-72; *see also* Wiseman, *supra* note 12, at 492-503.

115. K. LLEWELLYN, *supra* note 9, at 65-69.

116. *Id.* at 69 ("You have now the tools for arguing from that case as counsel on *either* side of a

different from every other in some respect, and that judges had no alternative but to engage in ethical inquiry to determine those differences between the case at hand and the prior case that mattered.<sup>117</sup>

Second, the realists argued against conceptualism. As Holmes noted in his dissent in *Lochner v. New York*<sup>118</sup>: “General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.”<sup>119</sup> According to the realists, the *Coppage* Court was irrational to suggest that the kind of coercion employees experience when required to desist from union membership as a condition of employment is not coercion “in truth.”<sup>120</sup> Coercion and freedom are relative concepts, shading into each other on a spectrum, not a rigid on/off distinction. Different sorts of coercion can also be distinguished qualitatively. Moreover, the definition of concepts like “coercion” is not a purely logical, deductive process; rather defining illegitimate coercion requires judgments about the relative importance of competing values.<sup>121</sup>

By arguing against the practice of deducing rules from abstractions, the realists hoped to focus attention on the facts of specific cases and to understand the development of the law in terms of situation-types. Further, they hoped to lower the overall level of abstraction in legal reasoning by relating concepts like freedom of contract and duress to value choices. Concepts are not self-defining, nor can they be defined by logical deduction from general propositions, such as “contract law protects the will of the parties.” Concepts can only be given meaning by reference to considerations of policy and morality. For example, to distinguish between freedom and duress sensibly, one must keep in mind (1) that contracts defined as “voluntary” will be enforced in accordance with their terms, and those defined as involuntary will be regulated; (2) the different consequences of enforcing or not enforcing contracts entered into under the circumstances of the case; (3) the competing interests of the parties; (4) the competing values of protecting individuals from coercion by other market actors and protecting market actors from regulation by the state; (5) the competing needs for predictability and regularity of law, and; (6) the need to shape law to achieve social justice and social welfare. Concentrating on factors such as these would allow judges to

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new case.” (emphasis in original)); see also Altman, *supra* note 7, at 211 (“the realists insist that the legal system contains competing rules which will be available for a judge to choose in almost any litigated case”).

117. F. Cohen, *Ethical Basis*, *supra* note 40, at 215.

118. 198 U.S. 45 (1905).

119. *Id.* at 76 (Holmes, J., dissenting).

120. *Coppage v. Kansas*, 236 U.S. 1, 16 (1915).

121. See Dawson, *supra* note 39, at 266.

address more honestly the values at stake in defining a contract as sufficiently voluntary to enforce.

Third, the realists argued that judges should make law based on a thorough understanding of contemporary social reality.<sup>122</sup> Judges should not make value judgments in the abstract about the substantive content of the law. Rather, they should closely examine the social context in which those affected by legal rules operate. Understanding this social context would enable judges to adjudicate disputes through "situation-sense," meaning the ability to fit the law to social practice and to satisfy the felt needs of society to achieve a "satisfying working result."<sup>123</sup> For example, in drafting the Uniform Commercial Code, Llewellyn hoped to formulate legal rules that would take into account the social context in which commercial transactions took place.<sup>124</sup> One goal was to protect the legitimate expectations of the parties by learning from experts about the customary practices of the trade.<sup>125</sup>

Finally, the realists argued against formalistic, mechanical application of rigid rules regardless of their social consequences. Judges should apply rules in light of their purposes, looking to the goals of the rules and their social effects. Moreover, they should also change or modernize rules to respond to changing social values and circumstances. As Holmes argued in *The Path of the Law*:

The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.

. . . .

I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty

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122. Wiseman, *supra* note 12, at 471, 492-503.

123. K. LLEWELLYN, *supra* note 11, at 60.

124. Wiseman, *supra* note 12, at 493-94. As Professor Wiseman explains:

In nineteenth-century commerce, the prototypical sales transaction was the face-to-face sale in which the buyer paid cash and took her goods home. Llewellyn sought, instead, a model that reflected the reality of a twentieth-century "nationwide, indirect marketing structure." In the modern world of sales, Llewellyn's and ours, most commercial sellers and buyers of goods do not deal face-to-face and do not immediately take the goods home. Rather, they contract for a sale in the future; their agreement is usually on the buyer's or seller's printed form; their sale is on credit; and their relationship has just begun.

*Id.* at 475-76.

125. Llewellyn sought rules that would presume that the usage of the trade was "the background which the parties have presupposed in their bargaining and have intended to read into the particular contract." *Id.* at 505 (quoting REVISED UNIFORM ACT SALES ACT § I-D (Report and Second Draft 1941)). He also hoped to have expert juries composed of merchants in the trade who would authoritatively state the trade customs. *Id.* at 512-13.

is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious . . . . I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.<sup>126</sup>

In ruling on such "burning questions," the realists wanted judges to balance pragmatically competing interests in light of competing policies, principles, and values. Judges must (1) identify a range of alternative legal solutions to any legal problem; (2) predict the consequences of deciding one way rather than another; (3) articulate the competing interests, values, and policies involved in the case and see how they conflict with one another; (4) compare the relative advantages of alternative approaches, including the social consequences of different alternative rules and the values that would be protected; and finally (5) make a choice designed, as Felix Cohen said, to "promot[e] the good life of those whom it affects."<sup>127</sup>

The realists' proposals for legal reasoning have a characteristic quality of ambivalence. This ambivalence revolves around the issue of whether judges make or find law. On one hand, the realists seemed to embrace wholeheartedly the idea that judges make law. The realists argued that judges choose between conflicting lines of precedent; they choose between broad and narrow interpretations of cases; they formulate rules by determining the purposes and policies that the legal rules should achieve; they seek to adjudicate disputes in a way that will have desirable social consequences; they make ethical value choices. On the other hand, the realists often made it seem as if judges could make these policy and precedential judgments without injecting personal political commitments into their decisionmaking. Realist scholars often argued that the legislature was the appropriate policymaking branch to which judges should defer; they often relied on custom (such as customary practices of the trade) to determine what was appropriate social conduct; they assumed conventional or consensual community norms for adjudicating disputes; they assumed a shared sense of what constituted the "public interest"; they assumed that experts (both commercial and administrative) could identify the most efficient means of implementing these shared goals; they had a sense that social science could tell us what rules work well; they relied on the metaphor of balancing interests which makes it seem as if controversial legal questions could be answered by a

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126. Holmes, *The Path of the Law*, *supra* note 40, at 465-68.

127. F. COHEN, *supra* note 20, at 42.

process of weighing (counting, observing, *finding*) rather than a process of judgment.

This ambivalence about the judicial role has survived to the present day. The question of whether judges make or find law troubles legal theorists to no end. We accept both the realist insight that judges exercise judgment (they make law) and the realist insight that judges are substantially constrained in that process by the social and institutional context in which they act (they find law). Confusion about how to understand the relation between these two insights is the most pronounced characteristic of the current state of legal theory.

## II

### WHAT DOES IT MEAN TO SAY WE ARE ALL LEGAL REALISTS NOW?

Several years ago I began teaching a course on legal theory. I started with an overview of the history of legal thought, including a description of preclassical legal thought, classical formalism, and legal realism. I then discussed a variety of current schools of academic thought about normative legal argument, including legal process, rights theory, law and economics, critical legal studies, and feminist legal theory. I expected to focus on the substantial differences among these approaches to legal reasoning. But, perhaps because I had organized the course historically, I found, to my surprise, that what stood out to the students and to me were the great similarities among all these schools as compared to the formalism of the classical era. Each of these current schools of thought is, to a significant extent, both a reaction to, and a current version of, legal realism. All of them appropriate legal realist insights. To a great extent, we really are all legal realists now.

The legal realists successfully changed the nature of persuasive argument. Most current legal scholars accept the realist message that it is wrong to attempt to answer legal questions by appealing to the inherent nature of the abstract concepts of property, contract, and liberty. They distinguish between concepts like freedom and duress by line-drawing rather than by definitional assertion. To draw the necessary lines, current theorists talk about the principles, policies, and purposes underlying legal rules. They hope to interpret and fashion legal rules to achieve those underlying purposes. This mainstream approach is, for the most part, consequentialist and anticonceptualist. Current scholars understand legal rules to be devices for achieving social ends of fairness and efficiency. Moreover, virtually every approach to legal thought depends heavily on the realists' metaphor of balancing competing interests. Finally, the major mainstream schools of legal thought, including legal process, rights theory, and law and economics, all revolve around images

of consent and process, rather than logic or science. In this way as well, the modern schools are clearly the heirs of the legal realists.

The realists were extremely successful at introducing interest balancing, line-drawing, policy analysis, purposive reasoning, and process concerns into legal thought. But they were far less successful in translating these vague ideas into a workable vocabulary and stance toward normative legal argument. I understand legal thought since the 1930s to be a long and often confused attempt to deal with this problem. Legal theorists have attempted to formulate normative legal argument without abandoning the realists' insights. Several schools of normative legal thought have emerged over that period. These schools fit roughly into two categories, which I will call "liberal" and "critical" theories. The major liberal theories include legal process, rights theory, and law and economics.<sup>128</sup> While they adopt many of the ideas of the legal realists, the liberal theorists' attempts to formulate principled methods of deciding cases recreate significant elements of formalist reasoning. In contrast, the critical schools, including critical legal studies, feminist legal theory, and law and society, attempt to construct a form of normative argument that does not resurrect discredited formalist ideas.<sup>129</sup>

In this Part, I describe the legal realist aspects of three major liberal theories.<sup>130</sup> I then turn to the ways in which liberal theorists combine their realist inclinations with some elements characteristic of formalism.

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128. These are not the only approaches to liberal normative argument. Another popular approach, for example, is policy analysis. This form of argument is less tied to precedent and institutional role considerations than the legal process approach, and is less narrow than economic analysis in defining the sorts of policies that the legal system should further. Myres McDougal and Harold Lasswell are usually credited with originating this approach to normative legal argument (pp. 176-87).

129. In some ways, law and society is the most direct descendant of legal realism. Its proponents use social science research techniques to learn how the legal system operates in the real world. See Lawrence Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986); David Trubek & John Esser, "Critical Empiricism" in *American Legal Studies: Paradox, Program, or Pandora's Box?* (1987) (unpublished manuscript on file with the author). On the relation between law and society and critical legal studies see David Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

At the same time, it is not clear that law and society is a normative theory; it focuses on understanding the relation between law and society rather than developing an approach to determining what the law should be. Of course, understanding law in action is a crucial element in determining what rules work well.

130. Many theorists fit into more than one school. For example, Dworkin's recent book, *Law's Empire*, could fit both into the legal process school (because he emphasizes the differential institutional requirements of courts and legislatures and because he focuses on reasoned elaboration of precedent) and into the rights theory school (because he argues that the theorist or judges must have a personal moral theory of what it would mean to make our society the best it can be). Similarly, Richard Posner is both one of the foremost adherents of law and economics and a rights theorist because he attempts to ground wealth maximization in a normative theory of consent. The divisions among the schools of thought are my interpretive construction of significant differences in approaches to legal reasoning and normative argument.



In Part III, I describe the principal differences in approach between liberal and critical theories.

*A. Legal Realism and Contemporary Legal Theory*

*1. Legal Process: The Theory of Reasoned Elaboration*

The legal process theorists have shifted attention away from substantive legal principles to the process by which legal institutions operate. They accept the legal realist theory that we cannot deduce specific rules from abstract legal principles. They admit that much of law is political in the sense that members of the polity disagree about substantive ends. In contrast to the formalists, they argue that legal rules can be justified if they are created through a legitimate set of procedures by legitimate institutions keeping within their proper roles. This approach to legal reasoning has three different facets: institutional competence, reasoned elaboration, and majoritarianism.

*a. Institutional Competence*

Henry Hart and Albert Sacks argued in their influential manuscript, *The Legal Process*,<sup>131</sup> that the analysis of legal questions should focus initially upon which governmental institution is most competent to decide the question.<sup>132</sup> They argued that legislatures are better equipped than courts to deal with the sorts of questions that can be answered only by "preference," political compromise, or majority rule.<sup>133</sup> The executive is better equipped to handle questions that require relatively free, "continuing discretion" to choose between alternatives. For example, the president appoints federal judges based on any relevant factor and has no obligation to justify the decision in a way that will reconcile it with past decisions or guide future choices.<sup>134</sup> In contrast to legislatures and executive officials, courts have an institutional obligation to engage in "reasoned elaboration" of their decisions; they must justify their decisions by formulating general rules or standards that can be both recon-

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131. H. Hart & A. Sacks, *supra* note 41.

132. 1 *Id.* at 110-24. As Kalman explains:

[Hart and Sacks] exposed students to the various lawmaking institutions—private lawmakers, courts, legislatures, the executive branch, and administrative agencies. They focused on the question: "What is each of these institutions good for? How can it be made to do its job best? How does, and how should its workings dovetail with the workings of their institutions?" Different standards of decision making, they taught, were appropriate for different institutions: there was a great deal of difference between the decisional process of the courts and the "discretion" of the legislature. The process jurisprudence of Hart and Sacks made it less important that a decision be substantively correct than that it be reached by the right process (p. 222).

(footnotes omitted).

133. See 1 H. Hart & A. Sacks, *supra* note 41, at 123.

134. *Id.* at 161.

ciled with past practice and applied to like cases in the future.<sup>135</sup>

The central question for the realists was what decisions are best made by officials who are accountable to constituent preferences (legislatures) or have continuing discretion (executive officials or administrative agencies), and what decisions are best made by officials who have an institutional obligation to develop general rules and principles to guide future conduct (courts). According to Hart and Sacks, the nature of the judicial inquiry—reasoned elaboration—limits the range of issues that would be decided by courts.<sup>136</sup>

Lon Fuller similarly argued that courts should refrain from deciding substantive legal questions that involve “polycentric” tasks.<sup>137</sup> These tasks include resolving disputes that encompass many parties or require policy decisions that have complex ramifications. Because polycentric relationships are “many centered,”<sup>138</sup> there usually is more than one way reasonably to resolve the conflicting interests among all affected persons. Courts are competent to define the *process* by which polycentric decisions are made. For example, courts can promulgate rules about contracting. Courts cannot, however, decide the correct substantive outcome; they cannot write contracts.<sup>139</sup> Such decisions cannot reasonably be reduced to the kind of binary choices that are capable of argument and just resolution by adjudication. They should usually be left to other forms of resolution, such as voting, managerial direction, or contract.<sup>140</sup>

The enduring power of the legal process approach appears even in writings of scholars not widely identified as adherents to this view. Ronald Dworkin recently argued, in an influential article, that courts must justify their decisions on the basis of principles, while legislatures are free to act on the basis of general policy. He explains the distinction between principle and policy as follows:

Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole. The argument in favor of a subsidy for aircraft manufacturers, that the subsidy will protect national defense, is an argument of policy.

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135. *Id.*

136. [D]iffering degrees of discretion need to be exercised by different kinds of procedures and under the restraint of different kinds of checks. Thus, courts, which exercise the least discretion under maximum discipline from an established technique of decision, are given the greatest freedom from external controls. At the other extreme, decisions which depend essentially upon preference or sheer guesswork are left to be made by count of noses at the ballot box. One of the grand problems of society is to distinguish between those problems which are soluble by methods of reason and those which had better be left to preference.

*Id.* at 123.

137. Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978) (written in 1957; revised in 1961).

138. *Id.* at 395.

139. *Id.* at 398.

140. *Id.* at 363, 398.

Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right. The argument in favor of anti-discrimination statutes, that a minority has a right to equal respect and concern, is an argument of principle.<sup>141</sup>

This division of institutional roles limits courts to adjudicating cases based on the sorts of arguments about which they are competent. It therefore constrains the power of judges in relation to legislatures.

Institutional role arguments are quite familiar in judicial opinions and in other forms of legal discourse. They have become a central feature of current legal argument. Judicial activists argue that “[c]ourts should not implement obsolete policies that have lost their vigor over the course of the years,”<sup>142</sup> while judicial passivists argue that “[w]hat is ‘desirable’ or ‘advisable’ or ‘ought to be’ is a question of policy . . . and its determination by the judiciary is an exercise of legislative power when [such choices] involve[] political considerations.”<sup>143</sup>

### b. Reasoned Elaboration

The legal process theorists further argue that courts should decide cases within their competence on the basis of reasoned elaboration of precedent (p. 224). Karl Llewellyn,<sup>144</sup> Edward Levi,<sup>145</sup> Harry Wellington,<sup>146</sup> and Ronald Dworkin,<sup>147</sup> as well as Hart and Sacks, have taken this position. While each of these scholars has a different version of reasoned elaboration, they generally argue against the kind of induction and deduction performed by the classical theorists. Instead of generating grand principles from the cases and deducing specific sub-rules from those principles, they propose: (1) closer attention to the specific facts of cases and use of *analogy* as a central reasoning process in common law development; and (2) the use of *purposive reasoning* to interpret legal rules in accordance with the underlying policies or principles they were intended to further.

### c. Majoritarianism

Some legal process thinkers reacted to legal realism by relying on majority rule as the sole uncontroversial principle left in the legal system.

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141. RONALD DWORKIN, *Hard Cases*, in TAKING RIGHTS SERIOUSLY 81, 82 (1977).

142. *Prah v. Maretti*, 108 Wis. 2d 223, 237, 321 N.W.2d 182, 190 (1982).

143. *Id.* at 248, 321 N.W.2d at 195 (Callow, J., dissenting) (quoting *In re City of Beloit*, 37 Wis. 2d 637, 644, 155 N.W. 2d 633, 636 (1968)); see also Joseph William Singer, *Catcher in the Rye Jurisprudence*, 35 RUTGERS L. REV. 275 (1983).

144. See K. LLEWELLYN, *supra* note 9; K. LLEWELLYN, *supra* note 11.

145. See EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

146. See Harry Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

147. See RONALD DWORKIN, LAW'S EMPIRE (1986).

One version of this viewpoint, often associated with Justices Frankfurter (p. 221) and Brandeis<sup>148</sup>, emphasizes deference to the legislature. Courts should hesitate to create new legal rights; the legislature is usually the appropriate institution to do this. Another version offered by John Hart Ely and based on the famous footnote four of *United States v. Carolene Products Co.*,<sup>149</sup> authorizes judicial interference in the legislative process only when a defect exists in the political process such that some discrete group is illegitimately excluded from adequate representation in that process.<sup>150</sup> This facet of legal process theory accepts the controversial, political nature of lawmaking and asks judges to leave legal development, to the greatest extent possible, to the branch of government that can legitimately make such decisions by the process of majority rule.

The legal process school is a child of legal realism in several respects. It does not attempt to deduce specific rules from abstract legal principles. Instead, it cautions judges to defer to the legislature as the main lawmaking branch. When judges are unable to defer to the legislature, legal process theorists encourage judges to develop common law, not mechanically, but in light of the purposes and policies behind the rules they are elaborating and enforcing. This requires an interpretation of the reasons behind existing law that reconciles contradictory principles and determines the proper balance between competing social interests. Legal process theorists analyze case law at a low level of abstraction by focusing on the specific facts of cases and making analogies among cases based on situation-types. Legal rules are stated at a low level of generality. In sum, legal process theorists urge judges to use a combination of analogy and policy analysis to determine where to draw lines between competing interests and principles.

## 2. *Rights Theory: The Theory of Rational Consensus*

A second response to legal realism is the redefinition and elaboration of rights theory as a basis for normative legal argument. Rather than deducing the inherent meaning of abstract concepts like private property and freedom of contract, this new approach employs rational consensus as its normative basis. The theorists who have written in this mode include John Rawls,<sup>151</sup> Robert Nozick,<sup>152</sup> Karl Llewellyn,<sup>153</sup> Ronald

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148. See, e.g., *International News Serv. v. Associated Press*, 248 U.S. 215, 264-67 (1918) (Brandeis, J., dissenting).

149. 304 U.S. 144, 152 n.4 (1938).

150. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75-87 (1980).

151. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

152. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

153. See Wiseman, *supra* note 12, at 495 (arguing that Llewellyn drafted the Uniform Commercial Code to require judges to defer to reasonable customs in the trade, while holding

Dworkin,<sup>154</sup> Bruce Ackerman,<sup>155</sup> Richard Posner,<sup>156</sup> and Richard Epstein.<sup>157</sup> Despite the great differences among ideologies and approaches of these scholars, they share a fundamental commitment to identifying legal rules that people can and should accept, by elaborating community norms to which individuals would consent within a legitimate structure of rational decisionmaking.<sup>158</sup>

The central question is: What principles would people adopt if they thought about the problem of justice rationally? John Rawls argues that "a society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme, for it meets the principles which free and equal persons would assent to under circumstances that are fair."<sup>159</sup> Similarly, Richard Posner argues for wealth maximization as a criterion of social justice on the grounds that it attempts to give people what they would agree to in the absence of transaction costs.<sup>160</sup> "This is an example of implicit, or hypothetical, but still meaningful consent."<sup>161</sup>

The rational consensus approach to normative argument assumes a qualitative distinction between principles of justice, (the "right") about which we expect people to be able to agree and principles of morality, (the "good") about which we expect people to disagree.<sup>162</sup> As Dworkin explains:

Since the citizens of a society differ in their conceptions [of the good life], the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or more powerful

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merchants to better merchant practices, thereby promoting substantive fairness in commercial transactions).

154. R. DWORKIN, *supra* note 147; RONALD DWORKIN, *Liberalism*, in A MATTER OF PRINCIPLE 181 (1985) [hereinafter R. DWORKIN, *Liberalism*].

155. BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

156. RICHARD POSNER, *THE ECONOMICS OF JUSTICE* (1981).

157. *See, e.g.*, Richard Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

158. These theorists do disagree—a lot. Most important, they disagree about whether it is useful to imagine that you might be in someone else's position, how to think rationally about that possibility, and what it means for social justice.

159. J. RAWLS, *supra* note 151, at 13.

160. R. POSNER, *supra* note 156, at 96.

161. *Id.* at 97; *see also* Alan Schwartz, *Justice and the Law of Contracts: A Case for the Traditional Approach*, 9 HARV. J.L. & PUB. POL'Y 107, 107 (1986) ("just outcomes arise when people are permitted to do the best they can, given their circumstances").

162. J. RAWLS, *supra* note 151, at 31 ("The principles of right, and so of justice, put limits on which satisfactions have value; they impose restrictions on what are reasonable conceptions of one's good."); *id.* at 254 ("Liberty in adopting a conception of the good is limited only by principles that are deduced from a doctrine which imposes no prior constraints on these conceptions."); *see also* MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 5 (1982).

group.<sup>163</sup>

The principles of justice form the boundaries within which individuals are allowed to pursue their individual conceptions of the pursuit of happiness and "the good life." Legal rights, although limiting individual freedom of action, are based on principles of justice that should be acceptable to everyone, regardless of their disagreements about right and wrong. Although we have different and conflicting ideas about how to live, the basic rules limiting our freedom can and should be set by relatively noncontroversial criteria about which reasonable persons in our culture can be expected to agree.

Rights theory bears a family resemblance to legal process theory. Some rights theorists attempt to define a fair decision procedure for filtering community values. As Rawls put it, although "what is just and unjust is usually in dispute,"<sup>164</sup> people may "nevertheless acknowledge a common point of view from which their claims may be adjudicated."<sup>165</sup> These theorists imagine what values the community would choose in a suitably defined institutional process. Other rights theorists combine reasoned elaboration of community values, as evidenced in existing practice and belief, with an appeal to the theorists' intuitive judgments about justice.<sup>166</sup> Dworkin argues that judges should "decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community. They try to make that complex structure and record the best these can be."<sup>167</sup> This second framework for rights theory combines descriptive and normative theory. Dworkin asks judges to determine what the consensual practices and beliefs of our community are, and to identify principles that "fit" both with precedent and community values. But they are also to examine those community norms critically, with an eye toward generating principles that can be normatively and rationally "justified"<sup>168</sup> from the standpoint of "sub-

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163. R. DWORKIN, *Liberalism*, *supra* note 154, at 191 ("government must be neutral on what might be called the question of the good life").

164. J. RAWLS, *supra* note 151, at 5.

165. *Id.* Robert Nozick similarly uses a procedural theory of justice in *Anarchy, State, and Utopia*. Under his theory, the holding of an entitlement is just if it was initially acquired in a just manner (appropriation of unowned things) and if it was transferred in a chain of voluntary transactions to the current owner. R. NOZICK, *supra* note 152, at 150-51. "A distribution is just if it arises from another just distribution by legitimate means." *Id.* at 151.

166. Rawls, for example, uses both of these methods. The first elaborates the original position as a fair bargaining situation and derives general principles that would be chosen in those circumstances. The second is the method of reflective equilibrium in which the theorist reconciles those principles so chosen with her settled convictions about justice.

167. R. DWORKIN, *supra* note 147, at 255.

168. "[A]ny working theory . . . will include convictions about both fit and justification." *Id.*; *see also id.* at 248 (arguing that judges must both consider how a principle will "fit" with established

stantive political morality.”<sup>169</sup>

The most influential rights theorist is John Rawls. Rawls asked us to consider what basic institutions and background rights we would accept in a fair contracting situation. He sought to modernize social contract theory by investigating which basic principles of justice people in our culture would adopt if they had general knowledge of how our society works, but no specific knowledge about our individual abilities, characteristics, or circumstances. His goal was to encapsulate community values by filtering them through a legitimate decision procedure. A decision procedure is legitimate if it defines an institutional context for decisionmaking that people can accept as fair. Whatever principles people would adopt in that institutional context are, by definition, just.<sup>170</sup>

Rawls then defines an institutional context for decisionmaking in which free and equal individuals could collectively choose basic principles of justice. This context, called the “original position,” forms the framework for bargaining among these individuals. “The aim is to characterize [the original position] so that the principles that would be chosen, whatever they turn out to be, are acceptable from a moral point of view.”<sup>171</sup>

The original position must be a situation that “embodies widely accepted and reasonable constraints on the choice of principles.”<sup>172</sup> This bargaining situation must be sufficiently rich in normative detail to be able to generate answers, but sufficiently noncontroversial as to be acceptable to individuals with widely conflicting views about the good. The goal is to generate answers to controversial questions about principles of justice from relatively noncontroversial premises:

One argues from widely accepted but weak premises to more specific conclusions. Each of the presumptions [about the contracting situation] should itself be natural and plausible; some of them may seem innocuous or even trivial. The aim of the contract approach is to establish that taken together they impose significant bounds on acceptable principles of justice.<sup>173</sup>

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practice, and how to judge it substantively by deciding “which interpretation [of existing law] shows the legal record to be the best it can be from the standpoint of substantive political morality”).

169. *Id.* at 248.

170. “[P]ure procedural justice obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed.” J. RAWLS, *supra* note 151, at 86.

171. *Id.* at 120.

172. *Id.* at 13.

173. *Id.* at 18; see also Paul Bator, *Legal Methodology and the Academy*, 8 HARV. J.L. & PUB. POL’Y 335, 338 (1985) (arguing for the “proposition that certain sorts of principles can have a certain neutrality and can also have powerful constraining effects on human decision-making” (emphasis in original)).

Rawls argues that one of the essential features of the original position is ignorance of one's own particular characteristics which we can argue are irrelevant from a moral point of view. In the original position, people must adopt normative principles without knowing how those principles will affect their own lives.<sup>174</sup>

After defining the original position, Rawls asks us to imagine what basic principles we would adopt in the original position. We then must compare the resulting principles with our intuitions. We must check to see whether the principles derived from the original position "match our considered convictions of justice or extend them in an acceptable way. We can note whether applying these principles would lead us to make the same judgments about the basic structure of society which we now make intuitively and in which we have the greatest confidence."<sup>175</sup> To the extent the principles diverge from our intuitions, we must either give up or change our intuitions or recharacterize the original position to generate principles closer to our intuitions. Eventually, we can reach a reflective equilibrium among a generally accepted bargaining situation for choosing basic principles, the resulting principles, and our settled convictions about what a just society would look like.<sup>176</sup>

Rawls' analysis is decidedly legal realist in character. First, the characterization of the original position is based on premises that are not assumed, but must be justified by our settled convictions. Second, Rawls intends that these premises will be sufficiently noncontroversial and widely shared to provide a consensual foundation for theorizing about principles of justice. The analysis does not proceed on the basis of logical deduction from substantive premises; rather, it appeals to community values. Third, Rawls' theory for generating principles of justice is based on a suitably defined *process* for decisionmaking; he asks what principles people would choose if they had to act in the context of demonstrably legitimate institutional constraints. Fourth, the principles derived from the decision procedure are tested on the basis of their congruence with

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174. J. RAWLS, *supra* note 151, at 139-40.

175. *Id.* at 19.

176. In searching for the most favored description of [the original contracting] situation we work from both ends. We begin by describing it so that it represents generally shared and preferably weak conditions. We then see if these conditions are strong enough to yield a significant set of principles. If not, we look for further premises equally reasonable. But if so, and these principles match our considered convictions of justice, then so far well and good. But presumably there will be discrepancies. In this case we have a choice. We can either modify the account of the initial situation or we can revise our existing judgments, for even the judgments we take provisionally as fixed points are liable to revision. By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments and conforming them to principle, I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted. This state of affairs I refer to as reflective equilibrium.

*Id.* at 20.



our intuitions or considered judgments. Rawls hopes to minimize, but not to abolish, the role of intuition.<sup>177</sup>

### 3. *Law and Economics: The Theory of Efficiency*

The legal realists claimed that judges could not decide cases by logical deduction from general principles of liberty and property; law and legal decisions require social policy judgments. But, as unelected figures, what tools can judges use to make those policy judgments? Most realists recommended that judges adopt some form of utilitarianism or cost/benefit analysis. As Holmes explained in *The Path of the Law*, judges have a duty "of weighing considerations of social advantage."<sup>178</sup> Felix Cohen referred to this method, as does Professor Kalman (p. 3), as "functionalism."<sup>179</sup>

The rights theorists have attempted to modernize and revitalize social contract theory; the law and economics scholars have sought to do the same for utilitarian theory. Their goal, as Richard Posner explains, is to judge legal rules by their "effect in promoting the social welfare."<sup>180</sup> Law and economics theorists translate the ethical goal of promoting "the general welfare" into the concept of "wealth maximization" or "efficiency." They effectuate the concept of maximizing social utility through economic cost/benefit analysis; both to make the concept of utility more measurable<sup>181</sup> and to preserve the ethical goal of basing legal rights on consent.<sup>182</sup> Utility to an individual is measured by that person's "willingness to pay" to acquire an entitlement;<sup>183</sup> social wealth maximization (or efficiency) is defined as maximizing "the aggregate sat-

177. *Id.* at 41 ("No doubt any conception of justice will have to rely on intuition to some degree. Nevertheless, we should do what we can to reduce the direct appeal to our considered judgments.").

178. Holmes, *The Path of the Law*, *supra* note 40, at 467; *see also* F. Cohen, *supra* note 8, at 821 (arguing that we need to substitute a rational account of the law for the classical theological jurisprudence).

179. F. Cohen, *Transcendental Nonsense*, *supra* note 40, at 821. Professor Summers calls it "instrumentalism." R. SUMMERS, *supra* note 40, at 20.

180. RICHARD POSNER, *THE ECONOMICS OF JUSTICE* 49 (1981). As Jeremy Bentham explained:

The community is a fictitious *body*, composed of the individual persons who are considered as constituting as it were its *members*. The interest of the community then is what—the sum of the interests of the several members who compose it.

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An action then may be said to be conformable to the principle of utility . . . when the tendency it has to augment the happiness of the community is greater than any it has to diminish it.

JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 12-13 (J. Burns & H.L.A. Hart ed. 1970) (original 1788); *see also* J. AUSTIN, *supra* note 105; JOHN STUART MILL, *UTILITARIANISM* (O. Piest ed. 1957) (original 1861).

181. "Utility in the utilitarian sense also has grave limitations, and not only because it is difficult to measure when willingness to pay is jettisoned as a metric." R. POSNER, *supra* note 180, at 12.

182. R. POSNER, *supra* note 156, at 88-103.

183. R. POSNER, *supra* note 180, at 9.

isfaction of [individual] preferences (the only ones that have ethical weight in a system of wealth maximization) that are backed up by money, that is, that are registered in a market."<sup>184</sup>

The goal of law and economics scholars, like all utilitarians, is to compare costs and benefits of any allocation in entitlements and to establish legal rules that maximize social welfare. They differ from other utilitarians because they have invented a peculiar way to value costs and benefits: willingness and ability to pay. The amount one is willing to pay for an entitlement, given her wealth as defined under some preexisting allocation of resources, is taken as both *prima facie* and virtually conclusive evidence on how much the resource will benefit her.<sup>185</sup> Those who are willing to pay the most to acquire an entitlement are assumed to "value" it the most; it therefore will bring them more utility than anyone else. Entitlements should therefore be given to those who are willing to pay the most for them.

Law and economics scholars thus believe that, in the absence of externalities or imperfect information, contracts are *prima facie* wealth maximizing because they represent pareto superior exchanges: both parties feel better off with the exchange, and no one else is harmed, so social utility is increased by allowing the exchange to occur.

Where resources are shifted pursuant to a voluntary transaction, we can be reasonably sure that the shift involves an increase in efficiency. The transaction would not have occurred if both parties had not expected it to make them better off. This implies that the resources transferred are more valuable in their new owner's hands.<sup>186</sup>

Thus Posner claims: "[R]esources tend to gravitate toward their most valuable uses if voluntary exchange—a market—is permitted."<sup>187</sup>

At the same time, Posner argues that certain *forced* or *involuntary* exchanges will increase social wealth. Given his definition of efficiency, this seems quite paradoxical. Yet he argues that sometimes voluntary transactions are not "feasible."<sup>188</sup> Even though one person might be willing and able to pay others enough to induce them to sell their goods or labor, the exchange may never happen, for example, if the parties never find out about each other. Thus, an exchange that would increase social wealth may not happen. Impediments to transactions are called "transaction costs." Posner asserts that forced exchanges are wealth-maximizing if they achieve the results that people would bargain for in the absence of transaction costs.<sup>189</sup> People are entitled to legal rules that

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184. R. POSNER, *supra* note 156, at 392.

185. See Mark Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769.

186. R. POSNER, *supra* note 180, at 13 (footnote omitted).

187. *Id.* at 9.

188. *Id.* at 14.

189. *Id.* at 13-14.

mimic the outcome of the market exchanges that would occur if road-blocks did not prevent mutually beneficial exchanges from occurring. The goal of the efficiency scholar is therefore to identify various forms of transaction costs, to identify all the individuals affected by an entitlement decision, to determine how much all those individuals would be willing to pay for the entitlement in the absence of transaction costs, and to define and allocate entitlements in such a way as to distribute them to those individuals who value them most highly.

Law and economics theory is very much an exercise in legal realism. First, efficiency theorists reject the idea that one can deduce the inherent meaning of legal entitlements from abstract concepts. Nor do they believe that one can understand how the legal system operates, as well as the kinds of considerations judges take into account in deciding cases, simply by reading judicial opinions. Posner criticizes Langdell's claim that "principles of law could be inferred from judicial opinions" as a "form of Platonism" because "Langdell regarded particular decisions on contract law as manifestations of or approximations to the legal concept of contract."<sup>190</sup> He notes, with approval, the current "profound skepticism about the possibility of authoritative interpretation of texts" promoted by critical legal studies scholars.<sup>191</sup> He wholeheartedly adopts Holmes' view that "law is a tool for achieving social ends, so that to understand law requires an understanding of social conditions."<sup>192</sup> Efficiency scholars believe that the major goal of legal analysis is to focus on the social consequences of doctrinal decisions; the only reasonable way to judge the efficacy of the legal system is through use of any social scientific methods at our disposal.<sup>193</sup> Thus, efficiency theorists, like the realists, attempt to unify law and the social sciences.<sup>194</sup>

Second, efficiency theorists believe that formalistic elaboration of legal principles is unwise as a normative method for deciding cases. It both conceals the real considerations underlying judicial decisions and prevents open discussion of the political commitments inherent in deci-

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190. Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 762 (1987).

191. *Id.* at 768. Posner disapproves, however, of the normative analyses that have been generated by critical legal studies. *Id.*

192. *Id.* at 762.

193. *Id.* at 778-79. "[L]aw now was recognized to be a deliberate instrument of social control, so that one had to know something about society to be able to understand law, criticize it, and improve it." *Id.* at 763; see also Richard Coase, *The Problem of Social Cost*, 3 J. LAW AND ECON. 1, 2 (1960) (arguing that the benefits of legal rules must be judged by their impact on all affected activities); Pierre Schlag, *An Appreciative Comment on Coase's The Problem of Social Cost: A View from the Left*, 1986 WIS. L. REV. 919, 944 (arguing that legal rules must be judged by reference to their total social impact "on all the affected activities" (emphasis in original)).

194. Posner, *supra* note 190, at 779 (advocating the study of "legal theory," meaning "the study of the law . . . 'from the outside,' using the methods of scientific and humanistic inquiry to enlarge our knowledge of the legal system").

sionmaking. Thus, Posner advocates abolishing “scholarship in which political sallies are concealed in formalistic legal discourse—a staple of modern law review writing—[and replacing it with] a more candid literature on the political merits of contested legal doctrines.”<sup>195</sup>

Third, like the realists, law and economics scholars believe that we cannot deduce answers to legal questions from abstract moral principles. Value choices must be resolved by interest aggregation. Law and economics, as a normative theory, attempts to identify legal rules that will maximize the social welfare. Law protects individual interests, and since those interests collide with each other, the legal system must determine the proper balance between competing interests. Efficiency theorists balance competing interests by comparing costs and benefits of alternative legal rules as measured by likely consequences in the world. Thus, efficiency scholars repudiate conceptualism and adopt a form of consequentialism as their paradigm.

Fourth, law and economics scholars justify rule choices by reference to consent within a fair process. The goal of wealth maximization is to give people what they want by mimicking what people would bargain for in the absence of impediments to agreement. This method eschews deduction from substantive premises. Moreover, results will vary depending on how social values and desires change. Law and economics therefore incorporates the consequentialist reasoning championed by the realists.

### B. *Formalism and Contemporary Legal Theory*

Despite the significant realist influence on contemporary legal theory, many current scholars reintroduce formalist elements into their normative theories. While theorists associated with legal process, rights theory, and law and economics all attempt to absorb the insights of legal realism, they also attempt to create a new foundation for legal principles and decisions to replace the discredited foundations of formalism. They each attempt to recreate, to some extent, the idea of an objective standpoint that judges can use to adjudicate complex legal issues without taking sides in desperate social struggles.<sup>196</sup>

Each of these schools attempts to answer the question “why isn’t that just your opinion?” by reference either to an impartial criterion for judgment (efficiency, wealth maximization, autonomy) or a neutral decision procedure for adjudicating claims by persons with conflicting objectives (social contract theory, legal process, reasoned elaboration, policy analysis, the market). These impartial decision procedures are thought

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195. *Id.* at 778.

196. See Kennedy, *supra* note 47, at 621 (arguing that modern theorists attempt to answer legal questions without taking sides in the “deadly struggles of social groups”).

to be based on uncontroversial shared values. They are also thought to be sufficiently rich to generate, in a relatively determinate fashion, answers to controversial questions of social justice. Liberal normative argument thus seeks to generate answers to controversial questions by applying relatively noncontroversial procedures for judgments, or by analyzing the meaning of shared values.

The effort to answer controversial questions by appealing to shared substantive premises or neutral decision procedures is a kind of formalism. First, this methodology assumes that everyone would come to the same answer if they thought about the problem in the right way. Thus disagreement is not the result of political or ideological conflict, but of mistaken thinking. The attempt to resolve substantive controversy by identifying correct reasoning methods turns normative questions about the good society into an analysis of the inherent implications of values we already share with each other. Under this view, our disagreement is apparent, not real. Proper reasoning will yield the right answer that right thinking persons already should accept. Anyone who disagrees has misunderstood her own values.

Second, the process of generating answers to controversial questions from noncontroversial premises will ordinarily take a form characteristic of classical analytical reasoning. People who disagree about important substantive questions can nevertheless agree to premises at a high level of abstraction. Everyone is in favor of freedom, democracy, and equality. The fact that we can agree on abstract principles of this sort is what makes the theory of rational consensus about shared principles plausible. On the other hand, only highly abstract principles can unify political enemies. To generate agreement, these principles or decision procedures (like cost/benefit analysis or social contract theory) must be stated at such a high level of abstraction that they are ambiguous and can be used to generate conflicting outcomes; that is why they are acceptable to people who fundamentally disagree about the particulars of social justice. Indeed, believing that we can analyze premises at a high level of abstraction to generate answers to questions of social justice is what we mean by formalism.

Further, many current theorists recreate the public/private distinction and the idea of the self-regulating market. To the extent such theorists appeal to a market system that functions autonomously from state control, they fail to appreciate the realists' exposure of private power as publicly delegated and regulated. Moreover, by hoping that the idea of the "market" will answer normative questions, they depend on the formalist assumption that the abstract concept of the "market" or of "voluntary transfer" has a built-in institutional framework.

## 1. *Remnants of Formalism*

### a. *Legal Process*

For all its realist aspects, the legal process school creates a new kind of formalism. First, it presumes that it is possible to identify, in a relatively objective fashion, the sorts of issues that courts are, and are not, competent to decide. Yet there is no reason to suppose that the elaboration of institutional roles is any more objective or determinate than the formulation of substantive principles. For example, Fuller argues that courts should confine themselves to developing rules about what constitutes a legitimate contracting process and refuse to regulate the substantive terms of contracts.<sup>197</sup> But it is impossible to define what constitutes a legitimate contracting process without taking a position on the proper legal response to economic duress or unequal bargaining power. The more one wants to protect the integrity of the contracting process by regulating the ability of more powerful market participants to impose their will in the marketplace, the more the courts must regulate the substantive terms of contracts in order to prevent coercion. By exhorting courts not to "write contracts," Fuller conveys a substantive message: courts should defer to the bulk of market transactions. This message is substantive because it tells courts that they should only regulate the coercive use of unequal bargaining power in peripheral cases.

Second, the legal process approach assumes that although we cannot agree on ends, we can agree on means. This is formalistic because it assumes that processes are easier to identify and more subject to consensus than substantive ends. There is no reason to believe that this is the case. Individuals fundamentally disagree about what constitutes a legitimate contracting process or a legitimate political process.<sup>198</sup> We also disagree about how to construct and judge competing analogies. Thus it appears likely that we would disagree strongly about the purposes behind existing rules of law or how best to achieve them.

Third, it is impossible to argue for deference to the legislature without presuming a background set of conditions to be enforced in the absence of legislative action. When a plaintiff asks the court to create a new legal right or interpret existing rights to protect her from harm, the

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197. Fuller writes:

[T]here is no better illustration of a polycentric relationship than an economic market, and yet the laying down of rules that will make a market function properly is one for which adjudication is generally well suited. The working out of our common law of contracts case by case has proceeded through adjudication, yet the basic principle underlying the rules thus developed is that they should promote the free exchange of goods in a polycentric market. The court gets into difficulty, not when it lays down rules about contracting, but when it attempts to write contracts.

Fuller, *supra* note 137, at 403-04.

198. Compare J. RAWLS, *supra* note 151 with R. NOZICK, *supra* note 152.

court must decide the case either for the plaintiff or the defendant. But even when a court rules in favor of the defendant, the court promulgates a legal rule. Whether the rule is newly announced in that case or reaffirms prior common law rulings denying protection, it determines the rights of the parties in the absence of legislation to the contrary. The court's decision effectively delegates to the defendant the ability to cause the plaintiff harm under prescribed circumstances. To assume that the court is acting passively in this situation ignores the fact that the court is enforcing a substantive legal rule adopted by judges. By supposing that judges can decide cases without making law, the legal process theorists assume that there already exists a clearly defined, objectively identifiable, set of legal rights to which judges can defer. In other words, judges can resolve cases without having to make decisions. All they have to do is enforce the clear implications of whatever background entitlements are inherent in the legal system. This is formalism at its most egregious.

Legal process theory is thoroughly legal realist in its emphasis on process rather than substance, its focus on institutional roles, its attention to the specific facts of cases, its construction of analogies based on situation-types at a relatively low level of abstraction, and its emphasis on interpreting existing rules in light of their underlying purposes, policies, and principles. It is also formalist in its belief that decisions about process are more objectively resolvable than substantive issues; that reasoned elaboration through a combination of analogical and purposive reasoning will generate, in a determinate fashion, objectively sustainable decisions; that, by deferring to the legislature, judges can decide cases without exercising their own will or taking sides on controversial questions of public policy; that the elaboration of institutional roles would be less controversial and more likely to generate consensus than elaboration of substantive rules; and, in general, that the focus on process, roles, and precedent can guide judges in answering legal questions and deciding cases while protecting them from the charge that they are making law. By trying to answer controversial legal questions by reference to supposedly noncontroversial premises, the legal process theorists repudiated some important insights of legal realism. Their premises are more controversial than they think, and the process of generating conclusions from those premises is more indeterminate than they are willing to admit.

#### *b. Rights Theory*

Rights theory incorporates substantial elements of formalist reasoning. The theory of rational consensus assumes that it is possible to identify a common point of view from which we can judge competing claims of justice. Rawls identifies that common point of view as the original

position;<sup>199</sup> conservatives such as Nozick and Posner identify the common point of view as the market, seen as a realm of voluntary, consensual transfer.<sup>200</sup> They agree, however, that the proper way to discuss and adjudicate value choices is by appealing to ground rules for social life to which rational persons with competing interests and notions of the good can consent. This structure of normative argument assumes that one can identify a common point of view, or decision procedure, that is both sufficiently abstract to generate agreement and sufficiently rich to constrain judgments about social justice.<sup>201</sup> The idea that one can deduce answers to controversial questions from noncontroversial, widely-shared premises, smacks of formalism. It assumes that people can be forced, as a matter of logic, to reject conclusions they intuitively accept. Yet this is unlikely to be the case.

For example, if the premises defining Rawls' original position are in fact noncontroversial, they are likely to be so abstract and ambiguous that everyone accepts them only because they mean different things to people with different conceptions of justice. Such an ambiguous set of premises would allow people with competing ideas of justice to generate contradictory principles from the initial choice situation. If this is the case, it would be disingenuous—it would be formalist—to claim that one set of principles emerged from the original position.

Alternatively, the premises defining the original position could embody substantive choices that implicate controversial issues. In this case, the principles derived from the choice situation will be related, not to shared premises, but to controversial ones. To insist that one's premises are noncontroversial and widely-shared, in the face of actual disagreement by sophisticated philosophers, denies the reality of disagreement. It claims as a source of knowledge some inherent notion of what a rational person should think, rather than what people in our culture do think. This is formalism. It is similar to Justice Pitney's assertion that what the Kansas legislature believed was coercive

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199. See *supra* text accompanying notes 170-77.

200. See *supra* text accompanying notes 152, 160-61.

201. Rawls' theory, for example, is deductive in two ways: First, Rawls believes that once the original position is correctly characterized in terms of a fair procedure that everyone can accept, we can deduce from it substantive principles that embody a particular conception of justice. Second, he argues that the general principles so chosen significantly constrain the range of choices of more specific legal institutions and rules of law. "What these individuals [in the original position] will do is then derived by strictly deductive reasoning . . ." J. RAWLS, *supra* note 151, at 119.

[C]learly arguments from such premises [about the original position] can be fully deductive, as theories in politics and economics attest. We should strive for a kind of moral geometry with all the rigor which this name connotes. Unhappily the reasoning I shall give will fall far short of this, since it is highly intuitive throughout. Yet it is essential to have in mind the ideal one would like to achieve.

*Id.* at 121.



(employer insistence on nonunion labor) was not coercion "in truth."<sup>202</sup> If, however, the theorist acknowledges the reality of the disagreement, she cannot claim that the theory rests on noncontroversial, consensus-based premises.

A specific example illustrates this point. Rawls asserts, as a premise, that people do not deserve any special privileges because of certain characteristics like race, religion, intelligence, talents, sex, or descent. He tries to convince us that this is the proper view to take of social justice.<sup>203</sup> He then asks, what would you want if you did not know into which of the irrelevant categories you fell? I think this is a useful and compelling question to ask. I believe that asking this question of someone who *believes* it is a good question may cause her to change her mind about what constitutes a just resolution of a social issue. But that is because I already intuitively accept the premises with which Rawls starts. Nozick, for example, does not accept those premises; he argues that talented people, although they do not deserve their talents, ought, as a matter of social justice, be allowed to reap their benefits.<sup>204</sup> According to Nozick, Rawls' question is a terrible question to ask; it is an *unjust* question. If Rawls' premises are noncontroversial, why can't he convince Nozick, a talented philosopher with an office at the same university, to accept them? The answer is that they really do disagree about what constitutes social justice. Accordingly, it is highly unlikely that anyone could identify a set of premises that both Rawls and Nozick would accept as comprising a fair contracting procedure. It is the essence of formalism to hope that some set of shared premises could emerge from their conflicting social visions that could constrain them to converge on a single set of principles.

Rights theorists embrace formalism in a second way. Once they have identified their common point of view or impartial decision procedure, they use this formula to generate substantive principles of justice. These principles, however, are stated at such a high level of abstraction that they could not significantly constrain the choice of specific legal doctrines. Yet they *must* be highly abstract for the rights theorists to claim that society as a whole accepts them. Agreement on principles is meaningless, however, if the principles are so general that people who fundamentally disagree about what rights the law should protect can all use the same principles to support their contradictory conclusions. Rawls resorts to formalism by arguing that a small number of general principles can be used to regulate all basic social and legal institutions. He identifies *two* such principles, which he calls the equal liberty principle and the

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202. *Coppage v. Kansas*, 236 U.S. 1, 16 (1915); see also *supra* text accompanying notes 106-13.

203. See J. RAWLS, *supra* note 151, at 137.

204. R. NOZICK, *supra* note 152, at 195-204, 213-31.

difference principle.<sup>205</sup> Similarly, Nozick identifies three principles of justice—just acquisition of property, free transfer, and rectification of past injustice.<sup>206</sup> Ackerman argues for the principles of consistency, rationality, and neutrality.<sup>207</sup> Other rights theorists identify even fewer fundamental principles. Posner, for example, argues that rational consensus leads us to make all normative judgments on the basis of the single principle of wealth maximization.<sup>208</sup>

Abstract principles proposed by rights theorists may orient our thinking in a particular way; they may make certain issues salient and others peripheral. That is the way a paradigm functions. But the highly abstract principles that most rights theorists adopt cannot significantly constrain someone who has strong intuitive notions about the results she hopes to reach. To assume that they can is to put form over substance.

### c. *Law and Economics*

Law and economics is very much an exercise in formalism. First, despite its claims to evaluate rules on the basis of their social consequences, very little law and economics literature offers empirical evidence either about what people want or about the likely consequences of alternative rules. Moreover, in applying efficiency analysis, many theorists base their assertions on hunches or assumptions about the extent to which individuals value entitlements. They often do so with a tone of certainty.<sup>209</sup> Yet, without the empirical work necessary to back up their assertions, this tone of certainty is unwarranted.

Second, it is highly formalistic to seize on willingness to pay as conclusive evidence that a market transaction has in fact benefited both parties.<sup>210</sup> People enter into executory contracts because they believe that

205. First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.

J. RAWLS, *supra* note 151, at 60.

The second principle is later restated as the difference principle: "Social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity." *Id.* at 83.

206. R. NOZICK, *supra* note 152, at 150-52.

207. B. ACKERMAN, *supra* note 155, at 11.

208. See R. POSNER, *supra* note 156, at 88-115.

209. See, e.g., R. POSNER, *supra* note 156; Epstein, *supra* note 157. Pierre Schlag comments: How does Posner know, for instance, whether a good would be traded in the absence of transaction costs? The view from Chicago is not clouded by the ying-yang skepticism of the West coast or perverted by the nail-chewing self doubts of the Eastern seaboard: in Chicago, one can safely appeal to common sense.

Schlag, *supra* note 193, at 941.

210. See Kelman, *supra* note 185.

the exchange of performance in the future will benefit each of them. But they may be mistaken about this. There is no reason to presume that enforcement of a voluntary agreement that is executory in nature necessarily will cause more good than harm. When a promisor reneges on a contract, that indicates she no longer views the transaction as utility-maximizing. The fact that the promisor mistakenly thought she would benefit does not change the fact that she, in fact, will not be benefited by performance. The presumption that voluntary contracts maximize social wealth simply does not address the problem of regret.<sup>211</sup> To identify social welfare maximization with wealth maximization and to define wealth maximization as giving people what they bargain for in executory contracts conflates the ethical goal of causing more good than harm with the policy of promoting reliance on promises. Whether promoting reliance on promises through enforcing contracts does or does not maximize social utility is an empirical question.

Third, efficiency theorists engage in formalism when they fail to explain how they differentiate between transaction costs and other sorts of costs. The idea of a "transaction cost" is not self-defining. Yet the question of what is and is not a transaction cost is absolutely crucial for law and economics arguments.<sup>212</sup> Posner defines transaction costs as "barriers to the free flow of resources."<sup>213</sup> This definition is ambiguous. It gives no guidance in distinguishing between the substance of a transaction and the process of free exchange.

The issue of how to deal with imperfect information demonstrates the difficulty of distinguishing between "transaction costs" and elements of wealth that are exchanged in the transaction. Posner includes "high information costs" as an example of a barrier to the free flow of resources<sup>214</sup>, and thus defines them as transaction costs. There is no reason why they must be so considered, however. Assume that one of the parties to an agreement is mistaken about important facts relevant to the agreement. For example, a union fails to bargain for prenotification of a plant closing because it is mistaken about chances of the plant closing and the benefits of prenotification in such circumstances. If the union had known these facts, it would have insisted on prenotification in its

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211. P. ATIYAH, *supra* note 65, at 133. Moreover, it is no answer to say that if it were really worth more to the promisor to get out of the deal than it was worth to the promisee to have her perform, she would go ahead and renege and pay damages. We could just as easily argue that if the promisee wants performance so badly, let him offer the promisor enough to induce the promisor to perform the contract.

212. Gary Peller, *The Politics of Reconstruction*, 98 HARV. L. REV. 863, 871-73 (1985); Schlag, *supra* note 193, at 929-30. Professors Peller and Schlag have explained in separate articles that it is not easy to make or justify the distinction between costs that are "mere costs of transacting" and costs that themselves represent "the subject of the transaction itself."

213. R. POSNER, *supra* note 180, at 10.

214. *Id.*

contract, perhaps in return for other concessions. If we treat the information as a transaction cost, we should enforce the contract terms to which the parties would have agreed if they had perfect information; we can thus make both parties better off in their own terms. By giving the parties what they really wanted to bargain for, we are facilitating individual will. This is why treating imperfect information as a transaction cost maximizes social wealth; rather than redistributing a valuable resource, we merely perfect the process of free exchange.

We do not have to treat information as a transaction cost, however. We can treat it as a good that is traded in the market, and which represents part and parcel of the subject matter of the transaction itself. After all, we do buy and sell information. If the union had wanted better information about the employment market and the chances of a plant closing, it could and should have purchased that information from the company. Why give the union the benefit of information it was not willing and able to pay for? Why should the court redistribute information from the company to the union, as it were, for free?

When we treat information as a mere cost of transacting, we enforce the result the parties would have reached in a hypothetical market in which information was redistributed. This approach socializes access to information. In contrast, when we treat information as a valuable resource in its own right, we conclude that the union got exactly what it was willing to pay for in its contract. We will therefore maximize social wealth if we enforce the contract in accordance with its terms.

Logic alone cannot determine whether to treat a resource as a mere cost of transacting (creating a fair process) or as a constituent element of wealth, just as logic cannot define what is a free contract and what is a coerced contract. In both cases, the issue of how to define a fair bargaining process cannot be separated from a substantive judgment about which distributions of wealth and power are legitimate. Moreover, if information could be treated either as a transaction cost or a form of wealth, what about bargaining power? We could assume, as most efficiency theorists do, that bargaining power is a form of wealth because one's bargaining power depends on one's property rights, bargaining skills, and range of alternatives. We could then argue that everyone has the bargaining power they are willing to pay for. On the other hand, we could count bargaining power as a transaction cost; after all, we only need it for the purpose of engaging in transactions, just as we only need the ability to find and negotiate with others for the purpose of engaging in transactions. Bargaining power is a "barrier to the free flow of resources" because it blocks exchanges that might occur with a different distribution of bargaining power. If it is a transaction cost, we should enforce the bargain the parties would have reached if they had had rela-

tively more equal bargaining power. Such an approach would give us ample reason to regulate the terms of employment contracts to protect the interests of the more vulnerable party—the workers.

For that matter, logic does not dictate that transaction costs should be treated differently at all. A libertarian could argue that *all* costs are substantive elements of wealth; and therefore *no* forced exchanges can be justified. Transactions themselves benefit people; they are traded in the marketplace through contract assignments and option contracts. Why should courts give people the benefits of transactions they are unwilling to pay for? The court should never second guess the agreements made, or not made, by market participants. People should get what they are willing to pay for—no more and no less; the court should not be in the business of redistributing any sorts of entitlements on the grounds that the parties would have been willing to pay for them if only we lived in a different world and transactions were free; doing so socializes the benefit of transactions.

Only formalistic reasoning allows law and economics scholars to unreflectively identify certain costs as transaction costs and other costs as substantive objects of transactions. The realists would have wanted us to recognize that the distinction between a procedural issue of facilitating transactions and a substantive issue about the proper distribution of wealth cannot be made by logic alone. We can make this distinction, and we can apply transaction cost analysis, only by considering the wisdom and justice of redistributing and effectively socializing various sorts of interests—interests in transactions, in information, in bargaining power, in property itself.

Fourth, efficiency arguments are formalistic because theorists who use them are constantly turning normative questions into descriptive questions. They convert the question “what values should the law protect?” into the question “what bargains would people make in the absence of transaction costs, given a background distribution of wealth, allocation of resources, and market entitlements?” Arthur Leff described this as a “neo-Panglossian move: good is defined as that which is in fact desired.”<sup>215</sup> Thus, as Duncan Kennedy has explained:

the move to efficiency transposes a conflict between groups in civil society from the level of a dispute about justice and truth to a dispute about *facts*—about probably unknowable social science data that no one will ever actually try to collect but which provides ample room for fanciful hypotheses.<sup>216</sup>

Efficiency theory assumes a noncontroversial market structure

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215. Arthur Leff, *Economic Analysis of the Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 456 (1974).

216. Kennedy, *supra* note 47, at 603 (emphasis in original).

within which analysis can proceed. Posner asserts: "*By a process of voluntary exchange*, resources are shifted to those uses in which the value to consumers, as measured by their willingness to pay, is highest. When resources are being used where their value is highest, we may say that they are being employed efficiently."<sup>217</sup> Arthur Leff comments that this means that "since people are rationally self-interested, what they *do* shows what they value, and their willingness to pay for what they value is proof of their rational self-interest. Nothing merely empirical could get in the way of such a structure because it is definitional."<sup>218</sup> And what is assumed in the definition? Posner assumes that the phrase "a process of voluntary exchange" is self-defining, and that a general market structure based on such a concept can be easily identified.

This is formalistic nonsense. The legal realists convincingly proved that the concept of voluntary exchange is problematic, that it is not self-defining, and that we must use a combination of moral and policy arguments to define the market structure within which exchanges occur. In other words, we must define, through the use of public power, the contract and property entitlements that will determine the structure of the market. The only way to balance competing desires is through some process of decisionmaking. The efficiency theorists choose their conception of the free market as the neutral decisionmaking process. This is exactly what the legal realists warned us to avoid. It is formalistic to assume that there is such a thing as an inherent structure to the concept of the free market that does not need to be argued for on the basis of considerations of policy and morality. But efficiency scholars engage in precisely this sort of formalism.

Finally, law and economics scholars are formalists when they assume, without argument, the existing distribution of wealth. Most law and economics scholars are careful to state that economics cannot inde-

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217. R. POSNER, *supra* note 180, at 9 (emphasis added). In a similar vein, Alan Schwartz argues that the only question is "how well consumer markets work." Schwartz, *supra* note 161, at 110. This assumes a single definition of what constitutes a market. It pretends that no policy decisions need to be made to determine which specific legal rules constitute a market—either you have a market or you don't. This is formalistic because it implies a simple answer to numerous particular doctrinal decisions, such as the choice between expectation damages and reliance damages, the definition of rules about offer and acceptance, rules about what constitutes a material breach of contract, rules of interpretation, formal requirements like recording and writing the contract. Schwartz assumes that the correct rules are implicit in the abstract concept of "the market." This is false. There are many alternative definitions of the legal structure of the market; there are many different types of market. The choice is not simply market versus government control. Professor Schwartz compounds his formalist error by asserting that the legislature, not the judges, should determine when to intervene in the market. *Id.* at 112. This begs the question of what judges should do—what type of market rules they should promulgate—in the absence of legislative action. The judges are responsible for creating and defining these background rules; the rules do not define themselves.

218. Leff, *supra* note 215, at 457 (emphasis in original).

pendently reveal what public policy should be, or how to choose between alternative possible legal rules. It can only help to identify the costs and benefits of alternative approaches to answering legal questions, given certain assumptions about the background conditions against which the choice is being made. Posner, for example, notes that the amount an individual is willing to pay for an entitlement depends, in no small measure, on that person's wealth.

Suppose that pituitary extract is in very scarce supply relative to the demand and is therefore very expensive. A poor family has a child who will be a dwarf if he does not get some of the extract, but the family cannot afford the price and could not even if they could borrow against the child's future earnings as a person of normal height; for the present value of those earnings net of consumption is less than the price of the extract. A rich family has a child who will grow to normal height, but the extract will add a few inches more, and his parents decide to buy it for him. In the sense of value used in this book, the pituitary extract is more valuable to the rich than to the poor family, because value is measured by willingness to pay; but the extract would confer greater happiness in the hands of the poor family than in the hands of the rich one.<sup>219</sup>

Because wealth gives market power, a wealthy person may "value" (in Posner's terms) an entitlement more than a poor person, even though everyone would agree that more utility would be created by giving the entitlement to the poor person than the rich person.

Posner's admission that efficiency judgments are relative to an existing distribution of wealth states, clearly and realistically, the meaning of wealth maximization as a normative principle. He admits that his measure of social utility depends on assumptions that cannot themselves be justified by the decision procedure he has adopted. This is because cost/benefit analysis, as he performs it, can only be applied if we have already identified a background distribution of wealth that must be justified on other, explicitly political or ideological, grounds. In this, Posner is following the tradition of the legal realists.

But not for long. Posner's one paragraph admission that his theory is biased in favor of the rich is an example of what may be called the "inoculation theory" of legal realism.<sup>220</sup> In the very next sentence, he takes it back. "As this example shows, the term efficiency, when used as in this book to denote that allocation of resources in which value is maximized, has limitations as an ethical criterion of social decisionmaking—although perhaps not serious ones, as such examples are very rare."<sup>221</sup> Here formalism returns with a vengeance. How does he know that "such

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219. R. POSNER, *supra* note 180, at 11-12.

220. I get this phrase from Martha Minow. See also James Boyle, *Legal Fiction*, 38 HASTINGS L.J. 1013, 1015 (1987).

221. R. POSNER, *supra* note 180, at 12.

examples are very rare”)? They are rare only if you do not look for them or want to see them. They are rare only if you are not poor, or if you do not see the world from the point of view of those with little market power. Posner has tipped his hat to legal realism, but for the rest of his book, he analyzes legal doctrines in terms of his wealth-maximization principle, all the while blithely assuming—and leading the reader to assume—that efficiency is a pretty good proxy for social utility. Yet nowhere does he give an ethical justification of the existing distribution of wealth, despite the fact that, by his own admission, the entire normative power of his theory rests on such a justification. This is formalism because he takes the existing distribution of wealth for granted; he treats it as a fact of life rather than as a question the resolution of which is central to the legitimacy of his normative argument.

## 2. *Liberal Legal Theory and the Recreation of the Public/Private Distinction*

Liberal theorists further reject legal realism when they recreate the public/private distinction through the concept of a self-regulating market. They do this in a variety of ways.

### a. *Deference as an Appeal to a Private Sphere*

The most subtle, and therefore powerful, way in which liberal theorists have relied on the idea of the autonomous market is the modern idea of judicial restraint. This theory recognizes the realist insight that judges make law when they create new, legally protected interests. It then argues that the legislature, and not the courts, should change the law. This argument rejects the realists' insight that courts must decide the case somehow and whatever they decide, they are creating law. The theory works by appealing either to a formalistic application of precedent or by recreating the public/private distinction.

The legal process theorists are most closely identified with the idea of judicial restraint. They attempt to differentiate the sorts of issues which courts are competent to resolve from those issues the legislature or the marketplace can resolve better than the courts. The idea that judges can act passively—that they can dispose of a lawsuit without making law—presupposes that there is some neutral background set of entitlements to which they can refer that they are not responsible for having created. This perspective assumes the existence of a private sphere of market relations in which the state is not implicated.

For example, in *United Steel Workers, Local 1330 v. United States Steel Corp.*,<sup>222</sup> a steel company refused to negotiate on a possible sale to

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222. 631 F.2d 1264 (6th Cir. 1980).



the union of the plant that the company was closing. The union had asked for a court order granting it the right to purchase the plant. The court held that no existing statute or precedent created a right of first refusal in such a situation, and therefore that the company could do whatever it wanted with its property; it refused to create a new legal entitlement in the workers. Although the judges felt that the company owed moral obligations to the workers and the community,<sup>223</sup> they argued that "formulation of public policy on the great issues involved in plant closings and removals is clearly the responsibility of the legislatures of the states or of the Congress of the United States."<sup>224</sup>

This formulation of the institutional roles of the court and the legislature assumes that the court could resolve the dispute without "formulating public policy." This assumption is based on the court's belief that *it was not making a decision*, but rather, simply deferring to decisions made by others, including the legislature (through its failure to regulate plant closings) and the company (in deciding what to do with its property). The belief that the court is not implicated in the decisions made by the legislature and the company rests on the assumption that the public sphere of government regulation is fundamentally separate from the private sphere of market transactions.

From the standpoint of the legal realists, by ruling for the company, the court was actively defining and enforcing contract and property rights. It authorized the company to use its property as it pleased even though the company's actions would have substantial detrimental effects on other property owners in the community. It held that a collective bargaining agreement granting the employer full discretion over plant closings was sufficiently voluntary to be enforced in accord with its terms, despite the fact that, as the single largest employer in the city, the company had enormous bargaining power relative to the workers to dictate the terms of the contract between the parties. It also held that prior cases granting employers full power to control the disposition of factories were indistinguishable from the case at hand, even though a plausible argument could be made that the tremendous social effects of major plant closings in single employer communities were absent, or were never addressed in prior case law, making this a case of first impression in which the court had no alternative but to formulate and implement public policy.

By ignoring all these considerations, the court convinced itself that it could resolve the case without defining and implementing public policy decisions about the distribution of power in the marketplace. The court pretended that it was not implicated in, or responsible for, the company's

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223. *Id.* at 1279-82.

224. *Id.* at 1282.

decision to abandon the workers, and therefore it was not exercising power when it failed to protect them. This construction of the problem recreates the public/private distinction with a vengeance; it assumes that, in the absence of specific legislation, the state is not fundamentally implicated in the outcomes of the market.

*b. Contract and Adjudication as Separate Spheres*

Lon Fuller further illustrates the legal process school's recreation of the public/private distinction.<sup>225</sup> Fuller argued that adjudication, voting, and contract were distinct methods of social ordering. This set of distinctions rests on a distinction between the public sphere of government power (courts and legislatures) and the private sphere of the market (contract). Fuller recognized that the courts were implicated in the private sphere of contract, but only to the extent to which the courts defined rules about the contracting process. Courts (and by extension the state itself) were not further implicated in the "free exchange of goods in a polycentric market."<sup>226</sup> That was purely a matter of "negotiation" among market participants.<sup>227</sup> Again, from the standpoint of the legal realists, this is nonsense. By defining the rules of the free market, the courts do a lot more than merely clarify and enforce rules about the contracting process. They determine, to a large extent, the distribution of power and wealth in society.

*c. Autonomy and Unequal Bargaining Power as Appeals to a Private Sphere*

Conservative rights theorists appeal to the ideal of autonomy, or individual liberty, as the ultimate basis of legal rights.<sup>228</sup> Posner's wealth-maximization principle, for example, assumes that market exchanges are not coercive; they are, as he puts it, "voluntary."<sup>229</sup> Thus consent can justify even forced transfers if we ask people what they would agree to in the absence of transaction costs. The goal is to mimic the uncoerced agreements people would make in a frictionless world. Richard Epstein and Alan Schwartz further argue that freedom of contract enhances autonomy. According to Epstein, "freedom of contract is an aspect of individual liberty" that is generally impeded by government regulation.<sup>230</sup> Schwartz argues that "just outcomes arise when people

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225. See Fuller, *supra* note 137.

226. *Id.* at 403-04.

227. *Id.* at 363.

228. See, e.g., R. POSNER, *supra* note 156, at 96; Epstein, *supra* note 157, at 953-55; Schwartz, *supra* note 161.

229. R. POSNER, *supra* note 180, at 9.

230. Epstein, *supra* note 157, at 953.

are permitted to do the best they can, given their circumstances."<sup>231</sup> These views all share a common assumption: the market is free from mutual coercion, and therefore the state is not fundamentally implicated in the outcomes of private encounters.

Liberal rights theorists are much more likely to recognize the role the state plays in shaping the institutional framework for the market.<sup>232</sup> Yet they often define the basic issue of social justice as a fundamental conflict between efficiency and equity.<sup>233</sup> This formulation of the problem fails to recognize that what people bargain for is to a large extent a function of their market power, which in turn depends on the legal allocation of entitlements. With a more equal initial allocation of property rights and a different set of legal rules about contracts, a different pattern of outcomes would emerge. We could redefine the liberal goal as mimicking the bargains people would make if they had relatively equal bargaining power. Such a normative decision procedure could well define outcomes that produce a relatively egalitarian distribution of wealth as "efficient." The idea that there is a fundamental conflict between efficiency and distributive justice presupposes that the market possesses an inherent objective structure. In contrast, the realist idea that the legal order determines the relative bargaining power of market participants focuses our attention on the ways the legal definition of entitlements influences efficiency.

"The idea of "unequal bargaining power" supports the idea of an autonomous market because both courts and theorists tend to trivialize its incidence. As Kennedy argues, "the doctrine of unequal bargaining power has the appeal that it presupposes that most of the time there is equal bargaining power, so that freedom of contract is the appropriate norm. It is an exceptional doctrine, unthreatening to basic arrangements, however critical of particular cases."<sup>234</sup> By providing a basis for regulating severe cases of concentrated market power, the unequal bargaining power doctrine characterizes the vast bulk of market transactions

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231. Schwartz, *supra* note 161, at 107.

232. See, e.g., BRUCE ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 54 (1984) ("the activist lawyer cannot simply assume the legitimacy of the ongoing structure of activities, but must somehow be in a position to assess the extent to which these practices . . . require self-conscious restructuring through the legal order").

233. See, e.g., R. DWORKIN, *Liberalism*, *supra* note 154, at 195-96:

[The liberal] conception of equality requires an economic system that produces certain inequalities (those that reflect the true differential costs of goods and opportunities) but not others (those that follow from differences in ability, inheritance, and so on). The market produces both the required and the forbidden inequalities, and there is no alternative system that can be relied upon to produce the former without the latter.

The liberal must be tempted, therefore to a reform of the market through a scheme of redistribution that leaves its pricing system relatively intact but sharply limits, at least, the inequalities in welfare that his initial principle prohibits.

234. Kennedy, *supra* note 47, at 621.

as consensual. It therefore obscures the extent of state involvement in private transactions.

*d. Efficiency as an Appeal to the Autonomous Market*

Law and economics scholars argue that people are rational maximizers of their self-interest, and that the goal of the legal system should merely be to facilitate their ability to pursue their self-interest. The law should therefore defer to voluntary transactions, and when such transactions are not feasible, mimic the result that would occur if they were feasible. This structure of normative argument recreates the idea of a self-regulating market system whose outcomes are largely the result of individual, private choices in which the state is, by hypothesis, not fundamentally implicated. It ignores entirely the legal realists' insight that contract and property rights are defined by law. The legal system therefore substantially determines the relative bargaining power of market participants, and hence, both the shape and nature of economic activity, and the distribution of power and wealth in society. The idea of mimicking the result "the market" would reach in the absence of transaction costs distracts us from the public policy decisions that determine the entitlement structure which, in turn, defines the market. It hides the extent to which public power is involved in running and operating a market.

### III

#### LIBERAL THEORY, CRITICAL THEORY, AND THE LEGACY OF LEGAL REALISM

The legacy of legal realism is continued controversy about the nature of legal reasoning and of the relation between law and society. We are still digesting the implications of legal realism; it successfully removed certain sorts of arguments as persuasive tools, but it failed to adequately construct a new vocabulary and stance toward normative legal argument.

I have argued that the proposition that we are all legal realists now is partly true and partly false. All major current schools of thought depend significantly on assumptions about the relation between law and society and the nature of legitimate legal reasoning that can be traced directly to the realists. At the same time, the liberal theories I have described recreate central elements of classical formalism. They do so by recreating the idea of an autonomous market system, and by attempting to generate answers to controversial questions by reasoning from supposedly noncontroversial premises. They substantially rely on "finding" metaphors; they hope to "discover" the right answer, to "elaborate"

existing community values, to "uncover" the principles embedded in precedent and social practice, to "balance" interests.

In contrast, critical theorists associated with critical legal studies and feminist legal theory attempt to engage in normative legal argument without the crutch of formalism. In particular, we hope, first, to understand the many forms that power takes in society. This commitment prevents us from believing in an autonomous, self-regulating market independent of state power. We focus instead on the interconnection of state and society, of law and the market. Second, we hope to engage in normative argument in a way that acknowledges our responsibility for the decisions and value choices we make. This means that we cannot accept forms of normative argument that characterize decisions as the product of merely applying decision procedures. We hope to rely more on "making" than "finding" metaphors. To put it somewhat cantankerously: value choices cannot be made by applying a formula and seeing what comes out; morality is not like geometry. Instead, it requires active judgment. Third, we refuse to accept the idea that the only legitimate way to make value choices is to identify a procedure for decisionmaking that expresses a common, impartial point of view. Rather, we see normative argument as encompassing the creation and elaboration of both competing social visions and forms of moral persuasion. People sometimes disagree about social justice because they are thinking wrongly. When asked what they believe, they may answer with sweeping generalizations that oversimplify the complexity of their deep moral commitments. But people also disagree about social justice because reasonable people disagree fundamentally about the specifics of a just society. Mutual engagement of people with competing social visions may reveal substantial commonalities, and generating consensus on fundamental questions of social justice is a worthwhile goal. But the key to consensus is to recognize competing perspectives, and to engage in honest dialogue with people who hold different views, not to ignore or dismiss them.

There are a number of fundamental disagreements underlying some current debates about normative legal argument. These debates revolve around the two issues I have argued were the central concerns of most of the legal realists; the relationship between law and society and the nature of legal reasoning. The first question is whether we should reconstruct the idea of a self-regulating market system. The second question is whether normative argument should proceed by means of a neutral decision procedure. These two issues are connected. Many liberal theorists accept the idea of a self-regulating market system because it furthers the goal of establishing neutral guidelines for the exercise of government power. They believe such neutrality with respect to competing concep-

tions of the good both protects individual freedom from oppressive government power and maximizes social welfare.

*A. Is the Market Self-Regulating?*

One product of legal realism is controversy over the classical view that the market is a self-regulating system made up of individual, free transactions fundamentally separate from the public sphere of state power. Most law and economics theorists appeal to this image of the market system, and argue that the goal of the legal system should be, to the maximum extent possible, to establish such a market. Similar appeals to an autonomous private sphere characterize certain versions of rights theory, most notably those of Robert Nozick<sup>235</sup> and Richard Epstein.<sup>236</sup> Legal process arguments that depend on the idea of judges refraining from "making law" similarly assume a background set of neutral market rules and market outcomes for which judges (and the state in general) are not responsible.

Critical theorists adopt the competing view advanced by the legal realists. We see the state as fundamentally implicated in the processes and outcomes of private life because the legal definition of market entitlements largely determines the actual distribution of wealth and power in society. Moreover, every private transaction is performed in the context of both public and private coercion. In contrast, for the private market theory to provide a coherent analytical structure, it must assume that most market transactions are voluntary. The image of the private market provides an incentive for theorists to marginalize the problem of disparities in bargaining power. If I am right about this, the theory places the burden on whoever wants to invalidate a transaction to demonstrate that it was not voluntary. From the standpoint of critical theorists, this unfairly places the burden of persuasion in the wrong direction, with negative consequences for social justice: people who enter into a transaction out of economic necessity are just as coerced as those who are forced directly by law to act in a certain way. The central issue should be the use and abuse of power, both public and private. Market imagery characterizes one form of power as more pernicious than the other. This form of argument can be attractive only from the perspective of those with market power, because only these people feel uncoerced in the market.<sup>237</sup>

What is at stake in this debate? From the standpoint of the market

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235. R. NOZICK, *supra* note 152.

236. Epstein, *supra* note 157.

237. Those without market power may of course believe that the market is a legitimate determinant of who gets what. Such people may not feel coerced because they believe that the winners deserve to win.

theorists, the realist attack on the public/private distinction is frightening because it seems to imply that nothing is private; if nothing is private, moreover, nothing is free from the risk of government regulation, involvement, and oversight. This is part of what we mean by tyranny. However, from the standpoint of the critical theorists, the pretense of an autonomous private sphere conceals the fact that the market is defined by legal rules chosen and enforced by government; that other market structures are possible; and that the kind of market we create should be a function of considerations of policy and justice, not of formalistic deduction from abstract concepts. Moreover, the idea of an autonomous market focuses our attention solely on the potentially oppressive power of government intervention in private affairs. It thereby blinds us to the potentially oppressive power of "private" actors exercising their market entitlements. These private exercises of bargaining power are backed up by the coercive machinery of the state. The distribution of wealth and power in society is partly the result of individual decisions in the marketplace. But to a very large extent, they are determined by law. Only if we can see the role that public power plays in the "private" sphere, can we judge whether it has been used wisely. To make these judgments, we cannot pretend to always defer to individual, free transactions. We must confront directly our definition of a good society.

*B. Should Law Operate on the Basis of Neutral Decision Procedures?*

While the debate over the self-regulating market concerns the relation between law and society, the question of neutral decision procedures concerns the legitimate form of normative argument. What do we mean by the rule of law? What does it mean to establish social justice? How are we to determine what is right and wrong? Given the insights of legal realism, how can we make legitimate normative legal arguments? To what extent does the need to engage in normative argument require us to reject aspects of realist thought?

These questions underlie current confusion and disagreement between liberal and critical theorists. By "liberal" theorists, I mean to include the most sophisticated proponents of legal process, rights theory, and law and economics.<sup>238</sup> These theorists attempt to answer normative questions about what the law should be by identifying a neutral and objective decision procedure<sup>239</sup> that can generate answers and that fairly

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238. Of course, I am overgeneralizing madly here. It is quite possible to take a critical attitude toward process, rights, or economic arguments. It is also possible to formalize critical legal studies, feminism, and law and society approaches. I believe, nonetheless, that my comparisons of different approaches to normative argument describe general tendencies.

239. For elaboration of this point, see Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

filters the shared values of individuals in the community through legitimate institutional structures. They assume that although "what is just and unjust is usually in dispute," people may "nevertheless acknowledge a common point of view from which their claims may be adjudicated."<sup>240</sup> This theory claims that the very definition of legitimate normative argument about justice means identifying a decision procedure that embodies such a common point of view.

The liberal theorists' decision procedure must be designed to reconcile seemingly incompatible values in an impartial way. This is what liberal theorists mean by "law." Without a neutral decision procedure, judges have no alternative but to "mistake[] their own political or social preferences for those of the law."<sup>241</sup> Under this view, the practice of criticizing the contradictions within existing legal institutions and forms of reasoning is an essentially negative and unhelpful enterprise; it gets in the way of constructing normative commitments because it leaves the decisionmaker with nothing but personal, subjective choice.<sup>242</sup>

By "critical" theory, I mean to include the most sophisticated proponents of law and society, critical legal studies, and feminist legal theory. These theorists assume that it is not possible to identify a "common point of view" to answer normative questions that can be both based on shared values and sufficiently definite to generate answers in particular cases. They nonetheless see legitimate normative argument and consensus about justice as both possible and desirable. In contrast to liberal theory, critical theory seeks to place the distinction between ideological controversy about what constitutes a good society and controversy about law and legal reasoning into context. The critical theorists' goal is to understand legal reasoning as incorporating within itself all the competing political perspectives that find expression in the political system, rather than being qualitatively distinct from political controversy.<sup>243</sup>

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240. J. RAWLS, *supra* note 151, at 5. I call this "liberal" because I take it to be the fundamental premise of individualistic political philosophy since Hobbes and Locke.

241. Carrington, *supra* note 3, at 226.

242. Martha Nussbaum argues that this is the Kantian view.

Kant . . . argues [that] it is part of the very notion of a moral rule or principle that it can never conflict with another moral rule. . . . The requirement that objective practical rules be in every situation consistent, forming a harmonious system like a system of true beliefs, overrides, for Kant, our intuitive feeling (which he acknowledges) that there is a genuine conflict of duties. It appears that our duties may conflict. But this cannot be so, since the very concepts of duty and practical law rule out inconsistency.

MARTHA NUSSBAUM, *THE FRAGILITY OF GOODNESS* 31 (1986).

243. ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 15 (1986). James Boyd White explains:

Our standards of judgment come not from *a priori* reasoning, then, or from theories, but from our own experience of life and of other people . . . . Of course, no one experience or work can stand as a perfect authority. We make sense of what we read as we make sense of life, by putting one tentative judgment together with another, one version of ourselves and our capacities together with another, seeing how it works out, trying it another way,



This view sees decision procedures as illegitimate attempts to evade responsibility for moral choices about justice, and is skeptical about the possibility of identifying a single common viewpoint from which claims of justice may be judged. Moreover, it sees the elaboration of contradictory principles, values, and perspectives as itself a constructive part of normative argument. Contradiction all the way down is the route to a responsible, moral formulation of social justice. Judges, therefore, act unjustly if they decide cases without coming to terms with the fact that they have to exercise judgment within the contours of a given legal tradition and that such judgment requires hard choices in the face of contradictory moral impulses.<sup>244</sup>

For those who have never thought this way, the critical view is hard to understand. It is hard even to take seriously. It seems pointless to engage in moral argument without believing that the goal is a right answer or at least a procedure, however flawed, that can help us look for such an answer. Martha Nussbaum explains that the critical view originated in Greek tragedy.<sup>245</sup> In her view the tragedies depicted people who were placed in situations in which they were pulled, morally, in two different directions at once. A Kantian, or liberal, approach to such moral dilemmas asks us to revise the conflict-generating principles through rational introspection so that they are consistent with each other.<sup>246</sup> The creation of a consistent set of principles in a sense solves the moral problem. It provides a mechanism for relieving tension. Once

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and so on, continually growing and changing by progressive incorporations and discardings. We know how to do this, for we have always done it. There are the processes of reciprocal interaction with other people, with language, and with nature by which we have formed our own identities. We have no deeper knowledge.

James Boyd White, *Introduction: Is Cultural Criticism Possible?* 84 MICH. L. REV. 1373, 1385 (1986).

244. James Boyd White argues that we must escape the "desire[] for certainty" and, instead, respond to legal issues "by accepting the responsibilities that our actual capacities give us." *supra* note 211 at 1383. Similarly, Leon Green, one of the great legal realists argued:

The eternal gropings of men to find a source of their own control beyond themselves will not down. Is there no way to control the exercise of that power we hand over to our judges save by rules of law? These are but the trappings through which judgment is passed. . . . The judging capacity requires not merely a clerk who can match phrases. Phrases can state the issue upon which judgment must be passed but they cannot pass the judgment. At this point the judge finds himself out in life at large beyond any bounds that the terminology of legal science yet knows and it is out here that the judge must find the power which sustains thought and judgment; it is out here that he must employ the processes of intelligent men generally. This hitching up of law with life is a gap that must be bridged before any mature science of law can be developed. A technic of judging finds its chief support in the depths of culture and experience which lie beyond the crusted phraseology of the opinions of judges. The control of judges is not to be found in rules, but in the fact that they are men nourished on the same thoughts and other life-giving forces as the rest of us, and are subject to be influenced by the same factors in making their judgments as those which influence their fellows generally.

Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1020 (1928).

245. M. NUSSBAUM, *supra* note 242, at 23-47.

246. *Id.* at 48-49.

we know what this new set of consistent principles requires, we know what justice demands, and we can act. But this solution to the moral dilemma is *condemned* in the tragedies. It is condemned, partly, because “this is not how it *feels* to be in that situation. It does not feel like solving a puzzle, where all that is needed is to find the right answer.”<sup>247</sup> More important, it is condemned because it provokes “a change from horror to complacency, from the feeling that wrong must be done to the feeling that right has been discovered. This shift is not compatible with the insights of tragedy.”<sup>248</sup> One who “feel[s] no opposing claim, no pull, no reluctance” in resolving a true moral dilemma “has failed to see and respond to his conflict as the conflict it is.”<sup>249</sup> The better response is to recognize the competing moral claims, to feel them pressing upon you at the moment you act. Aeschylus thus criticized Agamemnon for rationalizing the moral dilemma away, for making things “too simple.”<sup>250</sup>

Agamemnon seems to repudiate or suppress initially accurate judgments. Once the decision is reached, the case appears soluble, the competing claim “counts as nothing.” A proper response, by contrast, would begin with the acknowledgement that this is not simply a hard case of discovering truth; it is a case where the agent will have to do wrong.

Such a response would continue with a vivid imagining of both sides of the dilemma . . . .

. . . .

. . . Aeschylus has indicated to us that the only thing remotely like a solution here is, in fact, to describe and see the conflict clearly and to acknowledge that there is no way out. The best the agent can do is to have his suffering, the natural expression of his goodness of character, and not to stifle these responses out of misguided optimism . . . .

If we were such that we could in a crisis dissociate ourselves from one commitment because it clashed with another, we would be less good. Goodness itself, then, insists that there should be no further or more revisionary solving.<sup>251</sup>

What is at stake in this debate about moral argument? From the standpoint of the liberal theorists, the critical theorists have sought to undermine, fundamentally, the possibility of legitimate normative argument. The critical theorists, they argue, sabotage normative argument by insisting that law is “just” a matter of social policy, and that nothing inherent in legal reasoning provides an objective basis for adjudicating competing legal claims or is qualitatively distinct from politically controversial discourse. Moreover, the critical theorists seem uninterested in

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247. *Id.* at 32.

248. *Id.* at 48.

249. *Id.* at 39.

250. *Id.*

251. *Id.* at 42, 49-50 (footnote omitted).

generating tests, procedures, or methods for adjudicating competing values. They therefore treat law as if it really were like politics, where competing rational positions are possible, so that solutions are never more than temporary compromises among groups with competing interests and conceptions of the good. If the critical theorists are right about this, law can provide no independent, nonpolitical, basis for rational decision-making. From the standpoint of the liberal theorists, this situation would be intolerable; it would both undermine social order and make it impossible to create a just society since "what is just and unjust is usually in dispute."<sup>252</sup>

But from the standpoint of the critical theorists, the liberal theorists have tried to create a new kind of formalism. Their procedures for normative decisionmaking conceal the underlying value choices that decisionmakers must confront directly and honestly if they are to make legitimate social decisions about what the law should be. From the critical perspective, liberal theory clouds the real issue, which is the contest among alternative possible perspectives and between competing versions of what constitutes a good society. Liberal theorists address these social visions only indirectly by attempting to apply a decision procedure whose goal is to generate the single result everyone would choose if they thought about the choice in the right way. Critical theorists believe that elaboration and justification of those alternative social visions should be performed directly and openly.

Critics of critical legal studies have attacked it in two, essentially inconsistent, ways. One critique characterizes critical legal studies as *trivial*. These critics argue that all critical legal studies attempts to prove is that law is a matter of social policy and that legal rules must be chosen and identified by choosing between competing interests and between principles and policies. They conclude: Everyone is a legal realist now; let us stop quibbling about methodology and begin to construct substantive arguments about social justice.<sup>253</sup>

A second, contradictory, critique of critical legal studies characterizes it, not as trivial, but as radical, as *nihilistic*. If law is "just politics"—if it involves disputes among groups with competing interests and moral views that cannot be reconciled in an objective fashion—then there is no way for judges to decide cases legitimately; they can appeal only to their

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252. J. RAWLS, *supra* note 151, at 5.

253. Donald Brosnan, *Serious But Not Critical*, 60 S. CAL. L. REV. 259, 396 (1987); John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986). John Stick, ironically, makes both claims about critical legal studies. He argues, first, that the notion that legal choices are not qualitatively distinct from any other kind of value choices is nihilist because it claims that we can give no reasons for such choices that transcend individual preference. *Id.* at 392. Second, he argues that we actually agree on a pragmatic approach, so we should stop arguing about methodology and argue instead about substance. *Id.* at 397.

personal, subjective intuitions about justice, or to theories of economics or morality external to the law.<sup>254</sup> This is the death of law and of the possibility of social justice.<sup>255</sup>

These contradictory attacks on critical legal studies are possible precisely because we are still arguing about the legacy of legal realism. We are still debating what exactly it means to claim that law is a matter of social policy, of balancing interests, of reconciling competing principles. We still cannot figure out how much formalism we need in order to provide a legitimate moral basis for adjudication.

This is why it is still so explosive to claim that law is a form of politics. Liberal theorists feel that the critical approach removes all constraints on power. If law organizes all the conflicting values and social visions that exist in our political system, power holders can impose any vision they like and run with the wind. From the liberal perspective, the critical view gives the power holder too much comfort because it legitimizes the use of power to implement a social vision that is not necessarily shared by others.

So why do the critical theorists persist? I think there are two reasons. First, we insist that law is a form of politics because modern theorists who separate law from politics generally do so by defining law in terms of consensus and process. They intend their decision procedures to be neutral. By appealing to existing community practice, however, they are in fact conservative. They make it easier to identify the status quo—a contingent form of social life—with reason itself.

Second, the conceptual separation of law and politics makes it easier for a power holder to justify the exercise of power to implement one social vision rather than another. It allows the power holder to claim that the policy being implemented is really the one any rational person

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254. This second critique resembles certain critiques of legal realism. Professor Kalman notes that Roscoe Pound wrote in 1936:

“Indeed my chief reason for giving up the Deanship is that I do not care to be responsible for teaching that law is simply a pious fraud to cover up decisions of cases according to personal inclinations or that there is nothing in the way of reason back of the legal order but it is simply a pulling and hauling of interests with a camouflage of authoritative precepts” (p. 57) (quoting Letter from Roscoe Pound to Spier Whitaker (Aug. 27, 1936) (available at Dean’s Files, Harvard University Archives)).

Paul Bator made this argument recently:

The invasion of the academy by the notion that all positions collapse immediately into issues of ideological and political values (not themselves subject to a system of reasoned ordering) is fundamentally subversive to the academic enterprise. If there is any group of lawyers who ought to be committed to the proposition that the life of the law is reason and that governance of affairs by reason is a meaningful enterprise, it certainly ought to be those whose personal vocation is to a life of thinking. Maurice Holland noted that it would be [a] great mistake for us to assert that what we do at law schools and universities is not political. An even greater mistake, however, is to assert that it is *merely* political. Scholarly truthfulness, lawful judging—these are ideals worth maintaining in themselves.

Bator, *supra* note 173, at 339 (emphasis in original).

255. Carrington, *supra* note 3, at 226-27; Fiss, *supra* note 3, at 15-16.

would accept if they thought about it long enough and in the right way. Anyone who disagrees with the policy is therefore the victim of false consciousness. She has misunderstood her own values, and her objections can thus be safely ignored. From the critical perspective, therefore, it is the *liberal* solution that gives the power holder too much comfort.

### C. *What Do We Share?*

Law matters. It matters because it determines how power and wealth are used and distributed. It matters because it defines, to a substantial degree, our form of social life and our fundamental political values. Liberal and critical theorists both worry about the abuse of authority—but from different angles. Clifford Geertz remarked that “[w]e are being offered a choice of worries.”<sup>256</sup> Liberal theorists worry that in the absence of a common point of view above mere politics—the clash of interests—we cannot achieve either social order or social justice. The view that normative argument cannot be resolved from a common standpoint leaves power holders free to impose their will with impunity and either claim that it represents the general interest or feel no need to justify to others their partial point of view. In contrast, critical theorists worry that persons in power will have a particular perspective and set of interests but claim that their perspective is a general one about which everyone should agree. This approach can leave the power holder blind to competing perspectives, interests, and legitimate claims of justice, and enable the government to commit injustice with impunity.

If it is true that law is not logic, and if substantive debate is messy and inconclusive, how is normative argument to proceed? What exactly are we supposed to say when we express a deep-felt moral commitment only to hear a listener who disagrees respond by saying, “That is just your opinion”? How exactly do we come by our normative commitments? How should we question them? How do we persuade others?

The legal realists removed the possibility of answering these questions by appeal to natural law or to the logical implications of abstract concepts. Yet they gave us no way to answer these questions convincingly. Legal theorists reacted to this situation with a form of paralysis. Rather than confronting questions of value directly, they fled to process. The only remaining, seemingly uncontroversial approach, was to defer to the considered judgments of individuals in society, and then somehow to aggregate all these individual choices by a fair community decision procedure. This method relies on a mixture of *consent* (the considered judgments of individuals) and social decisionmaking through a fair *process*.

Legal process, rights theory, and law and economics all ask us to

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256. Clifford Geertz, *Anti Anti-Relativism*, 86 AM. ANTHROPOLOGIST 263, 265 (1984).

give people what they would want if they thought about the matter carefully and had to choose within a fair process. Legal process filters consent through institutions acting within their proper roles. People consent to what the legislature and the executive branches do because they vote for the representatives and officials; they consent to what courts do because courts use reasoned elaboration of precedent which is itself based on a reasoned elaboration of community values. Rights theory filters consent through a fair contracting process, which could take Rawls' liberal form (identifying the principles people would adopt in the original position behind a veil of ignorance) or Nozick's conservative form (free transactions in the marketplace). Law and economics filters consent through a market system of voluntary transactions corrected by forced exchanges when the market fails to achieve the results people want to bargain for.

However, even liberal theorists recognize that we cannot escape substantive value choices. Such choices are inherent in their theories. Elaboration of precedent must be *reasoned*. The contracting process must be *fair*. Market exchanges must be *voluntary*. Consensus must be *rational*. And it is these substantive value choices that we are not very good at explaining or justifying. Liberal theorists pretend that process, consent, and community practice can answer our normative questions, but they cannot. We must answer those questions, somehow, ourselves, with no guarantee that we are doing the right thing.

#### IV

#### WHERE DO WE GO FROM HERE?

I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.

— Oliver Wendell Holmes<sup>257</sup>

Consistency in conflict is bought at the price of self-deception.

— Martha Nussbaum<sup>258</sup>

Law is based, to some substantial extent, on our intuitive judgments of right and wrong, fairness and unfairness, justice and tyranny. Yet it is inaccurate to describe intuitive judgments as "just your opinion." They are inevitably the opinion of someone situated in our society, with experiences shared with others.<sup>259</sup> The reasons we can give for our moral intu-

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257. Holmes, *The Path of the Law*, *supra* note 40, at 468.

258. M. NUSSBAUM, *supra* note 242, at 39.

259. I get this point from Elizabeth V. Spelman.

itions will also be based on a shared cultural heritage of what constitutes a good argument for a proposition. We can question our intuitions; we can observe their frailties and criticize their fragile empirical and normative bases. We can try seriously to understand the views taken by others. We can follow the legal realists in engaging in a pragmatic critique of power. To do this, we need to develop a language capable of both expressing and disciplining our normative commitments, a language that allows us both to understand alternative social visions and to judge them. There is no single best way to do this. Our goal should be to generate competing visions of social justice. We should not attempt to achieve the definitive recipe for justice, but to engage in a democratic process of mutual persuasion in light of our disparate visions. Consciously or unconsciously, all lawmakers act in light of such visions. We must talk with each other about our competing visions of the good society if we want to achieve justice.

It would be well for liberal theorists to understand, even if they cannot accept, that their view of moral reasoning is not the only one. In particular, the liberal view—premised as it is on the search for consistent propositions that rational persons in our culture could all be expected to accept—is formulated so as to minimize feelings of conflict. It lacks a tragic view of life.

To assert, as Professor Fiss does,<sup>260</sup> that fundamental contradiction makes it impossible to make moral choices or normative statements, is to take a substantive position on what it means to live a moral life and to insist that it is the only possible rational view about such matters. Fiss fails to understand that we have two different approaches to thinking about morality. His rationalist approach says: Either you take my view—normative statements are answers to problems that are solved by applying a “universally acceptable criterion”<sup>261</sup> such as rational consensus or reasoned elaboration of precedent—or you reject morality and reason altogether. It may be that the rationalist position is the best one to take, but we can never know this unless we compare rationalism to alternative, competing philosophical views that define morality differently.

Liberal and critical theorists have been talking past each other a lot, and it seems to me that we should try to figure out where we disagree and where we do not disagree. We do not disagree about the possibility of generating legitimate moral commitments or normative discourse. We do disagree, in fundamental ways, about how to conceptualize and engage in moral inquiry and conversation. We also conceive of the role law plays in social life in different ways. Thus we must talk about both our substantive social visions and our conceptions of a mature moral

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260. Fiss, *supra* note 3, at 13.

261. *Id.* at 7.

conversation. Methodology matters;<sup>262</sup> our methods of moral inquiry shape our emotional experience and influence both our choices and our perceptions.

If we want to do anything more than talk past each other, we must attempt to understand the different perspectives we may take toward moral argument.<sup>263</sup> If we cannot communicate about our divergent world views, then rational consensus—the very project the liberal theorists have taken on for themselves—is impossible. If they do not seek to understand the different stances that can be taken toward thinking about justice, their project is bound to fail. We therefore have a mutual interest in conversation about what moral choice looks like to each of us. We are unlikely to agree about the best ways to engage in normative argument or legal reasoning. From the standpoint of the liberal theorist, that is a depressing thing to contemplate. But from the standpoint of the critical theorist, it is simply an acknowledgement of what it means to be human. The fear of the critic is that the liberal theory of rational consensus blinds us to the needs and truths of those who reason differently, or who do not consent. Those people exist, but those who insist that there can be only one truth, one right answer, cannot see them. If such people disappear, that would be tragic indeed.

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262. *But see* Stick, *supra* note 253, at 397 (“[m]ethodological skirmishing is a diversion critical legal studies cannot afford”).

263. Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324-25 (1987); Martha Minow, *The Supreme Court, 1986 Term—Forward: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Patricia Williams, *Alchemical Notes: Reconstructed Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 406, 429 (1987).

Elizabeth V. Spelman explains:

When you presume, you are not treating me as the person I am: when you do not presume, you are treating me as the person I am in a minimal sense; when you recognize and respond to the person I am, you are treating me as the person I am in a maximal sense.

Elizabeth Spelman, *On Treating Persons as Persons*, 88 ETHICS 150, 161 (1978).