

BACK TO THE FUTURE: FROM CRITICAL LEGAL STUDIES FORWARD TO LEGAL REALISM, OR HOW NOT TO MISS THE POINT OF THE INDETERMINACY ARGUMENT

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INTRODUCTION

A woman living in a rural setting becomes ill and calls her family physician, who is also the only local doctor, for help. However, it is the doctor's day off and because he has a golf date, he does not respond. The woman's condition worsens, no other physician can be procured in time, and as a result, she dies. Her estate then sues the doctor for not coming to her aid. Legal research discovers a rule of law that holds that in the absence of an actual contract for services there can be no liability.¹ However, further research discovers another rule that holds that in the absence of an explicit contract, the law will imply a contractual relationship where such is necessary to avoid injustice.² Which rule will the judge apply? If the judge believes that physicians are ordinary human beings who are entitled to lives of their own and are not required to be at the beck and call

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¹ See *Hurley v. Eddingfield*, 156 Ind. 416, 59 N.E. 1058 (1901).

² See *Cotnam v. Wisdom*, 83 Ark. 601, 104 S.W. 164 (1907).

of their patients, he or she is likely to apply the rule that holds that there is no liability in the absence of an explicit contract. However, if the judge believes that by entering the practice of medicine, physicians take on a special obligation to care for the sick which it would be unjust to violate, he or she will be more likely to apply the rule implying a contractual relationship.

An auction house sells a painting for a bid of \$100. When the buyer has the painting appraised, it turns out to be a lost masterpiece worth millions. Upon learning of this, the auction house sues to rescind the contract of sale. Legal research discovers a rule of law that holds that a contract may be rescinded when there has been a mutual mistake concerning a material fact. If the contract was for the sale of an inexpensive painting, then there was clearly a mutual mistake. But if the contract was for the sale of a work of unknown value, there was not. How will the judge describe the object sold? If the judge believes that the purpose of contract law is to ensure a fair bargain, he or she is likely to describe the object sold as an inexpensive painting and grant rescission. However, if the judge believes the purpose of contract law is to encourage people to be self-reliant and careful in their dealings, he or she is likely to describe it as a work of unknown value and uphold the contract.³

For the past three-quarters of a century, cases such as these have been used to argue that Anglo-American law is indeterminate; that the rules of law do not compel judges to decide cases one way rather than another. This "indeterminacy argument," which was originally developed by the legal realists in the 1920's and 30's, was famously revived and updated in the 1980's by the adherents of the Critical Legal Studies movement (hereinafter Crits) to serve as the spearhead of

³ See *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887) and *Wood v. Boynton*, 64 Wis. 265, 25 N.W. 42 (1885) respectively.

their crusade against legal liberalism. The Crits employed this argument to claim that the liberal concept of the rule of law was a myth designed to maintain the illegitimate domination of society by the economically and politically powerful. This contention touched off a decade long jurisprudential wrangle between the Crits and more traditional legal scholars regarding the nature and extent of legal indeterminacy. Throughout the 1980's and early 1990's, so much ink was spilled on this topic that today, only eighteen years after the First Conference on Critical Legal Studies, the dispute over the indeterminacy argument, and to some extent, the Crits themselves, are regarded as passé.

I think this is unfortunate because I believe that in the midst of the struggle over the cogency of the indeterminacy argument, the implications it holds for our future jurisprudential endeavors have been overlooked. Accordingly, I would like to revisit the subject, not to reprise the debate over whether the indeterminacy argument is in fact correct, but to examine what follows from the assumption that it is. In this article, I will argue that the use the Crits make of the indeterminacy argument suggests that they have missed its essential point. I will contend that the indeterminacy argument recommends, not the radical political action advocated by the Crits, but rather, the thoroughly pragmatic approach to the law urged by the realists over half a century ago. Thus, I will suggest that, correctly understood, the indeterminacy argument leads us not in the direction the Crits would take us, but back to the unfinished project of the legal realists. I will further suggest that the public choice scholars represent a group of theorists who are currently pursuing this project, and thus that it is they, rather than the Crits, who are truly following the line of analysis the indeterminacy argument recommends. Finally, I will suggest that given the knowledge that these scholars and earlier classical liberal economists have developed, the

indeterminacy argument may afford as much support to the classical liberal agenda as it does to the Critical one.

A BRIEF HISTORY OF THE INDETERMINACY ARGUMENT

The indeterminacy argument was originally developed by the legal realists⁴ as a critique of the legal formalism of the late nineteenth and early twentieth centuries.⁵ During this era of "classical legal consciousness,"⁶ judicial decision-making was viewed as "a scientific, deductive process by which preexisting legal materials subsume particular legal cases under their domain, thus allowing judges to infer the antecedently existing right answer to the case at bar."⁷ This formalistic approach viewed the judge as one who objectively and impersonally decided cases by logically deducing the correct resolution from a definite and consistent body of legal rules.⁸ Thus,

⁴The realists were an exceptionally diverse group of legal scholars whose work stretched from the 1920's through the 1950's. It may be that they are only identifiable as a school of jurisprudential thought because of Karl Llewellyn's catalogue of scholars whose work shared nine common features in his 1931 article, *Some Realism About Realism--Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1226-28, n.18 (1931). For this reason, generalizations that attempt to describe what "the realists" thought are problematic. However, brevity requires such generalizations. Thus, for purposes of this article, references to "the realists" should be read as holding only for those scholars actually cited in the notes.

⁵See Gary Minda, *The Jurisprudential Movements of the 1980's*, 50 OHIO ST. L.J. 599, 633-34 (1989); Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Studies*, 95 HARV. L. REV. 1669, 1670 (1982).

⁶See Elizabeth Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW 13 (David Kairys ed. rev. ed., 1990); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America*, 3 RES. L. & SOC. 3 (1980); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988).

⁷RAYMOND A. BELLIOTTI, JUSTIFYING LAW 4 (1992).

⁸See KARL LLEWELLYN, THE COMMON LAW TRADITION 24-25 (1960). This deductive process has been most clearly described by Edward A. Purcell as follows:

the judge did not make law, he or she merely applied the law that had been created by the legislature or was inherent in the common law.⁹

The realists introduced the indeterminacy argument to demonstrate that the application of the principles of deductive reasoning to the set of legal materials did not and could not uniquely determine the outcome of particular cases; that judicial decisions were not "rationally deducible

That predominant legal theory claimed that reasoning proceeded syllogistically from rules and precedents that had been clearly defined historically and logically, through the particular facts of a case, to a clear decision. The function of a judge was to discover analytically the proper rules and precedents involved and to apply them to the case as first premises. Once he had done that, the judge could decide the case with certainty and uniformity.

EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* 74-75 (1973) (endnote omitted). It should be noted that actual adherents of legal formalism have been notoriously difficult to locate. John M. Zane appears to be the usual suspect since he wrote:

Every judicial act resulting in a judgment consists of a pure deduction. The figure of its reasoning is the stating of a rule applicable to certain facts, a finding that the facts of the particular case are those certain facts and the application of the rule is a logical necessity. The old syllogism, "All men are mortal, Socrates is a man, therefore he is mortal", [sic] states the exact form of a judicial judgment. The existing rule of law is: Every man who with malice aforethought kills another in the peace of the people is guilty of murder. The defendant with malice aforethought killed A.B. in the peace of the people, therefore the defendant is guilty of murder.

John M. Zane, *German Legal Philosophy*, 16 MICH. L. REV. 287, 338 (1918). *See also* CHARLES W. BACON & FRANKLYN S. MORSE, *THE REASONABLENESS OF THE LAW: THE ADAPTABILITY OF LEGAL SANCTIONS TO THE NEEDS OF SOCIETY* (1924).

⁹*See* Mensch, *supra* note 6, at 19; Singer *supra* note 6, at 496-97; Richard Michael Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505, 511 (1987). Legal formalism has also been referred to as mechanical jurisprudence, *see* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Minda, *supra* note 5, conceptualism, *see* Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199 (1984); G. Edward White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649 (1984), and scientific jurisprudence, *see* Fischl, *supra* this note, at 511.

from a closed system of law."¹⁰ The argument was based on two observations. The first was that the law is riddled with contradictory rules such that a judge will always have a choice between "competing rules leading to opposing outcomes."¹¹ My initial hypothetical concerning the physician who does not respond to the call of a regular patient was designed to illustrate this observation. The second was that it is always possible for a judge to interpret the breadth of the rules and the facts of the case so as to generate conflicting results. This is because the rules are

¹⁰Richard K. Greenstein, *The Nature of Legal Argument: The Personal Jurisdiction Paradigm*, 38 HASTINGS L.J. 855, 884 (1987). Most of the realists were social reformers who were reacting against the decisions of the Supreme Court during the so-called *Lochner* era in which the Court routinely struck down social welfare legislation as inconsistent with the liberty of contract. *See, e.g.*, *Lochner v. New York*, 198 U.S. 45 (1905) (invalidation of a New York statute restricting baker's working hours to 10 per day) and *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidation of a Kansas statute prohibiting "yellow dog" contracts). For this reason, the indeterminacy argument is usually seen as having been developed to combat this strain of libertarian Supreme Court jurisprudence. *See Mensch, supra* note 6, at 18-21; Singer, *supra* note 6, at 477, 500 ("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, . . ."); Hutchinson and Monahan, *supra* note 9, at 203-04. However, although this is certainly responsible for much of the attention paid the argument, the argument itself clearly predates these decisions since it was given its prototypical expression by Oliver Wendell Holmes as early as 1897.

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 is generally an 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. You can give any conclusion a logical form.

Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465-66 (1897).

¹¹Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHILOSOPHY AND PUBLIC AFFAIRS 205 (1986). *See Llewellyn, supra* note 4, at 1239, 1252; Felix Cohen, *The Problems of a Functional Jurisprudence*, in THE LEGAL CONSCIENCE 77, 83 (1960) ("Legal principles have a habit of running in pairs, a plaintiff principle and a defendant principle."). *See also* Singer, *supra* note 6, at 470; Karl Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 297 (1989); Fischl, *supra* note 9, at 513.

expressed in such vague language (e.g., 'reasonable,' 'due process,' 'fair value,' etc.) as to allow them to be read as broadly or as narrowly as necessary to achieve any desired result,¹² and because it is the judges themselves who characterize the facts of the case and decide which are relevant.¹³ My hypothetical involving the painting sold at auction was designed to illustrate this observation.

The purpose of the indeterminacy argument was to demonstrate that the formalist image of the judge as one who does not make law, but impersonally discovers and applies an antecedently existing law, was a myth. It implied that the rules of law could not constrain judges' choices since it was the judges who chose which rules to apply and how to apply them. Further, since such choices were necessarily based on the judges' beliefs about what was right, it was the judges' personal value judgments that consciously or unconsciously formed the basis of their decisions.

For the realists, this had profound implications for both legal practice and legal theory. With regard to practice, the realists claimed that attorneys would be better able to predict the outcome of cases and correctly advise their clients if they studied the social factors that influenced

¹²See K. N. LLEWELLYN, *THE BRAMBLE BUSH* ch. IV (1930); Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A.J. 357 (1925) ("If you are a little clever, [the rule] will catch or let out the situation you are deciding."); Felix Cohen, *supra* note 11, at 82-3; Walter W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 467-68, 482 (1924). See also Altman, *supra* note 11, at 208; Singer, *supra* note 6, at 470.

¹³See JEROME FRANK, *LAW AND THE MODERN MIND* 106, 116 (1930). See also G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, in PATTERNS OF AMERICAN LEGAL THOUGHT 99, 123 (1978).

judges' behavior rather than the syllogisms the judges offered in support of their decisions.¹⁴ With regard to theory, they believed it demanded a redirection of study away from the logical relationships among the abstract rules of law and toward the actual effects of law and judicial decision-making on society.¹⁵

The realists derided the resolution of legal cases through the manipulation of logical abstractions that took no account of social consequences as "word-magic"¹⁶ or "transcendental nonsense."¹⁷ By demonstrating that the purely formal processes of legal argumentation could not produce unique results, they believed they had shown that "[l]egal criticism is empty without objective description of the causes and consequences of legal decisions."¹⁸ Thus, they insisted on

¹⁴See Jules L. Coleman and Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 581 (1993). See generally Karl Llewellyn, *A Realistic Jurisprudence--The Next Step*, 30 COLUM. L. REV. 443 (1930); Frank, *supra* note 13; Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L. Q. 274 (1929).

¹⁵See Llewellyn, *supra* note 14, at 447-48; Frank, *supra* note 13, at 121-32, 148-59, 264-84; FELIX COHEN, *ETHICAL SYSTEMS AND LEGAL IDEAS* 12-42 (1933); Walter W. Cook, *Scientific Method and the Law*, 13 A.B.A.J. 303 (1927).

¹⁶Frank, *supra* note 13, at 60, 181.

¹⁷Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935). The realists were quite imaginative in expressing derision for the formalistic legal method. For instance, Cohen considered legal propositions composed of the "legal 'solving words' of traditional jurisprudence" as "identical in metaphysical status with the question . . . 'How many angels can stand on the point of a needle?'" and found that arguments based upon them "add precisely as much to our knowledge as Moliere's physician's discovery that opium puts men to sleep because it contains a dormative principle." *Id.* at 810, 820. Frank regarded such propositions as "[v]irtually empty concepts [that] seem to give the metaphysician the stable world he requires," Frank, *supra* note 13, at 65, while Underhill Moore called them "phantoms drifting upon the stream of daydreams." Underhill Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609, 612 (1923).

¹⁸Cohen, *supra* note 17, at 849.

the "evaluation of any part of the law in terms of its effects."¹⁹

¹⁹Llewellyn, *supra* note 4, at 1237. The need "to understand law in terms of its factual context and economic and social consequences," LAURA KALMAN, LEGAL REALISM AT YALE 3 (1986), was a consistent theme of the realist movement. As early as 1897, Oliver Wendell Holmes was warning that judges "have failed adequately to recognize their duty of weighing considerations of social advantage." Holmes, *supra* note 10, at 467. Karl Llewellyn characterized realistic jurisprudence as "a philosophy *not only* of Law, *but also* of Law's Function, *and* of Law's Operation, *and* of Legal Institutions: i.e., of Law *and* Law's Work, *and* Law's Personnel," Karl N. Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581, 606-07 (1940), while Felix Cohen described it as aimed at "eliminating supernatural terms and meaningless questions and redefining concepts and problems in terms of verifiable realities . . . as constructs, or functions, or complexes, or patterns, or arrangements, of the things that we do actually see or do." Cohen, *supra* note 17, at 822-26. One notable example of this type of investigation was Underhill Moore and Charles Callahan's detailed study of the effects of parking and traffic regulations on the behavior of the motorists of New Haven. Underhill Moore & Charles Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L. J. 1 (1943).

To most of the realists, the call to evaluate the law "in terms of its effects" meant the application of the social sciences to the law. Thus, Llewellyn declared that "[w]hen one approaches the law, not with the idea of formulating its rules into a system, but with an eye to discovering how much it does or can effect . . . , economic theory offers in many respects amazing light." Karl N. Llewellyn, *The Effect of Legal Institutions upon Economics*, 15 AMERICAN ECONOMIC REV. 665, 682 (1925). Most realists were social reformers who believed that the social sciences could provide the expertise required to employ the law as a method of social engineering to create a better world. *See* White, *supra* note 13, at 125. Because administrative agencies were better equipped to provide such expertise than was the judiciary, many realists "advocated a power shift from the judiciary to expert state agencies." Raymond A. Belliotti, *Is Law a Sham?*, 48 PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH 25, 30 (1987). Several realists such as Thurmon Arnold, Charles Clark, Felix Cohen, Walton H. Hamilton, Jerome Frank, Rexford G. Tugwell, and William O. Douglas, accepted public service posts in the New Deal to help carry out this project. *See* Note *supra* note 5, at 1675 n.38. This line of thought culminated in the belief that it was possible to identify a scientifically determined conception of the public interest that could be advanced by developing the proper legal policies. *See* Minda, *supra* note 5, at 635. Perhaps the most famous outgrowth of this was Lasswell and McDougal's attempt to reform legal education to employ the social sciences to consciously train future lawyers for policy making. *See* Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203 (1943). *See generally* Purcell, *supra* note 8; White, *supra* note 13; Singer, *supra* note 6.

The realist commitment to social science, administrative agencies, and policy making has been subjected to much criticism. However, none of this is relevant for present purposes. In this paper, I will be citing the realists *only* for their claim that the law should be evaluated on the basis of its actual effects on human beings, and that therefore, study (in whatever form) of its actual

By the time *West Coast Hotel v. Parrish*²⁰ signalled the end of the *Lochner* era of Supreme Court jurisprudence in 1937, the indeterminacy argument had essentially carried the day against legal formalism. Lawyers now routinely presented "policy" arguments based on the social consequences of the decision in so-called "Brandeis briefs"²¹ and, as exemplified by *Brown v. Board of Education*,²² courts were increasingly willing to make such arguments the basis of their decisions. Despite this, there was great reluctance in the legal community to accept the full implications of legal indeterminacy. If the personal motivations and values of judges rather than the rules of law determined the outcome of cases, then, as the realists had pointed out, "[t]he ideal of a government of laws and not men [was] a dream,"²³ and further, there was no substantive difference between legal reasoning and political discourse. This seemed to deprive the law of its moral imprimatur and suggest that law was nothing more than the naked exercise of political power. Especially in the aftermath of World War II, this appeared to imply a dangerous form of relativism similar to that which had given rise to the authoritarian regimes the United States had just struggled to defeat.²⁴ As a result, there was a felt need to distinguish the way the judiciary

operation is required.

²⁰300 U.S. 379 (1937).

²¹This name came from the brief Louis Brandeis submitted to the Supreme Court in *Muller v. Oregon*, 208 U.S. 412 (1908) which contained two pages of legal argument and over a hundred pages of sociological data and analysis. See Purcell, *supra* note 8, at 76.

²²347 U.S. 483 (1954).

²³Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L. J. 468, 480 (1928).

²⁴See Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REF. 561, 572-79 (1988); Mensch, *supra* note 6, at 23-24; G. Edward White, *The Evolution of Reasoned Elaboration*:

dealt with sociological data from the purely political way in which the legislature did.

In the 1950's, this gave rise to the Legal Process school (usually associated with the materials developed by Henry Hart and Albert Sacks)²⁵ which cast the legislature and judiciary in distinctly different roles. Taking the value of democracy as their guiding force, the legal process theorists argued that it was the task of the democratically elected legislature to make substantive determinations of public policy. The courts, on the other hand, were restricted to deciding essentially procedural matters; they made determinations "not that a particular exercise of power was 'right' in any normative sense, but rather that the appropriate institution had used the procedures that made that institution appropriate for deciding the kind of issue it had decided."²⁶ The process theorists believed that by thus restricting the realm of judicial decision-making, they could answer the realists' challenge to the political neutrality of law since "[w]hile substantive decision making might ultimately be political, procedural analysis could be both normative and

Jurisprudential Criticism and Social Change, in PATTERNS OF AMERICAN LEGAL THOUGHT 136, 137-44 (1978).

²⁵See HENRY HART AND ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958). For a detailed account of the motivation for and development of legal process theory, see Peller, *supra* note 24. See also White, *supra* note 24.

²⁶Peller, *supra* note 24, at 570. According to legal process theory, courts were bound to act in accordance with the principle of institutional settlement. This held that since "[t]he alternative to disintegrating resort to violence is the establishment of regularized and peaceable methods of decision, . . . decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed." Hart and Sacks, *supra* note 25, at 4. This implied that "an institutional decision was entitled to respect regardless of its substance so long as the appropriate procedures for resolving a dispute had been observed," and thus, that "[o]nce such procedures were identified, it would be possible to assert neutrally the application of the normative prong of the 'principle of institutional settlement,' the notion that a particular decision 'ought to be respected.'" Peller, *supra* note 24, at 593.

neutral."²⁷ Thus, they believed that, within this realm, judges could impersonally decide cases through the process of "reasoned elaboration," i.e., the elaboration of "principles and policies contained within precedent and legislation [that yielded] a reasoned, if not analytically determined, result in particular cases."²⁸

An outgrowth of this commitment to judicial decision by reasoned elaboration was the call by Herbert Wechsler for neutral principles of Constitutional interpretation.²⁹ Wechsler freely admitted "what many for so long denied: that courts in constitutional determinations face issues that are inescapably 'political' . . . in that they involve a choice among competing values or desires, . . ."³⁰ However, he argued that since courts were "bound to function otherwise than as a naked power organ,"³¹ they must make such determinations on the basis of "the type of reasoned explanation . . . intrinsic to judicial action,"³² i.e., on the basis of "reasons that in their generality and neutrality transcend any immediate result that is involved."³³ Wechsler believed that if judges

²⁷Peller, *supra* note 24, at 590.

²⁸*Id.* at 595.

²⁹Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

³⁰*Id.* at 15.

³¹*Id.* at 19.

³²*Id.* at 15-16.

³³*Id.* at 19. Wechsler argued that what distinguished the way the judiciary rendered value judgments from the way the legislature did was that the judicial decision-making was "principled."

I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. To be sure, courts must decide, or should decide, only the case before them.

would decide cases strictly on the basis of such neutral principles rather than being result driven, judicial decision-making could be rendered both determinate and politically neutral.

Meanwhile, more substantive challenges were being raised against the claim that the law was indeterminate. For example, H. L. A. Hart contended that the realists had greatly exaggerated the amount of indeterminacy in the law. He argued that although there was indeed a "penumbra of doubt"³⁴ within which the rules of law did not yield determinate outcomes, there was also a much more extensive "core of certainty"³⁵ within which they did. Hart attributed the indeterminacy that the realists had observed to the inherent "open texture" of legal rules which is "a general feature of human language," and argued that although this "uncertainty at the borderline is the price to be paid for the use of general classifying terms," both the rules of common law and legislation were definite enough to yield determinate results "over the great mass of ordinary cases."³⁶ Thus, Hart saw legal indeterminacy as "a peripheral phenomenon in a system of rules which, by and large, does provide specific outcomes to cases."³⁷

In the 1970's, Ronald Dworkin argued that even the amount of indeterminacy that Hart

But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply?

Id. at 15. This foreshadowed the approach that Dworkin was to champion in the 1970's. See *infra* text accompanying note 41.

³⁴H. L. A. HART, THE CONCEPT OF LAW 119 (1961).

³⁵*Id.*

³⁶*Id.* at 124-25.

³⁷Altman, *supra* note 11, at 207.

allowed was exaggerated.³⁸ This was because Hart erroneously viewed the law as consisting exclusively in rules. Dworkin claimed that in addition to rules, the law was comprised of "principles, policies and other sorts of standards."³⁹ In deciding cases, courts were called upon to construe not merely rules of law, but legal principles as well.⁴⁰ In those cases in which the rules did not clearly decide the case, it was the principles which would "guide judges to a determinate outcome."⁴¹ The judge's job was to render decisions that were rationally consistent with the relevant set of legally authoritative rules and principles.⁴² Thus, Dworkin argued that by correctly identifying the "best" interpretation of these materials, judges were able to render determinate outcomes to legal controversies even in those cases in which appeal to the rules alone would provide ambiguous results.⁴³

This set the stage for the re-introduction of the indeterminacy argument by the Critics. The

³⁸See RONALD DWORKIN, *The Model of Rules I*, in TAKING RIGHTS SERIOUSLY 14 (1977).

³⁹*Id.* at 22. Policies are "standard[s] that set[] out a goal to be reached, generally an improvement in some economic, political, or social feature of the community." *Id.* In contrast, principles are "to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality." *Id.*

⁴⁰Although the legislature could consider both principles and policies in the law-making process, courts were restricted to the consideration of principles. RONALD DWORKIN, *Hard Cases*, in TAKING RIGHTS SERIOUSLY, *supra* note 38, at 84.

⁴¹Altman, *supra* note 11, at 212. In this sense, Dworkin's argument is a natural outgrowth of Wechsler's earlier call for "principled" judicial decision-making. *See supra* note 33 and accompanying text. *See also* Altman, *supra* note 11, at 218 n.34.

⁴²DWORKIN, *supra* note 40, at 105-23.

⁴³*See generally* RONALD DWORKIN, *The Model of Rules I* and *Hard Cases*, in TAKING RIGHTS SERIOUSLY, *supra* note 38.

legal community's response to realism had been to recognize that the law consisted in principles, policies, and moral and political ideals as well as rules, and to assert that within this enriched legal universe, the proper attention to institutional competencies and roles and the proper interpretive techniques could yield determinate outcomes. This had allowed it to absorb the realist insight that legal reasoning did not consist in the logical deduction of the outcome of cases from fixed, determinate rules, while avoiding the more radical implication that the law was indistinguishable from politics.

The Critics attacked this reconstruction of the legal system by arguing that there was no sustainable distinction between process and substance and that the larger set of legally authoritative materials was itself indeterminate. They claimed that the focus on procedures could never render judicial decision-making truly "neutral" since in order to determine that a legislative or administrative value determination was entitled to deference, "one had to make substantive political and ethical judgments about the permissible range and extent of institutional power."⁴⁴

⁴⁴Peller, *supra* note 24, at 608. Peller points out that the normative force of the claim that courts should respect the value determinations of the legislature (and administrative agencies) was derived from the commitment to democracy. However, this implied that a court could know that a legislative action should be respected only by first making the substantive normative determination that the legislature was in fact functioning democratically. Thus, process was not truly distinct from substance. He illustrated this with Herbert Wechsler's criticism of the decision in *Brown v. Board of Education*.

Finding that the issue in *Brown* involved a value judgment constituted merely half the analysis--before deference to the legislature was in order, the judiciary would have to decide that the legislature actually employed the procedures that made it competent to decide the issue, that is, that the legislature was truly democratic. . . . There was no neutral way to decide the case on the basis of relative institutional processes because, in the identification of "democracy," process and substance overlapped. If the segregation of public schools was part of a state-supported institutionalized domination of blacks, the conclusion that the legislature was democratically legitimate was impugned unless democracy was consistent with such a widespread social

They also claimed that indeterminacy was not limited to the rules of law and could not be cured by appeal to legally authoritative principles.⁴⁵ Rather, they argued that the realm of principles was itself comprised of contradictory principles and ideals and that there were no meta-principles available for resolving these contradictions.⁴⁶ To the Critics, the "invocation of principles only

domination that the concept lost its coherence as a legitimizer of social decision making. By advocating deference to legislative judgment, Wechsler was implicitly taking a substantive stand on the issues as he identified them. He assumed that social domination of blacks either did not exist or that such a racial regime did not impugn the legitimacy of the legislature.

Id. at 610-12. *See also* Mensch, *supra* note 6, at 33.

⁴⁵The Critics claim to go "well beyond the version of the indeterminacy argument that everyone professes to accept today--the argument that legal rules do not, of themselves, decide cases" to hold "that the idealized view of the judge as a mechanical law-applier--and of law as apolitical--is fundamentally and inescapably flawed, because of the very nature of legal discourse and its connection to human experience and interaction." Fischl, *supra* note 9, at 524.

⁴⁶Much of the Critical Legal Studies literature is devoted to demonstrating that there are contradictory principles underlying each of the particular subcategories into which the law is conventionally divided. *See generally* THE POLITICS OF LAW (David Kairys ed. rev. ed. 1990). However, a central tenet of critical thought is that these particular antinomies merely "reflect a deeper level of contradiction," Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Thus, Robert Gordon asserts that "[t]he same body of law, in the same context, can always lead to contrary results. This is because law is indeterminate at its core, in its inception, not just in its applications: because its rules derive from structures of thought (collective constructs of many minds) that are fundamentally contradictory." Robert Gordon, *Critical Legal Histories*, 36 STANFORD L. REV. 57, 114 (1984). This "fundamental contradiction" has been described by Duncan Kennedy as follows.

[I]ndividual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. . . . Only collective force seems capable of destroying the attitudes and institutions that collective force has itself imposed. Coercion of the individual by the group appears to be inextricably bound up with the liberation of that same individual.

Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 211-12 (1979). The ubiquity of the fundamental contradiction implies that regardless of the type of legal standards being considered, whether rules or principles, "[t]heir contradictory content, as they

serves to push back to another stage the point at which legal indeterminacy enters and judicial choice takes place."⁴⁷ Furthermore, they argued that liberal legal theorists had grossly underestimated the degree to which legal language was "open textured" and that, in fact, this language was so malleable that judges could always pour into it whatever ideological content they desired.⁴⁸ By thus demonstrating the ineradicable indeterminacy of the law, the Critics claimed to have shown that there could be no principled distinction between legal reasoning and ordinary political debate, i.e., that "law is politics."

The Critics regard themselves as more radical than the realists because they employ the indeterminacy argument to attack the concept of the rule of law itself. They do this on the basis of the "mystification thesis," i.e., the claim that the idea that judges can impersonally and objectively decide cases according to definite criteria serves to mask what is actually occurring, the imposition of the ideological preferences of one group upon the entire community.⁴⁹ According to

attempt to embrace both the commitment to autonomy *and* the commitment to community, without any meta-principle to decide when one commitment should prevail over the other, gives them . . . a wholly indeterminate character." Clare Dalton, *Book Review*, 6 HARV. WOMEN'S L. J. 229, 235 (1983) (footnote omitted). For an excellent discussion of the fundamental contradiction, see Belliotti, *supra* note 7, at 163-66.

⁴⁷Altman, *supra* note 11, at 217.

⁴⁸See, e.g., James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1152 (1985). This line of argument is usually associated with the deconstructionist wing of the critical movement. For a good discussion of this type of critique, see J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L. J. 743 (1987).

⁴⁹See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 463-70 (1987). Among the Critics, commitment to the claim that the concept of the rule of law disguises the unjust nature of current social arrangements is as close to universal as anything can be said to be. Virtually all the critical articles cited to this point contain some version of it. For a good catalog of sources, see *id.* at 467-68.

the Crits, the ideal of the rule of law, of a government of law and not people, "merely cloaks power in the garb of right."⁵⁰ By disguising the value choices inherent in the judicial process, legal rulings are made to look like the necessary outcome of the play of natural forces rather than an exercise of will by those who control the political machinery of society. For the Crits, "the Rule of Law is a mask that lends to existing social structures the appearance of legitimacy and inevitability" which "acts to protect and preserve the propertied interest of vested white and male power."⁵¹ Thus, they regard the value of the indeterminacy argument to be that it reveals that the social structure generated by the legal system is not the embodiment of justice it purports to be, but an illegitimate hierarchy.

CRITICAL IMPLICATIONS

Let us assume that the Crits have been as successful at demonstrating the indeterminacy of the set of legal standards currently recognized as authoritative as the realists were at demonstrating the indeterminacy of legal rules. Let us further assume that they have demonstrated that the myth that the law is determinate serves to preserve the illegitimate hierarchy of those who currently wield power.⁵² What follows from this?

⁵⁰David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 595 (1984).

⁵¹ALLAN C. HUTCHINSON, CRITICAL LEGAL STUDIES 3-4 (1989).

⁵²Both of these propositions have been challenged and debated in countless articles critical of CLS and in the Crits' responses. It is not my purpose to rehearse any of this debate here. This article is concerned solely with the implications that can be drawn from these propositions if they are, indeed, correct. To pursue the substantive debate concerning their truth, a good starting point would be the symposium on critical legal studies in 36 STAN. L. REV. (1984). For an excellent recent treatment of the significance of legal indeterminacy, see Coleman and Leiter, *supra* note 14.

At first glance, it might be thought that such a conclusion would drive its proponents toward a radical form of classical liberalism. If the rule of law is indeed a myth that serves to maintain the illegitimate domination of the politically powerful, justice would seem to require that the role the law plays in the organization of society be shrunk to an irreducible minimum. The essential purpose of the law is to indicate the circumstances under which the state is morally authorized to exercise its coercive power. If the Critics are correct that such authorization can never be ideologically neutral and that the coercion that is in fact authorized invariably serves the interests of the politically dominant class at the expense of the rest of society,⁵³ it might seem that all that can be done is to restrict the scope of legal regulation as much as possible. This is precisely what classical liberal proponents of the minimal state such as Robert Nozick advocate.⁵⁴

⁵³An extremely clear articulation of this central tenet of critical thought is provided by David Kairys who states:

The law's ultimate mechanism for control and enforcement is institutional violence, but it protects the dominant system of social and power relations against political and ideological as well as physical challenges. The law is a major vehicle for the maintenance of existing social and power relations by the consent or acquiescence of the lower and middle classes. The law's perceived legitimacy confers a broader legitimacy on a social system and ideology that, despite their claims to kinship with nature, science, or God, are most fairly characterized by domination by a very small, mainly corporatized elite.

David Kairys, *Introduction*, in *THE POLITICS OF LAW*, *supra* note 6, at 7. *See also* the invitation to the first CLS conference issued by Mark Tushnet and the conference organizing committee consisting of Professors Abel, Heller, Horwitz, Kennedy, Macaulay, Rosenblatt, Trubek, and Unger which stated, "law is an instrument of social, economic and political domination, both in the sense of furthering the concrete interests of the dominators *and* in that of legitimating the existing order." Invitation to First Conference on Critical Legal Studies, Jan. 17, 1977 (emphasis in original).

⁵⁴*See* ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). *See also* LOREN LOMASKY, *PERSONS, RIGHTS, AND THE MORAL COMMUNITY* (1987); JAN NARVESON, *THE LIBERTARIAN IDEA* (1988); TIBOR MACHAN, *INDIVIDUALS AND THEIR RIGHTS* (1989); DOUGLAS B. RASMUSSEN

This, of course, is not the direction the Crits take.⁵⁵ Unfortunately, due to the wide divergence of opinion among them, it is far from easy to characterize the direction they do take. It has become conventional to divide the Crits into what may be called the mainstream of the movement and its irrationalist or nihilist wing.⁵⁶ Both schools agree on the indeterminacy and mystification theses; both "reject the notion that there is any distinction between law and power and argue that our current legal system supports an illegitimate use of power by some social groups to oppress others."⁵⁷ However, the mainstream Crits or rationalists believe in the possibility of reform. They "argue that critical theory can be used to re-rationalize mainstream legal doctrine and provide a normative basis for 'reconstruction' after the demise of liberal legalism."⁵⁸ The irrationalists, on the other hand, reject even the possibility of reform. They claim

& DOUGLAS J. DEN UYL, *LIBERTY AND NATURE: AN ARISTOTELIAN DEFENSE OF LIBERAL ORDER* (1991). For an explanation as to why one unfamiliar with contemporary jurisprudence might be misled into identifying the Crits with the classical liberals, see the discussion of their use of the term 'liberation,' *infra* note 65.

⁵⁵At this point, the obligatory cautionary note concerning the diversity of opinion among the adherents of the Critical Legal Studies movement is in order. Even more than the realists, the Crits are an extremely diverse group of thinkers. It is often said that the only true generalization that can be made about the Crits is that no such generalization is true (which is, of course, itself false). However, the theorists that I am including under the label of 'Crits' for purposes of this article are those who subscribe to both the indeterminacy and mystification theses. This does, in fact, include the majority of the critical thinkers. Beyond the commitment to these two theses, however, any uniformity of thought among the Crits rapidly falls away as will be made evident below. Therefore, as was the case with the realists, general assertions about "the Crits" should be read as holding only for those theorists cited in the notes.

⁵⁶See Dalton, *supra* note 46, at 231-39; Minda, *supra* note 5, at 619-20; Daniel C.K. Chow, *Trashing Nihilism*, 65 *TULANE L. REV.* 221, 234 (1990).

⁵⁷Chow, *supra* note 56, at 234.

⁵⁸Minda, *supra* note 5, at 619-20 (footnote omitted).

that "all reconstruction efforts are doomed"⁵⁹ and that "no law or legal system can ever be legitimate."⁶⁰ Let us consider the implications each "wing" of the Critical Legal Studies movement draws from the indeterminacy argument.

The mainstream Crits claim that the indeterminacy argument demonstrates the need to employ the legal system to create a more "democratic" and "egalitarian" society.⁶¹ They assert that recognition of legal indeterminacy allows us to see the law for what it truly is, a political struggle in which the wrong ideological values have triumphed. Accordingly, they advocate restructuring the legal system so as to ensconce the correct, nonhierarchical values of "humaneness, democracy, community, personal, and collective liberation."⁶² The mainstream Crits view law as a vehicle for

⁵⁹*Id.* at 620.

⁶⁰Chow, *supra* note 56, at 234.

⁶¹*See* Fischl, *supra* note 9, at 524.

⁶²Jay Feinman, *The Failure of Legal Education and the Promise of Critical Legal Studies*, 6 CARDOZO L. REV. 739, 757 (1985). As this list suggests, the mainstream Crits almost invariably express the things they are in favor of in very abstract and general terms. This has made it notoriously difficult to come to grips with their "constructive project." Neither their specific proposals for reform nor the precise nature of the values they wish to instill into the legal system are easy to pin down. This, coupled with their unrelenting critique of existing legal arrangements, has led some traditional legal theorists to dismiss the Crits as cynics with nothing of value to offer the legal community. This view was most famously expressed by Paul Carrington, then the dean of Duke Law School, who suggested that the Crits have "an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy." Paul Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984).

The Crits, of course, vehemently reject this characterization. They view themselves as working "toward a world that is more just and egalitarian" by allying their critique of the current state of the law with "a program of 'left' politics." Allan C. Hutchinson, *Introduction*, in CRITICAL LEGAL STUDIES, *supra* note 51, at 2-3. Thus, they describe themselves as placing "fundamental importance on democracy, by which we mean popular participation in the decisions that shape our society and affect our lives." Kairys, *supra* note 53, at 4-5. *See, e.g.*, Karl Klare, *Critical Theory and Labor Relations Law*, in THE POLITICS OF LAW, *supra* note 6, at 86 (advocating the transformation of the workplace into "a locus of democratic self-governance"); Gerald Frug, *The*

social transformation that can be used to cast aside the "patchwork quilt of liberal politics" in order "to make a bigger social bed with more popular bedding."⁶³

Initially, the reform project of the mainstream Crits may appear to be internally inconsistent. If by showing the law to be indeterminate, they have, as they claim, shown it to be an inherently political mechanism by which dominant social groups illegitimately impose their ideological preferences upon society, how can they advocate its use to produce the egalitarian society they favor? The answer apparently rests on some underlying political assumptions. The Crits believe that unregulated market forces inevitably produce a hierarchical social structure in which the economically powerful are dominant. They attack the liberal legal regime for reinforcing this illegitimate hierarchy.⁶⁴ However, they cannot advocate abandoning the legal regulation of

City as a Legal Concept, 93 HARV. L. REV. 1059 (1981) (advocating decentralizing the political system to allow cities to be genuine experiments in representative democracy). Further, they see themselves as committed to the egalitarian creation of "nonhierarchical communities of interest," Gerald Frug, *Language as Power*, 84 COLUM. L. REV. 1881, 1895-96 (1984), and thus, the empowerment of those oppressed by the current legal system. See Peter Gabel and Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982-83). Accordingly, the mainstream Crits have been generally described as in favor of "participatory democracy, civic republicanism, or decentralized socialism" based on the value of "the individual's active desire to participate in community life or the value of an institutional framework that systematically reduces economic inequalities." Note, *supra* note 5, at 1682-84. For a more extensive catalogue of CLS values, see Louis B. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 435 (1984).

⁶³Hutchinson, *supra* note 62, at 3.

⁶⁴The belief that the law merely reinforces the illegitimate hierarchies inevitably generated by a capitalist system is common to almost all the Crits. In characterizing the commonalities among the Crits, David Kairys includes the belief that "[t]he law is a major vehicle for the maintenance of existing power and social relations" and that "it protects the dominant system of social and power relations against political and ideological as well as physical challenges." Kairys, *supra* note 53, at 7. A statement issued by the Conference on Critical Legal Studies describes CLS as seeking "to explore the manner in which legal doctrine and legal education and the practices of legal institutions work to buttress and support a pervasive system of oppressive, inegalitarian relations."

human activity since this would simply allow the underlying hierarchies to flourish. Thus, for the mainstream Crits, the only alternative is to use legal compulsion to attack the market-generated hierarchies.⁶⁵

Statement of Critical Legal Studies Conference, *quoted in* CRITICAL LEGAL STUDIES (P. Fitzpatrick & A. Hunt eds., 1987). *See also* Dalton *supra* note 46, at 230 ("The legal system of late twentieth century America is seen as inextricably linked to the reality of illegitimate hierarchies, whether derived from ownership or control of the means of production, or race or gender discrimination."); Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1366-87 (1988).

⁶⁵Duncan Kennedy has provided what is probably the most forceful statement of this as follows:

Only collective force seems capable of destroying the attitudes and institutions that collective force has itself imposed. Coercion of the individual by the group appears to be inextricably bound up with the liberation of that same individual. If one accepts that collective norms weigh so heavily in favor of the status quo that purely "voluntary" movement is inconceivable, then the only alternative is the assumption of responsibility for the totalitarian domination of other people's minds--for "forcing them to be free."

Kennedy, *The Structure of Blackstone's Commentaries*, *supra* note 46, at 212. *See also, e.g.*, Richard Abel, *A Socialist Approach to Risk*, 41 MD. L. REV. 695, 718 (1982) ("Autonomy is not ensured by eliminating political restraints. That is the great myth of liberalism. Economic, social, and psychological constraints are just as important and often more powerful."); Klare, *supra* note 62, at 84-85 ("my antibureaucratic tone might suggest that my thrust is 'antistatist' or, in the current parlance, 'deregulatory.' This is not my intent. In the prevailing political context, deregulation of the workplace (i.e., statutory repeal) means ratification of the preexisting structures of economic inequality and hierarchy, . . ."); Hutchinson and Monahan, *supra* note 9, at 236-42 ("a powerful state is necessary to fracture existing patterns of social hierarchy and domination.")

Much of the traditional legal community's confusion regarding the mainstream Crits' positive project is due to the Crits' use of terminology. For example, almost all Crits identify themselves as being in favor of "liberation." To the uninitiated, this term may suggest freedom from governmental coercion, causing them to identify the Crits with the classical liberals as was suggested above. *See* text accompanying note 54. However, the Crits certainly do not mean the same thing by 'liberation' that the classical liberals do. What they are referring to is collective or group liberation. For example, Karl Klare points out that "the highest aspiration of democratic culture should be to generate and nurture in all people the capacity for individual and collective self-government and self-realization of their potential." Klare, *supra* note 62, at 86 (underlining

The mainstream Critics have provided many suggestions as to how this may be done. Some have contended that the law should be directly applied to the democratization of social life. Thus, arguments have been presented to legally require "democratic governance in the workplace,"⁶⁶ and the decentralization of political power to allow more effective democratic governance at the city level.⁶⁷ Others assert that the law should be employed to effect the redistribution of wealth. On this score, Crit proposals run the gamut from the radical, such as that the law effect the transfer of ownership and control of production facilities to workers⁶⁸ or that it read an implied promise into employment contracts transferring ownership of any plant that is closed to its present, laid-off, and retired workers,⁶⁹ to the relatively moderate, such as that the income tax be

added). In rejecting the classical liberal view that liberation is achieved by the law "withering away," he points out that:

[t]he difficulty with this perspective is . . . a failure to appreciate that politics--the evolving of institutions for organizing peoples' collective, self-directive capacities and for nurturing each person's opportunity for and experience of his or her own potential and the promise of social living--is an essential component of human freedom.

Id. This point is perhaps made even more clearly by Duncan Kennedy who states: "We can achieve real freedom only collectively through *group* self-determination. . . . [This] implies the use of force against the individual." Kennedy, *Form and Substance in Private Law Adjudication*, *supra* note 46, at 1774. It is clear that to achieve this type of "liberation," the coercive power of the state is indispensable. This accounts for the Critics' willingness to employ the law to realize their values despite their unceasing critique of it.

⁶⁶Klare, *supra* note 62, at 86.

⁶⁷Frug, *supra* note 62, at 1149-54.

⁶⁸See Abel, *supra* note 65.

⁶⁹See 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 (1982).

retained in preference to a consumption tax because of its greater effectiveness as a redistributive tool.⁷⁰ Perhaps most significantly, however, many of the Critics argue for the legal empowerment of the subordinated or oppressed groups currently victimized by the "cultural and intellectual hierarchies of the legal system."⁷¹ This line of argument has included arguments for the empowerment of union members, by investing them with "joint sovereignty" with management over investment and other decisions that affect the competitive position of the firm;⁷² of women, by altering state laws concerning working conditions and child care to aid working mothers in maintaining their careers,⁷³ extending the scope of anti-discrimination statutes from the workplace into the private sphere,⁷⁴ and shrinking⁷⁵ or eliminating⁷⁶ the defense of consent in cases of rape; of racial minorities, by making the law explicitly race conscious⁷⁷ or instituting programs of large scale affirmative action;⁷⁸ and of oppressed people generally, by using the law to build "an

⁷⁰See Mark Kelman, *Time Preference and Tax Equity*, 35 STAN. L. REV. 649 (1983).

⁷¹Minda, *supra* note 5, at 621.

⁷²See Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1558 (1981).

⁷³See Gerald Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55 (1979).

⁷⁴Nadine Taub and Elizabeth Schneider, *Perspectives on Women's Subordination and the Role of Law*, in THE POLITICS OF LAW, *supra* note 6.

⁷⁵Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

⁷⁶Catherine MacKinnon, *Toward Feminist Jurisprudence*, 34 STAN. L. REV. 703 (1982).

⁷⁷See Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (1990); Crenshaw, *supra* note 64.

⁷⁸Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L. J. 705 (1991).

authentic or unalienated political consciousness."⁷⁹

Unlike the mainstream Critics, the irrationalists offer no specific program for legal reform.⁸⁰ This is because, as their designation suggests, they believe that reason is impotent to resolve legal and moral issues. Heavily influenced by the philosophy of Richard Rorty⁸¹ and the deconstructionist school of literary criticism associated with Jacques Derrida,⁸² the irrationalists believe that objective knowledge is impossible. Following Rorty, they reject the correspondence theory of truth that holds that a statement is true when it is an accurate representation of an underlying reality.⁸³ They assert that since it is impossible "to step outside our skins--the traditions, linguistic and other, within which we do our thinking and self-criticism--and compare ourselves with something absolute,"⁸⁴ reality is socially constructed, i.e., the result of social practices that "embody contingent choices concerning how to organize the thick texture of the

⁷⁹Gabel and Harris, *supra* note 62.

⁸⁰In what follows, I present only a cursory overview of the irrationalist position. To even approach an adequate treatment of it would require a detailed exegesis on complex metaphysical and epistemological positions quite beyond the scope of the present work. For an excellent discussion of the philosophical foundations of the irrationalist position, *see* Chow, *supra* note 56.

For the purposes of the present discussion, I will take the following works to be representative of the irrationalist wing of CLS: Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Peller, *supra* note 48; Boyle, *supra* note 48. For an extended list of irrationalist writings, *see* Chow, *supra* note 56, at 223-24 n.4.

⁸¹*See* RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979); RICHARD RORTY, *THE CONSEQUENCES OF PRAGMATISM* (1982).

⁸²*See* JACQUES DERRIDA, *ON GRAMMATOLOGY* (1976).

⁸³*See* Chow, *supra* note 56, at 259-65.

⁸⁴RORTY, *supra* note 81, at xix.

world in consciousness."⁸⁵ Thus, the irrationalists adopt the coherence theory in which "the meaning of words are not determined by external referents, but instead by their coherence with other words or judgments within our total body of knowledge."⁸⁶ This, however, implies that "the attempt to fix the meaning of an expression leads to an infinite regress,"⁸⁷ and hence, that "meaning is ultimately indeterminate."⁸⁸ Since this is true generally, it obviously must be true within the legal realm as well.⁸⁹ Therefore, for the irrationalists, the indeterminacy of the law is merely a consequence of the inherent indeterminacy of human language.⁹⁰

⁸⁵Peller, *supra* note 48, at 1169 (footnote omitted). Peller explains that:

objects are constructed as they are perceived since perception itself occurs through the medium of representational categories. Knowledge does not flow from a free subject perceiving independently existing objects; it is constructed in the relationships *between* things, in the metaphors we create. . . . Hence, "reality" is not an objective realm existing independent of representational practices. "Reality" is not carved up into categories that representational systems happen to match. Rather, "reality" is constructed in the very process of description or representation."

Id. at 1170-76.

⁸⁶Chow, *supra* note 56, at 275.

⁸⁷Peller, *supra* note 48, at 1167.

⁸⁸*Id.* at 1169.

⁸⁹As Chow explains it, "[s]ince it is impossible to trace all of the interconnections of words throughout the entire system of beliefs, the meaning of any one word always remains indeterminate. If the meaning of any word, the building blocks of legal reasoning, is indeterminate, then legal reasoning itself is indeterminate." Chow, *supra* note 56, at 275.

⁹⁰For the irrationalists, both the indeterminacy and mystification theses essentially fall out of their underlying epistemological position. According to Peller, the liberal mindset is the result of what Derrida calls "the metaphysics of presence," DERRIDA, *supra* note 82, at 49, in which "the artifactual character of representational categories utilized in purportedly rational thought processes is denied." Peller, *supra* note 48, at 1168-69. As he puts it, "The purported distinction in liberal thought between reason and will--and, I will contend, law and politics--depends on the

This philosophical position, which has been described as radical subjective idealism,⁹¹ leads the irrationalists to embrace an extreme form of epistemic skepticism in which "it is impossible to say anything true about the world."⁹² This, of course, entails a commitment to ethical relativism such that "[a]ny action may be described as right or wrong, good or bad."⁹³ Thus, for the irrationalists, reason is irrelevant to our normative pursuits. Since there are no objective moral or legal truths, reason cannot help us find them. "[L]egal and moral questions [are] matters to be answered by experience, emotion, introspection, and conversation, rather than by logical proof."⁹⁴

Hence,

when judges decide cases, they should do what we all do when we face a moral decision. We identify a limited set of alternatives; we predict the most likely consequences of following different courses of action; we articulate the values that are important in the context of the decision and the ways in which they conflict with each other; we see what relevant people (judges, scholars) have said about similar issues; we talk with our friends; we drink enormous amounts of coffee; we choose

denial of the contingency of representational categories." *Id.* at 1168.

For an excellent account of the derivation of the irrationalist position, see Chow, *supra* note 56, at 275-77.

⁹¹Chow, *supra* note 56, at 259.

⁹²Singer, *supra* note 80, at 4. According to Singer, "No one can properly claim to describe the world accurately: Anything anyone says is as likely to be wrong as to be right, and anything is as likely to be right or wrong as anything else." *Id.*

⁹³*Id.*

⁹⁴*Id.* at 56 (footnote omitted). For the irrationalists, moral and legal decisions have the same character as decisions as to whether "to get married, to have children, to go to law school, to move to another state, [or] to quit their jobs." *Id.* at 62. To make such decisions, people do not reason their way to a resolution, they simply choose. They "think long and hard about what they want in life; they imagine what life would be like if they were to follow one path rather than another; they talk with the people who are most important to them and whose opinions they value; they argue with others and with themselves; and in the end, they make a decision." *Id.*

what to do.⁹⁵

For the irrationalists, the function of legal theory is essentially "expressive rather than determinative."⁹⁶

For this wing of the CLS movement, the implication of the indeterminacy argument is that all legal judgments must be made intuitively.⁹⁷ However, they regard this as cause not for concern, but for celebration. This is because they believe that once human beings come to see that "all aspects of social life, including laws and legal institutions . . . are socially constructed," they will feel "free to restructure or reject all of them."⁹⁸ This, in turn, will liberate them to develop and embrace their own "passionate moral and political commitments,"⁹⁹ and the concomitant recognition that each of them bears responsibility for all such choices¹⁰⁰ will empower them "to become the rulers of [their] own destin[ies]."¹⁰¹ Thus, for the irrationalists, our acknowledgment

⁹⁵*Id.* at 65.

⁹⁶*Id.* at 63.

⁹⁷Since "general social-theoretical explanations are unavailable," these intuitions will apparently arise out of one's immersion in "minutely detailed maps or descriptions of phenomena." Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505, 513 (1986).

⁹⁸Chow, *supra* note 56, at 227.

⁹⁹Singer, *supra* note 80, at 9.

¹⁰⁰*See id.* at 66.

¹⁰¹Chow, *supra* note 56, at 227. Indeed, since the Crits see liberalism as responsible for creating a culture of alienated and lonely individuals in continual competition with one another, *see* Singer, *supra* note 80, at 69, they regard the very process of critique as a liberating experience. As Clare Dalton expresses it:

Imagine critique as a powerful device for stripping away from us, if we choose, the legal abstractions by which we order our perceptions, leaving us groping, to be sure,

of the indeterminacy of the law gives rise to a profoundly hopeful experience.¹⁰²

A REALIST CRITIQUE

The Critics are conventionally regarded as the intellectual descendants of the legal realists,¹⁰³ and with respect to their deployment of the indeterminacy argument against the formalism they found in the post-realist legal universe, this is an apt description. However, when we consider the implications that the Critics draw from legal indeterminacy, the family resemblance quickly fades. To see that this is the case, recall that the realists had introduced the indeterminacy argument to direct the legal community's attention toward the empirical effects of legal decisions and enactments on the lives of the human beings to be governed by them. They attacked the formalism

but forced to deploy whatever *other* means of decision are available to us, and with at least a hope of making something new of our experience. . . . Imagine the possibility that those who embraced the experience and felt changed by it, would feel the desire to act with others towards social transformation in the name of a contingent commitment to association rather than isolation and conflict.

Dalton, *supra* note 46, at 241-42.

¹⁰²The irrationalist position has frequently been criticized as being incoherent or, at least, self-defeating. It is not my purpose to pursue this criticism here. I should point out, however, that although the irrationalists believe that all people must make moral and legal decisions on the basis of their intuitions, they seem to suggest that these intuitions should be arrived at on the basis of conversing with others, reflecting on experience, and imagining the consequences of the decision. See Singer, *supra* note 80, at 62, 65. If they do in fact make such a suggestion, then, given their position, it is not at all clear what can be meant by the word 'should' in the previous sentence or how this suggestion can be maintained in the face of those whose intuitions tell them that conversation and reflection are irrelevant and that all who disagree with them must be violently suppressed. This, however, represents the topic of another article. To pursue this line of objection, see Coleman and Leiter, *supra* note 14, at 601; Belliotti, *supra* note 7, at 169-73; Hutchinson and Monahan, *supra* note 9, at 236-42; Chow, *supra* note 56, at 277-98; Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U.L. REV. 429, 481, 488-91 (1987). See generally Schwartz, *supra* note 62, Phillip E. Johnson, *Do You Sincerely Want to Be Radical?*, 36 STAN. L. REV. 247 (1984).

¹⁰³See, e.g., Minda, *supra* note 5, at 636; Note, *supra* note 5, at 1669, 1682.

of their day for rendering legal judgments on the basis of the logical relationships among abstract concepts, i.e., transcendental nonsense, rather than in terms of the judgments' actual effects.¹⁰⁴ To the realists, the indeterminacy argument was a clarion call for a pragmatic approach to law.¹⁰⁵ This, however, is precisely the approach that Critics reject.

The Critical Legal Studies movement was formed as a reaction against the empirical orientation of the Law and Society Association.¹⁰⁶ The Critics broke off from this group because of their belief that "the Association had become too closely identified with the 'empirico-behaviorist' wing of social science and that the road to jurisprudential enlightenment lay down a less data-oriented, more theoretical path."¹⁰⁷ The Critics became the Critics specifically because of their desire to engage in doctrinal analysis at the more abstract level of social theory.¹⁰⁸ Their interests lay not in the study of how the law functions, but in the "dissect[ion of] the presuppositions and

¹⁰⁴See notes 16-19 and accompanying text.

¹⁰⁵The realists' emphasis on an empirical approach to law was an outgrowth of their underlying pragmatic philosophy. See Singer, *supra* note 6, at 474; GEORGE CHRISTIE, JURISPRUDENCE 643 n.13 (1973). See generally Kenneth Casebeer, *Escape from Liberalism: Fact and Value in Karl Llewellyn*, 1977 DUKE L. J. 671 (1977). For the pragmatists, knowledge consists in "understanding the consequences of holding the views we have and recognizing what it takes to achieve the goals we espouse." Trubek, *supra* note 50, at 581. Thus, "[f]or the pragmatists, the pattern of all inquiry--scientific as well as moral--is deliberation concerning the relative attraction of various concrete alternatives." RORTY, THE CONSEQUENCE OF PRAGMATISM, *supra* note 81, at 164. For the realists, this meant that factual inquiry was indispensable to legal analysis since "law cannot be defined other than by the difference it makes in society, and empirical inquiry is necessary to determine what that is." Trubek, *supra* note 50, at 581.

¹⁰⁶See Hutchinson and Monahan, *supra* note 9, at 200.

¹⁰⁷*Id.*

¹⁰⁸See *id.* at 213-19.

ideologies immanent in the legal order."¹⁰⁹ Thus, in order to attack the premises of liberal legalism "at higher and higher levels of generality,"¹¹⁰ the Critics abandoned the study of "the gap between the law in the books and the law in action"¹¹¹ for that of social theory, metaphysics, and epistemology.

For this reason, I suspect that although a resurrected realist might well be proud of the way in which his intellectual descendants have stripped away a new layer of legal formalism, he would be chagrined by their complete lack of attention to the practical implications of having done so. For, in surveying the contemporary jurisprudential literature, he would notice that after demonstrating how some aspect of the liberal legal system works to maintain the dominance of an illegitimate hierarchy, the Critics then simply assume that whatever they recommend will end this domination and create a more egalitarian society. Although he would find calls for "utopian speculation,"¹¹² "dreaming up the ways we think things might be better than they are,"¹¹³ and "imagin[ing] a better life in the context of living with others,"¹¹⁴ he would also find that the proposals that emerge from such imaginings "are not accompanied by any cost-benefit analysis,

¹⁰⁹Note, *supra* note 5, at 1680.

¹¹⁰*Id.*

¹¹¹Trubek, *supra* note 50, at 589. This article provides an excellent account of the divergence between the methodology of the realists and that of the Critics.

¹¹²Duncan Kennedy, *Cost-Reduction Theory as Legitimation*, 90 YALE L. J. 1275, 1283 (1981).

¹¹³*Id.*

¹¹⁴Singer, *supra* note 80, at 66.

comparison of alternative courses, or discussion of the necessary institutional arrangements."¹¹⁵ In short, he would find that "CLS scholars assume rather than investigate the relationship between elite legal ideological production and social action . . . [and are] relatively indifferent to most of the literature on law and society that does try to explore the impact (or lack thereof) of legal rules, doctrine, and institutions."¹¹⁶

With regard to the mainstream Crits, such a realist might point out that despite decrying the legal formalism of the liberal regime, these scholars seem to derive their constructive agenda from a new-minted *political* formalism, rather than from any consideration of the law's actual effects.¹¹⁷ He might note that although they excoriate liberals for deriving conclusions of law from the manipulation of legal abstractions such as "liberty, freedom of contract, and property,"¹¹⁸ these Crits themselves derive *political* conclusions from the manipulation of *political* abstractions such as 'democracy,' 'egalitarianism,' 'liberation,' 'hierarchy,' 'domination' and 'subordination.' For

¹¹⁵Schwartz, *supra* note 62, at 427.

¹¹⁶Trubek, *supra* note 50, at 615. Indeed, the Crits themselves often explicitly recognize this indifference. Thus, Karl Klare states that "an important limitation of the Critical labor law approach is its relative neglect, thus far, of the important task of drawing out empirically the interrelationships and connections between the intellectual history of collective bargaining law and the social history of post-World War II labor movement." Karl Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, 452 (1981). See also Kennedy, *The Structure of Blackstone's Commentaries*, *supra* note 46, at 220 ("what I have to say is descriptive, and descriptive only of thought. It means ignoring the question of what brings a legal consciousness into being, what causes it to change, and what effect it has on the actions of those who live it.")

¹¹⁷This critique is initially addressed only to the mainstream Crits since there is a sense in which it is true to say that the irrationalists have no constructive agenda. However, I will suggest below that it can be extended to the irrationalist position as well. See *infra* p. 36.

¹¹⁸Note, *supra* note 5, at 1679.

example, based on the political assumptions that an unregulated free market would produce a hierarchical society in which women and people of color were subordinated and that the liberal legal system reinforces rather than establishes this hierarchy, they simply declare that the extension of anti-discrimination laws into the private realm¹¹⁹ or the initiation of explicitly race conscious affirmative action programs¹²⁰ would be an effective step toward the liberation of these groups and the production of a more egalitarian and democratic society. Our revived realist might suggest that in the absence of some evidentiary support for these claims, the mainstream Critics are simply talking transcendental nonsense.

The realist would contend that in order to evaluate the desirability of any legal provision, one must descend from the realm of political abstraction to the world of the empirically verifiable and do the hard work of determining what effects that provision actually produces.¹²¹ He would surely point out that "relations between elite doctrine and social behavior cannot be assumed *a*

¹¹⁹See Taub and Schneider, *supra* note 74.

¹²⁰See Kennedy, *supra* note 78.

¹²¹Indeed, it has been suggested that this is precisely the type of work the Critics have reason to avoid. As David Trubek explains:

Most Critical legal scholars are legal educators. . . . They spend their working lives in settings that stress the importance of legal texts. Many work in schools that are largely isolated both from the day-to-day world of legal practice and from other academic disciplines. All these factors help explain why, even though contextual studies of law and legal thought in action form a necessary part of a genuine program of Critical thought on law, such studies are rarely produced.

Trubek, *supra* note 50, at 618.

priori."¹²² For example, to determine whether the anti-discrimination laws should be extended or new affirmative action programs instituted, one would have to ask questions such as the following: To what degree is the subordination of women or people of color attributable to market forces and to what extent is it attributable to the effect of past and present legal restrictions on the operation of such forces? What are the interests of the bureaucrats at the Equal Employment Opportunity Commission or a new Commission for the Empowerment of Women and People of Color and how are they likely to influence the way in which the law is interpreted? What effect will the enforcement of these measures actually have on the status of women and minorities? To what degree will it cause them to be treated with heightened respect and consideration and to what degree will it cause them to be treated with suspicion and resentment? How do the long-term results of imposing these legal prohibitions compare with those of leaving the field unregulated?¹²³ Since as far as I have been able to determine, the mainstream Critics have

¹²²Trubek, *supra* note 50, at 612. The Critics' tendency to make *a priori* assumptions has itself been seen as an argument against their agenda. Thus, Phillip Johnson argues:

This refusal to address the pragmatic issue . . . is typical of Critical legal scholarship, and explains why this kind of writing is so unsatisfying to persons of a practical bent. If the Critical scholars are making the point that utopian fantasy is the only alternative to conventional legal thought, then they are making the strongest possible pragmatic argument for maintaining our conventions.

Johnson, *supra* note 102, at 262.

¹²³The Critics have frequently been criticized for mischaracterizing the nature of unregulated human interaction. For example, Louis Schwartz points out that the Critics tend to identify liberal society with the liberal legal system, wholly ignoring nonlegal influences on human behavior. Thus, in response to Duncan Kennedy's claim that the liberal regime allows individuals "total arbitrary discretion [to act] without regard to the impact of their actions on others. . . . A can let B starve, or, indeed kill him, so long as this can be accomplished without running afoul of one of the limits of discretion without acknowledging any interdependence whatever as moral beings," Kennedy, *Form and Substance in Private Law Adjudication*, *supra* note 46, at 1768, he points

not addressed any of these questions, our realist critic would probably accuse them of doing nothing more than substituting one form of transcendental nonsense for another. And since the realists introduced the indeterminacy argument in order to force lawyers to evaluate the law in terms of its actual effects on human beings, I suspect that he might also suggest that these Critics have simply missed the point of that argument.

Of course, the realist's critique would not be limited to the mainstream Critics. Although the irrationalist Critics offer no specific proposals for legal reform and declare that legal judgments must be made intuitively, they are not recommending that such judgments be made blindly. The irrationalists are not calling upon judges, lawyers, and legal scholars to resolve difficult legal issues by flipping a coin or on the basis of ill-considered whims. Rather, they believe that such

out that "[c]riticizing the law's failure to demand altruism, self-sacrifice, or heroism is easy if one assumes that tradition, religion, family, patriotism, education, and charity are not part of our socialization. Such an assumption, however, is wholly invalid." Schwartz, *supra* note 62, at 433. Schwartz goes on to suggest that:

virtually all CLS writing ignores the nonlegal influences in society that conduce strongly towards mutual aid, charity, and the like. [This] may also illustrate the hazards of middle-class writing about how most people behave. Middle-class people have fewer occasions to render Critical assistance; anyone who knows the poor must recognize their proclivity to mutual aid.

Id. at 445. This constitutes a specific example of the broader criticism frequently directed against the Critics of failing to consider alternatives to their proposals. As Phillip Johnson expresses this:

Critical scholars who describe "capitalist" society as oppressive or hierarchical are like New Yorkers who speak of Cleveland as being in the "West." Contemporary capitalist society may be oppressive and hierarchical judged by some ideal standard and yet have less oppression and hierarchy than most or even all other societies that have ever existed. Critical legal writing systematically evades the question, "Compared to what?"

Johnson, *supra* note 102, at 260.

judgments should be made by reflecting about what one wants in life, imagining what life would be like were one to decide one way rather than another, and engaging in discussions with those whose opinions one values.¹²⁴ They are calling for decisions to be made on the basis of a considered intuitive judgment, one that is informed by "experience, emotion, introspection, and conversation."¹²⁵

Given this, our realist critic would probably suggest to the irrationalists that even if they are correct in calling for intuitive legal decision-making, more is required than merely imagining what the consequences of one's decisions will be. He would probably point out that if the irrationalists wish judges to base their decisions even partially on "predict[ions of] the most likely consequences of following different courses of action,"¹²⁶ judges would seem to have an obligation to procure some empirical information about these consequences. He might also suggest that to the extent that one is to base his or her decision on conversations, such conversations are likely to be more productive if one has acquired some information to converse about. Thus, the realist would contend that if the irrationalists want their legal decisions to be distinct from mere random guesses, they, too, have an obligation to study the relationship between their proposed solutions and those solutions' actual effects. Until they begin to pay attention to such matters, I suspect that our realist critic would accuse the irrationalists of talking transcendental nonsense just as much as the mainstream Critics, and, like them, to have missed the essential point of the indeterminacy argument.

¹²⁴See Singer, *supra* note 80, at 62.

¹²⁵*Id.* at 56.

¹²⁶*Id.* at 65.

In sum, I believe our reanimated realist might suggest to all the Critics that they pay closer attention to the words of one of their own, Roberto Unger, who warned that "[o]ne passes all too easily from remorseless savagery in the criticism of the past to childlike innocence in the anticipation of the future."¹²⁷

BACK TO THE FUTURE: PUBLIC CHOICE AND THE REALIST PROJECT

Our realist critic has suggested to the Critics that if they really believe the indeterminacy argument establishes that "law is politics," then they should be concerned with the ways in which the political process actually works. Although, to date, the Critics have been uninterested in pursuing this line of inquiry, there is another group of contemporary theorists who do precisely that. These are the public choice scholars.¹²⁸

These scholars are a group of economists, political scientists, and lawyers who examine the actual processes by which law is both made and put into effect. While recognizing that real world market economies are "replete with market failure,"¹²⁹ these theorists make no attempt to develop ideal "'solutions,' which in turn would be faithfully adopted by democratic governments

¹²⁷ROBERTO UNGER, *KNOWLEDGE AND POLITICS* 284 (1975).

¹²⁸I must now issue another disclaimer regarding the diversity of opinion among the groups of theorists to which I am assigning labels. Like the realists and Critics, the public choice scholars represent a widely diverging set of viewpoints. Although they probably have more in common than either of the other groupings of theorists so far examined, there clearly is no such thing as a uniform body of public choice doctrine. In this article, my comments will most often reflect what has come to be known as the "Virginia School" of public choice theory. However, as before, the ascriptions made to the "public choice theorists" should be read as holding only for those actually cited in the notes.

¹²⁹James Gwartney and Richard E. Wagner, *The Public Choice Revolution*, 23 *INTERCOLLEGIATE REVIEW* 17, 17 (1988).

to promote the general welfare."¹³⁰ Rather, they see their role as developing an understanding of the actual functioning of the political process in order to accurately compare what emerges from it with the results of market forces. Or, as expressed by a leading article on the subject, "If we want to know if and when government can be expected to yield preferable outcomes compared to the market, we must systematically analyze how the political process works. This is precisely what public choice theory does."¹³¹

Beginning with the assumption that "the men and women working in government as politicians and bureaucrats are pretty much the same as their counterparts in the private sector,"¹³² the public choice scholars regard the government neither as "some organic entity that always makes decisions in the public interest [nor] . . . as a mechanism that automatically corrects the failings of the market process,"¹³³ but as "a set of processes by which people relate to one another."¹³⁴ Viewed in this way, "[g]overnmental decisions and policies are simply the outcomes of the interactions of the people who relate to one another through a particular political system or constitutional order."¹³⁵ By taking this perspective, public choice theorists hope to achieve "the

¹³⁰*Id.*

¹³¹*Id.*

¹³²*Id.* at 18.

¹³³James Gwartney and Richard E. Wagner, *Public Choice and The Conduct of Representative Government*, in PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 3, 6 (James Gwartney and Richard E. Wagner eds., 1988).

¹³⁴James Gwartney and Richard E. Wagner, *The Public Choice Revolution*, *supra* note 129, at 17.

¹³⁵*Id.*

design of improved governmental methods based on the positive information about how governments actually function."¹³⁶

From this, it should be apparent that the public choice scholars are as much the intellectual descendants of the realists as are the Critics. Where the Critics are credited with reinvigorating and extending the realist critique of legal determinacy, the public choice scholars may be seen as reinvigorating and extending the realists' pragmatic approach to law in both its descriptive and normative dimensions. Recall that on the descriptive level, the realists insisted that attention be directed toward the law as applied rather than the law as written. Rejecting the idea that "all one needs to do in order to know the effects of a given rule is to read the rule and to appreciate its purpose,"¹³⁷ the realists called for the study of the law that emerges from the political and interpretative process, the law as it actually impacts upon the public.¹³⁸ This is a major part of

¹³⁶Gordon Tullock, *Public Choice*, in 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 1040, 1041 (John Eatwell et. al. eds., 1987). See also, Geoffrey Brennan and James M. Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie*, 74 U. VA. L. REV. 179, 187 (1988).

¹³⁷COHEN, *supra* note 11, at 87.

¹³⁸The realists described themselves as skeptics who:

demand hard coin of social fact in place of paper legalities. Some of these skeptics have suggested that the words of a statute often have only the most superficial resemblance to the workings of the statute. A good deal of statute law turns out under investigation to be without any force—law-in-books rather than law-in-action; other parts of the statute law have been given new meanings in judicial, administrative, and popular construction—meanings that could never have been deduced from the words of the legislature. In either case, study of the statutes fails to provide a realistic picture of functioning law.

Id. at 81.

what the public choice scholars working on the theory of bureaucracy do.¹³⁹ Their main object of study is the way the law as written is translated into action by those charged with its implementation. Furthermore, the realists' normative program was based upon recognizing the law for what it is, one among many methods of bringing order to the community with its own set of comparative advantages and disadvantages.¹⁴⁰ This implied that it had to be evaluated first in terms of what it was actually capable of accomplishing¹⁴¹ and then on the basis of whether it could accomplish this better than any of the other available mechanisms of social control.¹⁴² But this is the essence of the public choice program. By studying the effects of phenomena such as the

¹³⁹See GORDON TULLOCK, *THE POLITICS OF BUREAUCRACY* (1965); WILLIAM NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971); ANTHONY DOWNS, *INSIDE BUREAUCRACY* (1967).

¹⁴⁰The law is one among many "control" institutions. The direction of its powers is largely determined by a process of competition with religion, organized education, the family, professional and mercantile agencies of control, and various other social institutions, each with its own "inner order" and its own sanctions. The disruption of any one of these agencies throws new tasks upon the law; their development relieves the legal order of old responsibilities.

Cohen, *supra* note 11, at 91.

¹⁴¹The human significance of any rule of law thus depends upon the extent to which it secures obedience. This, in turn, will depend upon the strength of the organized desire for which the rule provides an enforcing instrument, as compared with the strength of the organized desire which the rule is intended to frustrate. The failure to recognize this persistent struggle that underlies all law enforcement is written large in the history of social reform legislation. Again and again idealists have succeeded in writing their hopes on the statute books, only to discover in dismay that laws are not self-executing. . . . What the law ought to accomplish in any given situation cannot be determined without determining what the law *can* accomplish.

Id. at 89-90.

¹⁴²"In this competition with other organizations of social force, the law realizes the limitations of its machinery." *Id.* at 91.

average person's "rational ignorance,"¹⁴³ the influence of special interests,¹⁴⁴ the incentives to engage in rent-seeking behavior,¹⁴⁵ the different time horizons for private versus collective choice,¹⁴⁶ and the difference between political and private transaction costs,¹⁴⁷ these scholars are attempting to determine both what it is possible to accomplish through political action and the extent to which such ends could be better achieved through nonpolitical means.

However, if this shows that the Critics and public choice scholars share a bond of consanguinity, it also shows it to be one beset by serious sibling rivalry. To see this, consider that public choice theory may be seen as at least implicitly criticizing the traditional approach to economics for dwelling upon abstractions such as the perfectly competitive market or *homo economicus* rather than the analysis of the way actual human beings function in real world economic and political systems.¹⁴⁸ In this respect, public choice scholars seem to echo not only the realists' criticism of nineteenth century legal formalism, but also our imaginary realist's critique of today's Critics. Indeed, since the Critics believe that law is politics, and politics is precisely what

¹⁴³See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

¹⁴⁴See *THE POLITICAL ECONOMY OF RENT-SEEKING BEHAVIOR* (Charles K. Rowley et al. eds., 1988) §3.

¹⁴⁵See *id.*; Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967).

¹⁴⁶See DWIGHT R. LEE AND RICHARD B. MCKENZIE, *REGULATING GOVERNMENT: A PREFACE TO CONSTITUTIONAL ECONOMICS* 127-131 (1987).

¹⁴⁷See Charlotte Twight, *Political Transaction-Cost Manipulation: An Integrating Theory*, 6 J. THEORETICAL POL. 191 (1994); Charlotte Twight, *Government Manipulation of Constitutional Level Transaction Costs: A General Theory of Transaction Cost Augmentation and the Growth of Government*, 56 PUBLIC CHOICE 131 (1988).

¹⁴⁸See Brennan and Buchanan, *supra* note 136, at 179-81.

public choice scholars study, it is not unreasonable to view the challenge they present to traditional economics as a challenge to the Critics as well.¹⁴⁹

If this is so, then the public choice scholars may be seen as standing in the same relationship to the Critics as the realists did to the legal formalists. For, where the realists castigated the formalists for basing *legal* decisions on the manipulation of *legal* abstractions rather than the actual effects of the decisions on human beings, the public choice theorists may be viewed as castigating the Critics for basing *political* decisions on the manipulation of *political* abstractions rather than the actual effects of the decisions. Public choice declarations that theorists "who formulate optimizing solutions to market failure that are inconsistent with the operation of political organization might as well be spending their time working crossword puzzles"¹⁵⁰ and that "[e]xpected outcomes under market organization . . . must be compared with expected outcomes under political organization . . . [to avoid being] like the judge who after hearing the first contestant sing, immediately declared the second contestant the winner,"¹⁵¹ sound hauntingly like the realist critique of legal formalism.

This, of course, does not establish that there is anything wrong with the Critics' proposals; it merely implies that, at present, they are based upon unsubstantiated assumptions. However, recent public choice scholarship has provided reason to doubt several of these assumptions. Consider,

¹⁴⁹It is important to note that I am not suggesting that any public choice scholar has actually made this or any other criticism of the Critics. Both here and throughout this article generally, I am describing what *I believe* public choice scholars would say to the Critics, if they were to address them. I am not aware of any public choice scholar who has, in fact, done so, as yet.

¹⁵⁰James Gwartney and Richard E. Wagner, *The Public Choice Revolution*, *supra* note 129, at 23.

¹⁵¹*Id.*

for example, the Critics' argument for legal action to empower people of color. One of the assumptions upon which this argument rests is the claim that the liberal legal regime merely reinforces the subordination of such people that is produced by market forces.¹⁵² This belief that the market is itself racially oppressive leads to the conclusion that merely repealing all racially oppressive laws would be insufficient to end this subordination. However, public choice theorist Jennifer Roback's studies of the political and economic forces responsible for the rise of "Jim Crow" legislation in the post-Civil War South¹⁵³ and the political logic of racism¹⁵⁴ suggest that the reverse may be the case.

In her examination of conditions immediately following the Civil War, Roback found that because the emancipated slaves had superior knowledge of agricultural techniques and because of the shortage of young white men due to the ravages of the war, the Southern blacks had considerable market power. Their value as agricultural laborers was such that attempts by white landowners to form collusive agreements to suppress their wages invariably failed due to the competitive advantage each could gain by defecting.¹⁵⁵ It was precisely the market's resistance to

¹⁵²See e.g., Kennedy, *supra* note 78. See also *supra* p. 35.

¹⁵³See Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?* 51 U. OF CHI. L. REV. 1161 (1984) (hereinafter *Jim Crow*); Jennifer Roback, *The Political Economy of Segregation: The Case of Segregated Streetcars*, 46 J. OF ECONOMIC HISTORY 893 (1986) (hereinafter *Segregated Streetcars*).

¹⁵⁴Jennifer Roback, *Racism as Rent Seeking*, 27 ECON. INQUIRY 661 (1989).

¹⁵⁵Throughout the period, we read of white planters pleading with one another to hold down black wages. "White men have to stick together" was the common theme. Despite all these admonitions, white employers vigorously competed with one another for black labor, and there are numerous reports of blacks leaving jobs to take higher-paying opportunities.

such efforts to subordinate African-Americans that led to political agitation for anti-black "Jim Crow" legislation. As Roback documents, this led to the passage of highly restrictive labor legislation throughout the South that "can best be understood as attempts to enforce a labor-market cartel among white employers that could not be enforced in any other way."¹⁵⁶ As she explains:

The planters wanted to collude to hold down black wages, both to increase their own profits and to solidify the dominant position of the white race. But . . . economic class interest and white solidarity were not adequate to overcome the economic incentive for individual planters to offer higher wages to blacks. The laws were intended to accomplish what race prejudice could not do by itself.¹⁵⁷

In addition, Roback discovered that Jim Crow legislation requiring the segregation of public transportation not only was not an outgrowth of market forces, but that it had to be imposed over the strenuous objection of the business community which, however racist it may have been, did not want to incur the costs associated with the provision of segregated services.¹⁵⁸ As she points out, had market forces favored segregation, the railway companies could easily have adopted such a policy without legislation.¹⁵⁹ But, although the costs associated with the provision of segregated services might have been prohibitive for private businesses, such was not the case for "political entrepreneurs," i.e., politicians who could make political capital out of white racism.

Roback, *Jim Crow*, *supra* note 153, at 1161.

¹⁵⁶*Id.* at 1162. For a summary of the legislation and dates of enactment, *see* the chart provided, *id.* at 1165.

¹⁵⁷*Id.*

¹⁵⁸For a detailed account of railway companies' continued resistance to segregation ordinances, *see* Roback, *Segregated Streetcars*, *supra* note 153, at 899-916.

¹⁵⁹*Id.* at 894.

Roback sums up the political logic of the situation as follows.

White passengers seemed to be indifferent about segregation; streetcar companies resisted segregation; certainly black passengers resisted segregation. Who then wanted it badly enough to work for its introduction? The most likely candidates are politicians who believed that there existed latent sentiment in favor of segregation among whites. Political entrepreneurs could offer white voters something they valued enough to vote for, but not enough to bear the costs privately. Through collective action, the costs of segregation could be imposed on the (disenfranchised) black passengers and the (regulated) streetcar companies.¹⁶⁰

What Roback's analysis suggests is that legislation subordinating people of color arose not to reinforce a market-generated hierarchy, but to redress the market's perceived failure to provide the "public good" of such a hierarchy. Indeed, she concludes her examination of Jim Crow legislation by observing:

There is hardly any question that legal sanctions were necessary to enforce discrimination against blacks. After all, if social pressure, economic power, and custom were sufficient, why did Southern whites bother to enact labor [and other] laws in order to extract what was wanted from blacks? . . . In any case, the evidence indicates that the law, not the market, was the chief oppressor of blacks in the Jim Crow period.¹⁶¹

If Roback is correct about this, then the Critics' assumption that markets are inherently racially subordinating is wrong.¹⁶²

This, of course, does not represent the only way in which the pragmatic orientation of public choice theory might undermine some of the Critics' proposals. Additional doubts might be raised by the scholars studying the theory of bureaucracy who would remind us that proposals for

¹⁶⁰Roback, *supra* note 154, at 674.

¹⁶¹Roback, *Jim Crow*, *supra* note 153, at 1191-92.

¹⁶²On this point, see also David E. Bernstein, *Roots of the 'Underclass': The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U.L. REV. 85 (1993).

political action must be judged not as ideal formulations, but as measures to be instituted by the ordinary human beings who work for the government.¹⁶³ They would contend that since it is the decisions of the officials charged with putting the law into effect that will determine what it accomplishes, one can never safely assume that any legal provision will serve the ends intended by its authors.¹⁶⁴ This is not because there is anything inherently corrupt or inefficient about people who work for the government. Indeed, it is when political functionaries are devoted to their jobs that the law as applied is most likely to diverge from the intent of the law as written. As the public choice theorists point out when discussing the actions of government officials:

As a rough rule of thumb, those people who do work hard and prepare themselves well are those people who have their own idea of what government should do in their particular division and work hard at that. . . [T]hey are usually well-intentioned individuals who can be criticized only in that their idea of the public good may or may not coincide with that of their superiors. If it does not coincide, this does not prove that they are wrong and the superiors right, but it does mean that the government is not apt to follow a coordinated policy.¹⁶⁵

Thus, the public choice scholars would remind us that the desirability of any proposed legal provision must be evaluated on the basis of the effects it is likely to have as implemented rather than those its proponents intend.

As illustration, consider again the Critics' argument for the legal empowerment of women

¹⁶³*See supra* note 139.

¹⁶⁴Bureaucratic decision-makers are human beings. This simple fact is only now beginning to be acknowledged in the theories of bureaucracy. The individual who is confronted with a choice among alternatives must choose, and the cost that inhibits decision is his own evaluation of the alternatives that must be foregone.

JAMES M. BUCHANAN, *COST AND CHOICE: AN INQUIRY IN ECONOMIC THEORY* 98 (1969).

¹⁶⁵Tullock, *supra* note 136, at 1042-43.

and people of color. Another assumption upon which this argument rests is that the political apparatus of society can, in fact, be used to effectively empower currently subordinated groups. The public choice scholars would insist that whether this is true or not depends on the nature of the apparatus to be employed. For example, one proposed method to combat the subordination of women is the passage of Catharine MacKinnon and Andrea Dworkin's anti-pornography statute that would allow the enjoinder of the production, sale, exhibition, and distribution of pornography which "consists of 'the graphic sexually explicit subordination of women through pictures and/or words' that also portray women in sexually degrading contexts, including submissive or servile poses, or sexualized in a manner involving violence."¹⁶⁶ In *Butler v. Her Majesty the Queen*,¹⁶⁷ the Canadian Supreme Court essentially engrafted this definition onto Canada's obscenity statute by reading the language that criminalizes the production and distribution of materials "a dominant characteristic of which is the undue exploitation of sex"¹⁶⁸ to include "degrading or dehumanizing materials [that] place women (and sometimes men) in positions of subordination, servile submission or humiliation."¹⁶⁹ However, because the agents

¹⁶⁶Note, *Pornography, Equality, and a Discrimination-Free Workplace: A Comparative Perspective*, 106 HARV. L. REV. 1075, 1076 (1993) (footnotes omitted). The statute referred to is the civil rights statute written by Catharine MacKinnon and Andrea Dworkin which defines pornography as illegal sex discrimination and which has been proposed for adoption in several states and municipalities. *See id.* at 1075 n.1. For the full text of the statute as well as an explicit statement of its rationale as a means for the empowerment of women, *see* Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, in FEMINIST JURISPRUDENCE 449 (Patricia Smith ed., 1993).

¹⁶⁷[1992] 1 S.C.R. 452 (1992) (Can.).

¹⁶⁸Criminal Code, R.S.C. ch. C-46, §§ 163(1), 163(8) (1985) (Can.).

¹⁶⁹*Butler*, *supra* note 167, at 479. The Court made it evident that it was adopting the essence of the MacKinnon/Dworkin theory of pornography as sex discrimination by stating:

charged with the enforcement of this statute apparently have a different interpretation of what is degrading, dehumanizing, and humiliating than do either MacKinnon and Dworkin or the Justices of the Supreme Court of Canada, the *Butler* ruling has been employed to justify the seizure of gay and lesbian literature as well as two of Dworkin's own books, while apparently reducing the pressure on traditional forms of pornography.¹⁷⁰

Furthermore, even when the functionaries charged with a statute's implementation are completely sympathetic to its intended ends, public choice theorists would point out that the functionaries' individual career goals, budgetary concerns, and personal agendas virtually guarantee that its enforcement will give rise to a myriad of unintended consequences.¹⁷¹ For example, the Equal Employment Opportunity Commission and the Justice Department's Civil Rights Division are clearly composed of people dedicated to the intended goal of Title VII of the Civil Rights Act which, as stated by Hubert Humphrey, one of its principal sponsors, is to relieve

[I]f true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on "the individual's sense of self-worth and acceptance.

Id. at 497 (quoting *Regina v. Red Hot Video Ltd.*, 45 C.R. 3d 36, 43-44 (B.C.C.A. 1985)).

¹⁷⁰See Mary Williams Walsh, *Chill Hits Canada's Porn Law*, L.A. TIMES, Sept. 6, 1993, at A1; Sarah Lyall, *Canada's Morals Police: Serious Books at Risk?*, N.Y. TIMES, Dec. 13, 1993, at A8. The two books that were seized, ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1989) and ANDREA DWORKIN, *WOMEN HATING* (1974), were confiscated because they "illegally eroticized pain and bondage." Walsh, *supra* this note, at A17. The L.A. Times article also contains an illuminating quote from Kimberly Mistyshyn, the manager of the Glad Day gay bookstore, on the distinction between the law as written and the law as applied. She states, "It's really sad that the Butler decision which was supposed to be positive for women has deeply affected the lesbian community. The lesbian community [consists of] women." *Id.*

¹⁷¹Tulloch, *supra* note 136, at 1042-43.

"the plight of the Negro in our economy" and "open employment opportunities for Negroes in occupations which have been traditionally closed to them."¹⁷² Yet, despite this, these agencies have interpreted the requirements of Title VII so as to create a set of financial incentives such that "when deciding where to locate a new plant or where to expand an existing one, a firm will be attracted (other things being equal) to areas that have only small percentages of blacks in their labor pools."¹⁷³ Public choice scholars would insist that considerations such as these have a direct bearing on whether anti-discrimination statutes should, in fact, be extended into the private

¹⁷²110 CONG. REC. 6548 (1964).

¹⁷³Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 513, 519 (1987). This is due primarily to the disparate impact approach to proving discrimination. Disparate impact is usually determined by comparing the percentage of minorities in the workforce with the percentage in the qualified local labor pool. However, since it is extremely expensive both to keep the records required to prove the absence of disparate impact and, if there is a disparate impact, to prove that the hiring methods employed meet the standard of business necessity, companies have a strong incentive to avoid these costs by locating away from minority populations. This effect is also partially due to the added expense of hiring and discharging minority employees under the current interpretation of disparate treatment that "operate[s] as a tax on employing [minority] workers and give[s] firms an incentive to locate in areas with few [minorities]." *Id.* See also RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS* 214-16, 262-63 (1992). Direct evidence of the effect of these incentives was presented in *Terry Properties, Inc. v. Standard Oil Co.*, 799 F.2d 1523 (11th Cir. 1986) (Defendant wished to build its plant in a city with a minority population of 35% or less.).

It is worth noting that the Critics clearly recognize the distinction between the purported goals of the law and the ends it actually serves when implemented when they are criticizing legal liberalism. For instance, in the context of the current example, the Critics contend that although liberal anti-discrimination legislation claims to establish equality for women and minorities, it actually serves to support the current racial and sexual hierarchy. See, e.g., Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978). In the present context, the public choice scholars may be viewed as pointing out that the same may well be true of the Critics' own proposals.

realm¹⁷⁴ and how likely large scale affirmative action programs are to accomplish their goals.¹⁷⁵

These examples in no way show that the Critics' proposals to legally empower subordinated groups will not, in the long run, prove to be the most effective means to eliminate racial and sexual subordination. What they do show, however, is that if the Critics are truly interested in ending subordination, then they must take the time to explore both the extent to which market forces, rather than state action, are responsible for it and the degree to which the necessity of implementing any legal empowerment provision through the political process is likely to reduce its expected effectiveness. If, after such an investigation, the evidence indicates that the empowerment provision, as implemented, is likely to be superior to the unregulated market in eliminating the unwanted subordination, the Critics should continue to advocate its adoption. However, until such an exploration is undertaken, the Critics' proposals have nothing to recommend them over those of the classical liberals.¹⁷⁶

¹⁷⁴See *supra* note 74 and accompanying text.

¹⁷⁵See *supra* notes 77-78 and accompanying text.

¹⁷⁶Although my remarks in this section have been addressed only to the mainstream Critics, what I am characterizing as the public choice critique of CLS applies with equal force to the irrationalists. Recall that although the irrationalists believe that legal judgments must be made intuitively, this does not imply that they are to be made randomly. See *supra* p. 36. Indeed, since the conclusion the irrationalists draw from legal indeterminacy is that human beings are both empowered to make the decisions necessary to transform society and required to "accept personal responsibility for the part they play in the legal system and society at large," Fischl, *supra* note 9, at 532, such judgments must *not* be made randomly. However, to either transform society or make responsible decisions one has to have some idea of what the consequences of one's decisions are likely to be. For this reason, the irrationalists are forced to recognize that legal judgments must be based not only upon reflection, emotion, and discussion, but also upon "predict[ions of] the most likely consequences of following different courses of action." Singer, *supra* note 80, at 65. Thus, even the irrationalists would need to know whether a proposed legal intervention is more likely to bring about its intended end than no intervention at all in order to make a useful legal judgment. Hence, they, too, would seem to be

Although the examples so far discussed have focused on the Critics' proposals to eliminate racial and sexual hierarchies, the hypothesized public choice critique of the Crit agenda would be perfectly general. Were they to address the Critics, the public choice scholars might point out that, regardless of the specifics, to propose that the community act through the agency of the law is to propose an act of collective choice. Their claim would simply be that no such proposal can be justified in the absence of a realistic comparison of both the benefits and the costs of collective action with those of individual action, i.e., of a pragmatic assessment of the relative strengths and weaknesses of political versus market action.¹⁷⁷ The public choice rejoinder to the Critics' claim that the indeterminacy argument proves that law is politics would be that that is only half the story. They would claim that the recognition that law is politics carries with it an obligation to examine how the political process actually works. Thus, they would contend that the indeterminacy argument demands precisely the type of pragmatic examination of political forces that they are engaged in. And since the Critics are apparently uninterested in participating in this examination, the public choice scholars could make a reasonable case that it is they, rather than the Critics, who are pursuing the line of analysis that the indeterminacy argument actually recommends.

THE EVIDENCE OF THE CLASSICAL LIBERALS

obliged to make the type of comparative study the public choice scholars recommend.

¹⁷⁷In its simplest terms, the public choice scholars are calling for a fair basis of comparison. They are criticizing traditional economists and, by implication, the Critics for comparing the results of the actual, imperfect market with the ideally-functioning political system. They would contend that this is as absurd as comparing the economists' notion of the perfectly competitive market with the results of the real-world political process complete with compromises, corruption, and ideological struggle. The public choice scholars are claiming that what is needed is a comparison of like with like, i.e., of the results that can be obtained through the imperfect, real-world market with those that can be obtained through the imperfect, real-world political process.

I have characterized the public choice scholars as pursuing the realists' project of pragmatic legal criticism in a contemporary setting. I have also suggested that they may be seen as admonishing the Critics that in the absence of empirical studies to determine whether the values they seek are more likely to be realized through the political process than through the play of market forces, there is nothing to recommend the Critics' agenda over that of the classical liberals. At this point, a classical liberal might suggest that, to the contrary, there is much to recommend the classical liberal agenda over that of the Critics. The classical liberal might point out that there is really nothing new about the type of research called for by the realists and undertaken by the public choice scholars. He or she might point out that looking through the forms of the law to its actual effects on the human condition and criticizing political action for failing to recognize its empirical limitations has long been at the heart of the classical liberal project. He or she might remind us that well before the advent of the "public choice" label, classical liberal economists such as Adam Smith, Ludwig von Mises, and F. A. Hayek were attacking legal provisions, not because the ends they were intended to achieve were morally objectionable, but because of the empirical impossibility of achieving those ends via the political apparatus. Finally, the classical liberal might suggest that the research of these forerunners of public choice theory indicates that, in many cases, the Critics' are less likely to achieve their desired ends through the political action they advocate than they would be by allowing individuals to act freely.¹⁷⁸

¹⁷⁸A distinction is necessary at this point. The Critics almost invariably identify classical liberals with the adherents of eighteenth-century style natural rights theory who believe that human personality springs to life *de novo* independent of social influences. Thus, Mark Kelman characterizes classical liberalism as follows.

Libertarians start with the supposition that individuals possess certain natural rights, which the state is created simply to protect. Collective bodies . . . simply ratify a

Consider, for example, the work of Ludwig von Mises. As early as 1920, he was criticizing socialist proposals to employ the machinery of the state to increase social welfare and create a more egalitarian society because, however desirable these goals may be, the inability to engage in economic calculation in the absence of private ownership of the means of production made their achievement impossible by the means advocated.¹⁷⁹ After being virtually ignored for

natural, conceptually preexisting scheme of entitlements. The scheme of entitlements that is ostensibly simply "recognized" is supposedly the only one compatible with the observation that persons are fundamentally separate, . . . [Libertarians] posit that we can imagine some set of authentic individual desires antedating and independent of the existence of the community.

Mark Kelman, *A Critique of Conservative Legal Thought*, in *THE POLITICS OF LAW*, *supra* note 6, at 436, 437-38.

Now, it is certainly true that eighteenth century thinkers such as Locke, Hutcheson, and Blackstone believed in natural rights, *see* J. LOCKE, *SECOND TREATISE OF GOVERNMENT* § 95 (C.B. MacPherson ed. 1980) (1690); Francis Hutcheson, *A Short Introduction to Moral Philosophy* in 4 *COLLECTED WORKS* 141-43 (1969) (1747); W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 68-69 (B. Gavit rev. ed. 1941) (1765), although it is extremely doubtful that they subscribed to the atomistic view of human beings Kelman and others attribute to them. *See* STEPHEN HOLMES, *THE ANATOMY OF ANTILIBERALISM* 190-97 (1993). However, finding contemporary, or even modern, classical liberal theorists who fit Kelman's description is at least as difficult as finding an actual legal formalist. Robert Nozick appears to be the usual suspect, although it is arguable whether even he fits this description. *See* ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). If there are other contemporary political theorists who present the naive arguments the Critics ascribe to classical liberals, I am unable to locate them. For two good examples of contemporary classical liberal theorists who definitely do not fit the mold the Critics have formed for them, *see* LOMASKY, *supra* note 54 and RASMUSSEN & DEN UYL, *supra* note 54.

Assuming, however, that there are classical liberals who base their arguments on natural rights and the belief that individual choice is not affected by social circumstance, these are not the theorists I am referring to in the present context. Rather, I am addressing the classical liberals whose arguments concern the practical limitations of governmental action. Such theorists are usually, but not exclusively, economists. As is the case with the other groupings of theorists discussed in this article, it is best to read my comments about the classical liberals as applying only to those I actually cite.

¹⁷⁹*See* Ludwig von Mises, *Die Wirtschaftsrechnung im sozialistischen Gemeinwesen*, 47 *ARCHIV FÜR SOZIALWISSENSCHAFTEN UND SOZIALPOLITIK* 86 (1920).

fifty years, many economists now believe that this "economic calculation argument" was proved correct by the failure of the Soviet Union;¹⁸⁰ Robert Heilbroner going so far as to assert, "It turns out, of course, that Mises was right."¹⁸¹ If this is indeed the case, it must have serious implications for the feasibility of any of the Crits' proposals that require democratic or political control of the means of production.¹⁸²

¹⁸⁰See DAVID RAMSEY STEEL, *FROM MARX TO MISES* 3 (1992). This book provides a thorough discussion of the economic calculation argument and its practical significance for economic reforms intended to produce a more egalitarian society.

¹⁸¹Robert Heilbroner, *The Triumph of Capitalism*, *THE NEW YORKER*, Jan. 23, 1989, at !!.

¹⁸²It is interesting to note the remarkable extent to which Mises' work reads like a template for later public choice theory. An early analog of Jennifer Roback's demonstration that the market was not responsible for the subordination of people of color can be found in his book *SOCIALISM*, first published in 1922. There, Mises examined the condition of women under capitalism in order to show that not only were market forces not responsible for their subordination, but that it was the liberal notion of women as parties to a marriage contract that elevated them from their status as chattel in the pre-capitalistic era to that of autonomous parties able to enter into reciprocal arrangements with men. See LUDWIG VON MISES, *SOCIALISM* 83-87 (*LibertyClassics* 2d ed. 1981) (1922). Furthermore, one can find an early version of the arguments made by the public choice theorists working on the theory of bureaucracy in his 1944 book, *BUREAUCRACY*. There, he explained that because public officials have no price structure to inform them when the further pursuit of their department's goals would use up public resources that would be better spent on other important social problems, it is precisely the honest and efficient public manager who is most likely to produce untoward consequences not intended by those who write the laws. See LUDWIG VON MISES, *BUREAUCRACY* 59-63 (Center for Futures Education ed. 1983) (1944).

Indeed, it is easy to find in Mises' early work both the criticism of abstract reasoning without empirical analysis and the call for a realistic basis of comparison between market and political forces that would subsequently be echoed by both the realists and the public choice scholars. The first is evident in his criticism of the social philosophers of his day on the grounds that "[t]hey see people poor and in want, but do not try to discover whether this is due to the institution of private property or to attempts to restrict it. . . . They judge, without first having made themselves familiar with the results of economic science." LUDWIG VON MISES, *SOCIALISM* 389 (*LibertyClassics* 2d ed. 1981) (1922). The second is exemplified in his comparison of socialism and liberalism.

Socialism sees the individuals--the hungry, the unemployed, and the rich--and finds fault on that account; Liberalism . . . knows well enough that private ownership in the

Similarly, in the 1940's, F. A. Hayek attempted to demonstrate that the inherent shortcomings in human beings' knowledge-gathering abilities limited what could be effectively achieved through centralized, collective action.¹⁸³ Hayek showed how market price structures served as "a system of telecommunications"¹⁸⁴ by which large numbers of people could transmit and receive the information necessary to coordinate their actions. He argued that to reform any aspect of the economy politically, the reformers would have to find a substitute for the information-generating function of the market; they would have to find a way of amassing the knowledge of economic conditions necessary to institute their reforms intelligently. This, according to Hayek, was not merely practically difficult, it was theoretically impossible because so much of the requisite knowledge was inherently local in nature, consisting in the specialized knowledge of individuals at specific times and places which could never be effectively centralized. For this reason, all such reform efforts would be beset by a certain amount of ineradicable uncertainty which would often produce unintended consequences quite at odds with the ends the reformers wished to achieve.¹⁸⁵ If correct, this observation must cast significant doubt upon the

means of production is not able to transform the world into a paradise; it has never tried to establish anything beyond the simple fact that the socialist order of society is unrealizable, and therefore less able than Capitalism to promote the well-being of all.

Id. at 461.

¹⁸³See F. A. HAYEK, *THE ROAD TO SERFDOM*, 48-50 (1944).

¹⁸⁴F.A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 87 (1948).

¹⁸⁵This, of course, represents only a cursory and highly incomplete account of Hayek's treatment of the "knowledge problem." For a fuller discussion, *see generally* F.A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* (1948). A useful compilation of Hayek's thinking on this subject is F.A. HAYEK, *ORDER--WITH OR WITHOUT DESIGN* (Naomi Moldofsky ed., 1989). *See also* F.A. HAYEK, *KNOWLEDGE, EVOLUTION, AND SOCIETY* (1983).

efficacy of those of the Crit proposals that seek to place an ever-expanding percentage of society's economic operations under democratic or communal control.¹⁸⁶

As a final example, consider the work of Adam Smith, whose *THE WEALTH OF NATIONS*¹⁸⁷ is essentially one long excursus on the empirical limitations of what may be accomplished through society's political machinery. In that work, Smith provides one of the the earliest as well as one of the best illustrations of the difference between the law-in-books and the law-in-action in his

¹⁸⁶It is important to note that Hayek was always at great pains to point out that his arguments concerned empirical matters of fact, not disagreements over values. In fact, he explicitly admitted to sharing "some values widely held by socialists." F.A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* 8 (1988). Like the later public choice theorists, he was concerned with the pragmatic analysis of what could be achieved by private and collective action respectively. Thus, he states,

The main point of my argument is, then, that the conflict between, on the one hand, advocates of the spontaneous extended human order created by a competitive market, and on the other hand by those who demand a deliberate arrangement of human interaction by central authority based on collective command over available resources is due to a factual error by the latter about how knowledge of these resources is and can be generated and utilised. . . .

This is why, contrary to what is often maintained, these matters are not merely ones of differing interests or value judgements.

Id. at 7. Interestingly enough, Hayek's criticism of the type of collective action generally advocated by the Crits employs precisely the same critical technique that the Crits employ against liberalism, the immanent critique. This is illustrated by his comments on the morality underlying collective action where he states:

If such a morality pretends to be able to do something that it cannot possibly do, e.g., to fulfill a knowledge-generating and organisational function that is impossible under its own rules and norms, then this impossibility itself provides a decisive rational criticism of that moral system.

Id. at 8.

¹⁸⁷Adam Smith, *The Wealth of Nations* (Edwin Cannan ed., 1937) (1776).

examination of England's poor laws.¹⁸⁸ There, Smith explained how seventeenth century laws designed to provide support for the indigent actually served to depress the wages of the working poor for over a century. When the charity that had formerly supported the poor disappeared with the monasteries, the Crown had required "that every parish should be bound to provide for its own poor; and that overseers of the poor should be annually appointed, who, with the churchwardens, should raise, by a parish rate, competent sums for this purpose."¹⁸⁹ Smith observed that this statute gave each parish a strong incentive to ensure that no outsider who was impoverished or presented the risk of becoming so could settle within it, since this would add to the community's burden. But since the working poor always presented such a risk, the statute almost completely destroyed the mobility of labor. As Smith expressed it:

No independent workman, it is evident, whether labourer or artificer, is likely to gain any new settlement either by apprenticeship or by service. When such a person, therefore, carried his industry to a new parish, he was liable to be removed, how healthy and industrious soever, at the caprice of any churchwarden or overseer, unless he either rented a tenement of ten pounds a year, a thing impossible for one who has nothing but his labour to live by; or could give . . . a security [of at least thirty pounds] which scarce any man who lives by his labour can give.¹⁹⁰

As a result, working men were prevented from improving their standard of living by moving to those areas of the country in which their labor was more highly valued and could bring higher wages.

The very unequal price of labour which we frequently find in England in places at no great distance from one another, is probably owing to the obstruction which the law of settlements gives to a poor man who would carry his industry from one parish

¹⁸⁸*See id.* at 135-41.

¹⁸⁹*Id.* at 136. *See* 43 Eliz., ch. 2 (Eng.).

¹⁹⁰SMITH, *supra* note 187, at 138.

to another without a certificate.¹⁹¹

Thus, by precisely the type of analysis that public choice scholars practice today, Smith demonstrated how a law designed to aid the poor produced a situation such that, "[t]here is scarce a poor man in England of forty years of age . . . who has not in some part of his life felt himself most cruelly oppressed by this ill-contrived law of settlements."¹⁹²

On the basis of evidence such as this, a classical liberal could contend that there are significant empirical limitations on what can be accomplished through centrally-guided, democratic collective action. If so, he or she would probably argue that the Crits' demonstration that the indeterminacy argument shows that law is indistinguishable from politics does not imply

¹⁹¹*Id.* at 140. The certificate referred to is a device that was subsequently introduced for the specific purpose of rectifying the restriction of labor mobility that had been produced by the law of settlements. *See* 8 & 9 Will. III, ch. 30. However, as Smith points out, this remedial statute itself had the contrary effect of "imprison[ing] a man as it were for life; however inconvenient it may be for him to continue at that place where he has had the misfortune to acquire what is called a settlement, or whatever advantage he may propose to himself by living elsewhere." SMITH, *supra* note 187, at 140 (quoting BURN, HISTORY OF THE POOR LAWS 235-36 (1764)). For the full discussion, *see id.* at 138-40.

¹⁹²*Id.* at 141. I might point out that if it is reasonable to regard Smith as a forerunner of public choice theory, then he probably should be considered the first legal realist as well. For, rather than take judicial reasoning at face value in his study of the English legal system, he noted that as long as the dispensation of justice remained a source of revenue to the state, the reality of judicial procedure was such that:

[t]he person, who applied for justice with a large present in his hand, was likely to get something more than justice; while he, who applied for it with a small one, was likely to get something less. . . [and t]he amercement, besides, of the person complained of, might frequently suggest a very strong reason for finding him in the wrong, even when he had not really been so.

Id. at 675. Indeed, if I were to stretch things a bit, I might even suggest that there is a sense in which Smith was the first Crit as well since he took the time to point out that "[w]hen the judicial is united to the executive power, it is scarce possible that justice should not frequently be sacrificed to, what is vulgarly called, politics." *Id.* at 681.

support for a program of radical political action designed to restructure society along more "humane," "egalitarian", "democratic", or "nonhierarchical" lines.¹⁹³ Rather, the classical liberal would contend that the most this observation can imply is that such action should be undertaken in those cases in which it is empirically possible for collective political action to help achieve this end. But the classical liberal can claim that, unlike the Critics, he or she is able to call upon a long line of empirical research to demonstrate that, in a great many cases, collective political action cannot create such a society more effectively than can politically unrestrained individuals functioning in a market environment. Thus, he or she could reasonably contend that the indeterminacy argument lends at least as much support to the classical liberal agenda as it does to the critical one.

CONCLUSION

In this article, I have been examining the implications that can be drawn from the assumption that the law is indeterminate. The Critics have argued that legal indeterminacy implies that there is no distinction between law and politics. They have concluded from this that the law should be employed as a weapon in the political struggle to destroy the illegitimate hierarchies of liberalism and produce a more egalitarian and democratic society. To this end, they have advanced many novel proposals for the legal regulation of human conduct.

I have suggested that this greatly overstates what the indeterminacy argument actually implies. Rather, the proper inference to draw from a demonstration that the law is indistinguishable from politics is that the cases in which the law should be employed to reform society are limited to those in which the desired reforms can be effectively realized through

¹⁹³*See supra* p. 21.

political action. The insight the legal realists provided long ago was that to identify these cases, one must undertake the pragmatic examination of how the law works in practice relative to alternative methods of social control. Thus, there is a need for empirical investigation to determine how the expected outcomes of collective political action compare with those of politically unrestrained individuals functioning in a market environment. Further, to be valid, this investigation must compare like with like; it must compare what can reasonably be achieved through real-world political processes staffed by less than perfect human beings with what is likely to result from unrestrained human interaction in the flawed markets that actually exist, not the utopian results of an ideal political system with those of imperfect, real-world markets. Because this is the case and because the Critics have resisted undertaking such investigations, I have argued that they have missed the point of the indeterminacy argument, and that if this argument is in fact correct, the way forward into our jurisprudential future lies in a return to the uncompleted project of the realists.

I have further argued that because it is the public choice scholars who are presently at work on this project, it is they, rather than the Critics, who are pursuing the line of inquiry the indeterminacy argument actually recommends. Further, to the extent that they, like the classical liberal economists who preceded them, identify the limits of practicable collective action, they cast considerable doubt on the proposals of the Critics that transgress these limits. For this reason, I have suggested that if, indeed, there are many cases in which the empirical evidence suggests that the values the Critics support would be better served by removing political constraints entirely rather than instituting measures of direct political control, the indeterminacy argument would seem to support the classical liberals' agenda as much as it does the Critics'.

It may be true that by demonstrating that the law is indeterminate, the Critics have shown that law is politics. It may also be true that they have shown that the law reflects the ideology of politically dominant groups and thus oppresses politically subordinated groups. But it is not true that they have shown that the most effective way to remedy this oppression is to enlist the coercive apparatus of the state. Indeed, if the public choice scholars and classical liberals are correct in asserting that market forces are frequently more effective at combatting this oppression than is political action, the implication of the indeterminacy argument may well be not that we must engage in a political power struggle for the control of the state in order to coercively impose the proper non-hierarchical or egalitarian or democratic values on society, but rather that we must greatly curtail the state's coercive activities if these values are to flourish. In 1815, Benjamin Constant suggested that in their commitment to democratic egalitarianism the Jacobin followers of Jean-Jacques Rousseau:

saw in history a small number of men, or even a single man, in possession of an immense power, which did much harm, but their wrath was directed against the possessors of power, and not against the power itself. Instead of destroying it, they only dreamt of displacing it. It was a scourge, and they regarded it as a conquest.¹⁹⁴

In this article, I have suggested that this comment may well be equally applicable to the Critics.

¹⁹⁴1 BENJAMIN CONSTANT, *COURS DE POLITIQUE CONSTITUTIONNELLE*, 9 (1815).