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**JURISPRUDENCE:
A BEGINNER'S SIMPLE AND PRACTICAL GUIDE
TO ADVANCED AND COMPLEX LEGAL THEORY**

Allen R. Kamp¹

INTRODUCTION

By now, if the first year curriculum, teaching method, and subject matter—the entire culture of the first year of law school—has achieved its desired goal, you should be in a state of total befuddlement.

Why the legal academy has chosen this strategy, these tactics, and its ultimate goal is a good question, but I am not even going to attempt to answer it. Rather my goal is to dispel a little of the confusion by giving an introduction to jurisprudence, the part of legal studies that attempts to construct a theory of law—what it is, how it functions, and what it should be.² Jurisprudence deals with the history, philosophy, and sociology of the law. Legal authorities—cases and statutes—are written and interpreted, consciously or unconsciously, with the use of jurisprudential concepts. Jurisprudence is a theoretical subject which can also provide practical insights on how to read and understand these legal authorities.

In the first year, we primarily study cases—the practice known as “the case method.” The common law is built on cases rather than on code.³ We look to the past in order to find rules and patterns that enable us to decide present disputes.

So how do we derive a system of law from a collection of decisions? By assuming that all these decisions form a coherent

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² I have tried to present the jurisprudential schools in their own terms. I, like almost all law professors, have my own views. I see Formalism as mistaken, the premise of Law and Economics wrong, and Neo-Textualism as hopelessly naïve. I consider myself to be working in the Legal Realism tradition. I have tried to be fair to all. Please note that I intend my footnotes to serve more as references for further reading than as authority.

³ Our system has become more and more dependent on statutes and regulations. This development, however, is not emphasized (perhaps it would be more precise to say it is ignored) in the first year of law school.

pattern and, using various principles, read cases to form, discuss, and apply that pattern. These principles include following past precedent (“stare decisis”), reconciling and distinguishing cases, deriving broad and narrow holdings, and interpreting cases on various levels of abstraction.

One problem students have in understanding the assigned cases is that the opinions seem both to come to different conclusions (*e.g.*, the necessity of consideration in order to have an enforceable promise), and to treat similar fact situations in totally different ways.⁴ Some knowledge of jurisprudence can help us understand that the courts *do* take different approaches in making decisions, and these varying approaches often reflect particular jurisprudential views.

Duncan Kennedy describes a related concept called “legal consciousness.”⁵ He describes, and I attempt to set out below, the ways in which judges, lawyers, and legal scholars have conceived of the law and applied their conception in different eras:

The notion behind the concept of legal consciousness is that people can have in common something more influential than a checklist of facts, techniques, and opinions. They can share premises about the salient aspects of the legal order that are so basic that actors rarely if ever bring them consciously to mind. Yet everyone, including actors who think they disagree profoundly about the substantive issues that matter, would dismiss without a second thought (perhaps as “not a legal argument” or as “simply missing the point”) an approach appearing to deny them.

These underling premises concern the historical background of the legal process, the institutions involved in it, and the nature of the intellectual constructs which lawyers, judges, and

⁴ *Compare* Alaska Packers’ Ass’n v. Domenico, 117 Fed. 99, 103 (9th. Cir. 1902) (consideration necessary in exchange for modification) with *Watkins & Son v. Carrig*, 21 A.2d 591, 592 (N.H. 1941) (no consideration necessary in exchange for modification).

⁵ Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. IN L. AND SOC. 3, 4 (1980).

commentators manipulate as they attempt to convince their audiences. Among these premises, there are often links creating subsystems with their own internal organization and rules of operation. These change with time. For example, they expand and contract to cover—or not cover—a greater or lesser number of the aspects of legal reality that are within legal consciousness at a given time.⁶

Before we begin, I offer a warning and a disclaimer. **Warning:** You as a student can use jurisprudence to help you understand the cases, but you cannot (if you want to pass) dodge the basic student (indeed lawyer) work of case analysis, synthesis, reconciliation and distinction. An answer to an essay question that reads, “It depends on whether one takes a Formalist, Realist, or Critical approach” will get a “huh” from the grading professor, followed by an F and a recommendation that the student enroll in a Ph.D. program. **Disclaimer:** This guide is necessarily simplistic. Legal scholars have been debating the characteristics of these jurisprudential schools incessantly and have written, at least, thousands of law review articles about the issues raised within the sub-discipline of the law called jurisprudence. What follows is a rough and ready guide, mostly focusing on the private law subject matter which forms the core of the first year curriculum.

FORMALISM

A Langdell student who was presented with a case—a case, for example, in which a landlord moves to evict a tenant for nonpayment of rent and the tenant replies that there has been no heat in the building for two years—was expected to find the doctrine that would logically decide it. According to the doctrine of Caveat Lessee, for instance, a contract between a landlord and a tenant promises nothing beyond which is specifically written into it: if there is no undertaking on the part of the landlord to keep the building heated, he isn’t obligated to do so. Case closed: the tenant’s on the street.⁷

⁶ *Id.* at 6.

⁷ This and the following introductory sections are taken from Calvin Trillin, *A Reporter at Large: Harvard Law*, NEW YORKER, Mar. 26, 1984, at 53.

We start with Formalism, a.k.a., Classical Legal Doctrine, the dominant jurisprudence of the last half of the Nineteenth Century up to the New Deal.⁸ There are some problems with our use of this term. First, the Formalists did not call themselves “Formalists.” The term was coined by the successor movement, Legal Realism. It is said, history is written by the victors, and most of the descriptions of Formalism have been written by the Realists who supplanted that approach to law.⁹ Basic principles of Formalism include:

- Law is elevated above politics by society’s commitment to universal principle.¹⁰
- Legal principles are “neutral,” not a product of choice between political interests or policies.¹¹ Any doctrine can be understood on its own terms; it is free-standing and self-sufficient and has its own moral justification and inner logic.¹² Thus, a few basic principles generate a logical system of rules.
- Judicial decisions should follow rules uncontroversially, without the need to choose between alternatives, when they are applied to readily ascertainable facts.¹³
- Very abstract propositions control entire bodies of law.¹⁴

⁸ This date and all the dates given for the various jurisprudential schools are approximate; there is much debate over the beginning and ending dates of all these schools of thought. My dates will, however, give the reader a rough idea of when the school had its dominant influence. Duncan Kennedy describes the dates roughly as follows: “Pre-Classical legal thought flourished between 1800 and 1860 and declined between 1860 and 1885. Classical legal thought emerged between 1850 and 1885, flourished between 1885 and 1935, but was in rapid decline by 1940. Modern legal thought emerged between 1900 and 1930 and survives to this day.” Kennedy, *supra* note 5, at 23.

⁹ “[N]one of the scholars who were later dubbed formalists seemed to have called himself a formalist or, for that matter, really thought there was a movement either to defend or to repudiate.” ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* §3.2, 57 (1988) (citing Roy Kreitner, *Fear of Contract*, 2004 WIS. L. REV. 429, 441 (2004)).

¹⁰ Kennedy, *supra* note 5, at 12

¹¹ *Id.*

¹² Jeffrey M. Blum, *Critical Legal Studies and the Rule of Law*, 38 BUFF. L. REV. 59, 116-17 (1990).

¹³ Thus, Classical Legal Thought sought objective tests, not the standards favored by the Legal Realists. See discussion below, under Part V: Rules and Standards, and Thomas C. Grey’s, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1, 11 (1983).

¹⁴ See Kennedy, *supra* note 5, at 21.

Christopher Columbus Langdell, Dean of Harvard Law School, who invented and applied the Socratic case method in the 1870s, was the archetypical Formalist. He saw the law as a science, with its first principles derived from case law, and then with particular rules derived from these first principles. These rules were seen to be coherent and consistent. Law *was* about these principled rules and their application, *not* about public policy, trade practices, wealth maximization, or the expectation of the parties.¹⁵

Law was thought of as a science, a science akin to geometry, in which basic axioms generate answers to specific problems. This view again explains the irrelevance of policy – a triangle’s angles total 180° whether it should morally or not, and whether social utility could be maximized by a different total is a nonsensical question.¹⁶ A Formalist believes that all controversies can be deduced by reference to the demands of a rather short list of principles.¹⁷ “[T]he working rules or operating procedures of the legal system should themselves be easily mechanically applied to raw facts without the need to rely on a great deal of subtle judgment, with only open-textured standards to guide the decision maker (for example a rule to enforce only ‘reasonable’ contracts).”¹⁸ “Formalism in this sense is the theory that all questions of law can be resolved by deduction, that is, without resort to policy, except for questions arising under rules that explicitly require policy argument.”¹⁹

We can see this philosophy at work in the answer to the “mailbox problem,” *i.e.*, is a contract formed when a formal written acceptance is put into a mailbox (as established by the “mailbox rule”), or when it is read by the offeror? To Langdell, fundamental contract doctrine clearly dictated that the acceptance had to be received by the offeror. A binding contract needs consideration. The consideration for the offeror’s promise is the offeree’s return promise, which becomes effective only when communicated. Thus the mailbox rule had to be wrong. Langdell answered the arguments that the mailbox rule served justice and

¹⁵ Grey, *supra* note 13, at 2.

¹⁶ *Id.* at 16-20.

¹⁷ MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 11 (1987).

¹⁸ *Id.*

¹⁹ DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIECLE 105 (1997).

the interests of the parties by stating that these arguments were irrelevant because law is a product of logic, not policy.²⁰

Examples of Formalist categories include “business affected with the public interest” and thus subject to regulation, as opposed to businesses not so affected and thus not subject; legislation that interfered with contract rights (bad), in contrast with legislation affecting remedies (okay); and the distinction between exercise of the police power (okay) and confiscation (bad).²¹ In the civil procedure area, a person was either present in a state and thus subject to its jurisdiction or outside of it and thus not so subject.²²

Contract cases that are Formalistic include *Hamer v. Sidway*²³ and *Strong v. Sheffield*.²⁴ In *Hamer*, an uncle promised his nephew \$5,000 if he would give up liquor, tobacco, swearing, and playing cards or billiards. The case was decided on the issue of whether there was consideration or not. The court ruled that there was consideration and thus a contract because the nephew had given up a legal right. In contrast, *Strong v. Sheffield* held that a guarantor’s indorsement on a note could not be enforced because there was no consideration. In both cases, what was left out of the opinions may be more important than what was included. In both, the question was whether there was consideration: if the requirements for consideration were met, there was a contract; if not, there was not. Neither decision explored whether or not agreements with nephews to have a moral life are a good idea, or whether some indorsements on negotiable instruments should or should not be enforced as a matter of commercial policy.

That a judge deciding a case under Formalistic doctrine could reach a very undesirable decision was a necessary result of Formalism’s premises. “For example the Statute of Frauds was intended to prevent the manufacture of evidence, but occasionally works as an escape hatch for a shady operator dealing with a legal neophyte.”²⁵ The parol evidence rule can also work injustice. In

²⁰ See Grey, *supra* note 13, at 4.

²¹ *Id.* at 18.

²² *Pennoyer v. Neff*, 95 U.S. 714 (1877).

²³ *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891).

²⁴ *Strong v. Sheffield*, 39 N.E. 330 (N.Y. 1895).

²⁵ Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 359 (1973) (citing *Bourke v. Callanan*, 35 N.E. 460, 461 (Mass. 1893) (“We are aware by our

Gianni v. R. Russell & Co. Inc.,²⁶ the owner of a small shop in an office building wanted to keep out a competitor. He claimed that, in return for not selling any tobacco, he had been promised that he would have no competition. The court, however, excluded any evidence of that promise because of the Formalistic parol evidence rule. With a little imagination and reading between the lines, one can see Gianni as an Italian immigrant unable to read English and struggling to make a living operating a small shop in an office building. He was prohibited from selling tobacco products, which would have been a substantial portion of his sales, but the lessor assured him that he would be the only concessionaire in the building. The court, however, refused to even consider such assurance, because the parol evidence rule restricted the agreement to the terms of the formal writing. Even though Gianni's story may well have been true and he may have been unfairly treated, the court purposefully ignored his story and his claim of injustice.

Anomalies

In order to fulfill the Formalistic program to achieve general, systematic, and abstract legal doctrine, judges and scholars had to separate out and classify as anomalies areas of the law such as insurance and quasi-contract that could not be made to fit into the Formalistic system.²⁷ We see such a process at work in *Cotnam v. Wisdom*,²⁸ where the court awarded compensation to a physician who had helped an unconscious accident victim. Since the victim was unconscious, no contract could have been made, but the court nonetheless found liability under the doctrine of "quasi-contract." The court took great pains to emphasize that a quasi-contract was not a real contract, but a fiction. "A contract implied by law, on the contrary, rests upon no evidence. It has no actual existence. It is simply a mythical creation of the law."²⁹ The court again stressed the doctrine "[i]s not good logic . . . not true . . . it is a legal fiction," concluding "[i]f it were true, it would not be a fiction."³⁰

construction . . . the statute of frauds may be made an instrument of fraud. But that always is true, whenever the law prescribes a forum for an obligation.").

²⁶ *Gianni v. R. Russell & Co. Inc.*, 126 A. 791 (Pa. 1924).

²⁷ MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* 15 (1992).

²⁸ *Cotnam v. Wisdom*, 104 S.W. 164 (Ark. 1907).

²⁹ *Id.* at 165.

³⁰ *Id.* at 165-166.

Quasi-contract presented a problem to a Formalistic court. A regular contract rests on facts from which the court could infer a mutual understanding: “[a]n actual contract . . . that is an actual meeting of the minds of the parties, an actual, mutual understanding,” while a quasi-contract presented the court with the task of doing justice without formal guideposts. Hence, seeing the situation of “quasi-contract” as an anomaly enabled the courts to both have a formal system of contracts and give relief outside of that system.

THE ATTACK ON FORMALISM

The Classical Legal System, however, began to break down and then found itself subject to unrelenting attack, starting in the late nineteenth century and continuing through the early twentieth century. Following Horwitz, we could call this (and thus link-up the attack with the political and social movement termed Progressivism) the challenge of “Progressive Legal Thought.”³¹

Scholars and judges came to the conclusion that there was no such thing as a value-free legal decision, and thus courts had to consider policy. Examples included the creation of two new legal doctrines: the right to privacy and promissory estoppel. Brandeis created the right to privacy out of neglected precedent. Like the Classicists, he founded the right on a general principle, but he justified his conclusion on policy and changed social conditions.³²

Promissory estoppel was also created by reexamining older, neglected cases and discovering a principle that provided relief in situations where it seemed that justice required compensation. It was later adopted by the Restatement. But of course, the doctrine based liability on reliance, rather than on agreement and consideration, and thus totally conflicted with Classical contract doctrine. ³³ Grant Gilmore went so far as to announce *The Death of Contract*.³⁴ Moreover, once policy was considered, the Formal system broke down. “[The judge] must *never* ask whether giving this particular response, in light of the total situation including

³¹ HORWITZ, *supra* note 27, at 4.

³² Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); see Grey, *supra* note 13, at 31-32.

³³ See *Feinberg v. Pfeiffer Co.*, 322 S. W.2d 163 (Mo. Ct. App. 1959) (in which a gratuitous promise to pay a pension could not be enforced as a contract, but could be under reliance doctrine).

³⁴ GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

but not limited to the *per se* elements, is best. The minute he begins to look over his shoulder at the *consequences* of responding to the presence or absence of the *per se* elements he has moved some distance toward substantively rational decision.”³⁵

Professor Horwitz maintains that the essential difference between nineteenth century and twentieth century American thought was that the former thought in bright line categories, while the later thought in terms of a continuum between contradictory policies and doctrines.³⁶ We may see this “de-categorization” at work in two famous contract opinions by Justice Cardozo: *Wood v. Lucy, Lady Duff-Gordon*³⁷ and *Jacob & Youngs, Inc. v. Kent*.³⁸ In *Wood*, Cardozo found consideration present in the form of Wood’s implied duty to use good faith in marketing Lady Duff-Gordon’s designs. Read literally, the contract did not require Wood to do anything; but Cordozo did not consider that the end of the matter. Rather, he saw the implication of such a promise to be a rejection of Formalism, “a punitive formalism” at that. “The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be ‘instinct with an obligation,’ imperfectly expressed. . . . If that is so, there is a contract.”³⁹ Thus, the court read an obligation of good faith regarding the marketing of the license into the contract, even though there was no explicit provision of any such obligation.

In *Jacob & Youngs*, the defendant refused to make the final payment to the contractor who had built his house because the pipe the contractor installed was not made by a specific manufacturer, as specified by the contract, although pipe of equivalent quality (although made by another manufacturer) had been used. Cardozo held that the owner was to receive the difference in value between the promised pipe and the delivered pipe (which was minimal), rather than the cost of having the walls torn down and the pipe he had contracted for installed. In deciding the case, Cardozo rejected bright line categorical thinking:

³⁵ Kennedy, *supra* note 25, at 359.

³⁶ HORWITZ, *supra* note 27, at 17.

³⁷ *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917).

³⁸ *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239 (N.Y. 1921).

³⁹ *Lucy, Lady Duff-Gordon*, 118 N.E. at 214.

Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier.⁴⁰

LEGAL REALISM

According to Legal Realism, cases are decided within the context of the society's cultural and economic and political values, and the law changes when the context changes—when, for instance, the society as a whole begins to worry a little more about protecting the tenant and a little less about protecting the landlord. . . . In 1970, Judge Skelly Wright, of the Court of Appeals of the District of Columbia Circuit, held that the contract between landlord and tenant contained an implied warranty that the premises were habitable.⁴¹

We now come to a school of jurisprudence, Legal Realism, which had its heyday between World Wars I and II, was enormously influential, and whose principles (some would say, lack of principles) still inform much of today's law.

The nature of the movement (and even whether or not it was a movement) is still a matter of debate today. At issue are such basic questions as whether it was an outgrowth of Progressivism or a break with it, its relation to the New Deal, and whether it died out in the late 1940s⁴² or became the dominant mode of contemporary legal thought. In investigating the doctrine, one immediately comes across Karl Llewellyn, who

⁴⁰ *Jacob & Youngs*, 230 N.Y. at 242-43.

⁴¹ Trillin, *supra* note 7, at 55.

⁴² Someone said it simply “disappeared like water poured into sand . . .” But someone else said “. . . we are all Realists now . . .” See John Henry Schlegel, *Drawing Back from the Abyss, or Lessons Learned from Count von Count*, 1 CRIT 16, 17 (2008).

invented the term⁴³ and was the chief drafter of the Uniform Commercial Code. But how typical of the movement was he? And what were the defining characteristics of the movement? I have spent too much time reading books and reading and writing articles debating these questions, and they do not reach a conclusion.

My own take is that Legal Realism was a movement of a group of quasi-radical, elite legal academics, located primarily at Harvard, Yale, and Columbia, who shared a set of working assumptions. I do not see these assumptions as being a set of consistent philosophical axioms, but rather as a shared way of looking at the law and contemporary social and legal problems. Most of the following assumptions were shared by of the Realists:

- The law should be congruent with social policy; it should promote fairness, efficiency, and prosperity.
- Lawyers are the architects of society and their work should reflect the values and goals of their society as the law accommodates the needs of social and economic groups.
- Society evolves, and the law must evolve with it. The Realists thus saw the need to clear away older concepts they saw as legal debris. These outmoded concepts were such abstract concepts of Formalism as the absolute necessity of consideration, privity of warranty, formal offer and acceptance, and the mirror image rule.
- As befits the term “Realism,” “the law should be based on fact, factual investigation, and actual practices rather than an abstract theory. The law should be judged on how it works, not its theoretical consistency.”⁴⁴
- Rules of law should be tailored (and limited) to specific situations. The more general the law, the worse it is.

This list could go on and on, but you can see that the Legal Realists rejected the first principles of Formalism. They were successful in demolishing the edifice of the Classical Legal System.

⁴³ See Karl Llewellyn, *Some Realism About Realism-Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931) (serving as the manifesto of Legal Realism).

⁴⁴ This pragmatic approach was later taken up by the Law and Economics movement, which is discussed below. Although politically Legal Realism was aligned with the New Deal and Law and Economics is with Neo-conservatism, both focus on pragmatic results rather than on constructing elegant theory.

The Arch-Realist was Karl Llewellyn, and his chief Realist masterpiece was the Uniform Commercial Code. Llewellyn and his colleagues' original vision was changed by the political process of enacting the UCC, and much of today's Code in fact contradicts the premises of Realism, but the Code remains its primary and most important achievement.⁴⁵ The Code's influence extends beyond commercial law to contract law in general and to ways of looking at all law. As stated by Grant Gilmore, the drafter of Article 9 of the UCC, "Llewellyn had recruited a drafting staff which was composed mostly of younger law professors whose own ideas about the law had been greatly influenced by Llewellyn and the other Realists. "Sharing Llewellyn's views, they produced drafts which reflected his own pluralism and anti-conceptualism."⁴⁶ The Code was written to build on and improve the common law by clearing away "debris from the field so that commercial law would follow the natural flow of commerce."⁴⁷ It generally rejects any Formalistic rule system; instead it identifies the relevant and important elements that point the way to a solution.

We can see this rejection of Formal concepts in both Article 2 and Article 9. Prior sales law had used "title" to determine issues such as risk of loss. For example in the "English haystack case," the buyer bought a haystack but delayed moving it. When the haystack burned up soon thereafter, the court put the risk on the buyer because title had passed.⁴⁸ The Realist's Article 2 rejected this reliance on title as metaphysical: "The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something [title] . . . and to substitute for such abstractions proof of words and actions of a tangible character."⁴⁹ Pre-Code, security interests in personal property⁵⁰ were extremely complicated, and many different security devices

⁴⁵ Allen R. Kamp, *Downtown Code: A History of the Uniform Commercial Code 1949-1954*, 49 BUFF. L. REV. 359 (2001) (I discuss the UCC at length because I am familiar with it and because it is a significant, if not the most significant contribution of the Realists to today's law).

⁴⁶ GRANT GILMORE, *THE AGES OF AMERICAN LAW* 85-86 (1977).

⁴⁷ Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 631 (1975).

⁴⁸ *Tarling v. Baxter*, 108 Eng.Rep. 484 (1827) (note that the court did *not* discuss who was better able to have the stack insured or protect against the loss).

⁴⁹ U.C.C. § 2-101, cmt. (2004).

⁵⁰ An example would be a buyer's granting an interest in a car to secure payment.

were required for particular secured transactions. The concept of “title” had been used to determine who had what security interest. With the UCC, the Realists completely threw out all the old security devices and created an entirely new vocabulary to describe such interests.

In interpreting contracts, Article 2 concentrates on such facts as how prior and present contracts have been performed by the parties, and what practices are normal in the business the parties are in. Thus, Article 2 depends on a close analysis of facts to determine issues. For example, Section 2-508(2) involves five factual issues in determining a seller’s right to cure a defective tender of goods: (1) is the rejected tender non-conforming, (2) did the seller have reasonable grounds to believe it was acceptable, (3) did the seller reasonably notify the buyer, (4) did the seller substitute a “conforming tender,” and (5) did he do so in a “reasonable time”? The judge or jury has to determine all these facts to decide the issue.

Hence, Article 2 does its best to demolish Classical Contract Doctrine. The 1941 Draft contained many sections that discarded Formalism, such as dropping title as a deciding factor, providing that a contract may be made in any manner, and limiting the scope of the statute of frauds. Similarly, under Article 2 the question of whether contract formation has occurred depend upon the doctrine of offer and acceptance, but rather “whether the parties, as a matter of fact, have rendered a business agreement to buy and sell goods.”⁵¹ The Code also rejects the doctrine of “definiteness,” which held all significant terms had to be agreed upon for there to be a contract. Consideration is downgraded, and both firm offers and modification are permitted without it. Further, there is no requirement that the exact moment of contract creation be determined. Article Two’s assault on traditional doctrine drew protests from the defenders of the old order. Hiram Thomas, a practicing attorney who was one of the Code’s drafters, complained that “Undue emphasis or stress is given to what might be called the variations or exceptions or limitations to fundamental contract rules . . . [t]he emphasis is not on the contracts as written, but on the variation.”⁵²

⁵¹ Revised Unif. Sales Act, § 3-A (1) (1941) (draft alternative).

⁵² Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940-49*, 51 SMU L. REV. 275, 290 (1998).

Cases decided under the UCC often apply the realist mindset in deciding the issues. In *Columbia Nitrogen Corp. v. Royster Co.*,⁵³ the court allowed contractual language, which stated that the seller must sell a minimum of 31,000 tons of phosphate a year, to be interpreted to as a mere projection of tonnage required to be sold that could be adjusted in response to changing circumstances. This reasoning is a notorious example of a court citing trade usage to allow variable contractual language. In that case, the court focused on what the parties had done and what the usage of the trade was rather than on the language of the contract.

Another example is *Laclede Gas Co. v. Amoco Oil Co.*⁵⁴ In that case, the court emphasized the real needs of the buyer (including the need for an assured supply of propane for supplying residential subdivisions), rather than Formalistic rules such as “mutuality” when it decided to grant the buyers specific performance. A sub-issue in *Laclede* also illustrates the Code’s approach to contract formation. The propane supplier tried to get out of the contract, claiming the contract was indefinite. The court held that even though the contract did not explicitly contain definite terms of duration, the contract in fact could be expected to terminate in ten or fifteen years, because the buyer’s customers would convert to natural gas and stop using propane within that time period.

Procedural law has also become more factually based. For example, the Federal Rules of Civil Procedure, promulgated in 1938, provide for wide-ranging discovery, using devices such as depositions, interrogatories, and document production requests in order to demonstrate the factual basis of every case.⁵⁵ Also, consider the holding in *Pennoyer v. Neff*,⁵⁶ where presence clearly determined jurisdiction, in contrast with the approach of the court in *International Shoe v. Washington*⁵⁷ which used the multi-factored minimum contacts test and based its holding on the actual relationship between the defendant and the jurisdiction.

Since many of the tenets of Realism are now generally accepted, those tenets influence modern case law. Justice Rodger

⁵³ 451 F.2d 3 (4th Cir. 1971).

⁵⁴ *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33 (8th Cir. 1975).

⁵⁵ FED. R. CIV. P. 26-37.

⁵⁶ *Pennoyer v. Neff*, 95 U.S. 714 (1877).

⁵⁷ *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Traynor, Chief Justice of the Supreme Court of California, applied the teachings of Legal Realism in his many path-breaking decisions. For example, in *Pacific Gas v. G.W. Thomas Drayage*, Justice Traynor wrote an opinion in which he severely limited the scope of the parol evidence rule,⁵⁸ by focusing instead on what the parties actually meant. He reasoned that in order to ascertain the parties' intent "rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties."⁵⁹

RULES AND STANDARDS

Although not strictly schools of jurisprudence, the proponents of rules and those of standards each have a different view of the law. Much of the difference between judicial opinions and statutes depends on whether a "rules" or "standards" approach is used. There is a fierce debate between rules-proponents and standards-proponents. For some reason, conservatives like rules, (for example, Justice Scalia is a strong proponent of rules).⁶⁰ Standards are associated with the left – the Legal Realists wanted to replace the rules of Formalism with standards and largely did so in the Uniform Commercial Code.⁶¹

Examples of "rules" include laws based on a person attaining a certain age, such as the age of majority in order to contract and the age of eligibility to receive Social Security. One immediately sees the virtue and the vice of such rules: the virtue is that they are easy to administer – one is, or is not, eighteen or over; the vice is that such rules are both under and over inclusive. Many people are mature enough to weigh the consequences of entering into a contract at age 17, while others are not at age 18. Some are aged at 64 and should qualify for Social Security, whereas some who are 69 are perfectly healthy and able to work.

Standards have the opposite virtues and vices; properly administered they will precisely fit the situation, but such administration is much more costly. Thus, rules and standards

⁵⁸ *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968).

⁵⁹ *Id.* at 639-40.

⁶⁰ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

⁶¹ The association is only a loose one (the left likes some rules, the right some standards), but this seems to be the general preference.

present us with a dilemma: we want the benefits of both, but we have to choose one or the other. Business people, for example, want clear rules so they know where they stand and what is allowed and prohibited. But they also want the administrative flexibility that goes with standards.

Examining “A safety compliance officer’s guide to facial hair,” an article in *FINANCIAL TIMES* by John Kay,⁶² provides a useful example. The problem is that “[i]f you work in a dusty environment, you should wear a respirator and insure that your beard does not get in the way.”⁶³ But how do you define ‘beard’? Here the U.S. and Britain take different approaches – we use rules – the U.S. Occupational Safety and Health Administration prohibits facial hair with detail and cross-references – while the British use standards – it simply imposes “on employers an obligation to ensure health and safety. . . .”⁶⁴ Some argue that the U.S.’s approach merely “invite[s] businesses to comply with the rules rather than ensure a safe and healthy working environment.”⁶⁵ Yet others counter that the U.K.’s common sense rule has its faults: common sense is not universally common, it may lead to over-compliance because there is no safe harbor, and no one is sure as to what exactly should be done.⁶⁶ Thus, while there is a demand for clearer, more definite rules, businesses also want sensitivity to particular circumstances and resent detailed prescription.⁶⁷ Regulators thus “tread a fine line between detailed prescription and inchoate principle, they must constantly listen to people who say “the government should do something about that” and to people – often the same people – who deplore red tape.”⁶⁸

⁶² John Kay, *A Safety Compliance Officer’s Guide to Facial Hair*, *FINANCIAL TIMES*, May 22, 2007, at 15, available at <http://www.johnkay.com/business/498>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

We can list the good and the bad things of both approaches.⁶⁹

Rules:

The Bad

- Rules are underinclusive as to purpose, overinclusive as to purpose, or both. This attribute of rules is a staple complaint against the law made by popular culture. It seems that every day newspapers have stories of how the law is being applied in an unfair way. In fact, the very day I was revising this section, I tested my theory by looking at the Chicago Tribune. Sure enough, in the Business section was the article “Federal rules wreak havoc on condominium sales,” complaining that the FHA rule that wreaks “the most havoc locally . . . is the one requiring a condo building to have four or more units.”⁷⁰
- Rules enable a person to “walk the line,” *i.e.*, to use the rules to one’s own advantage, which may be counter to the rules’ purpose. We have an intuitive sense of how to do this, my oldest granddaughter (at age 3), for example, was faced by a rule that she had to be “done” with her dinner in order to eat dessert; she ate four peas and announced “done.”
- Rules will always have gaps and conflicts that breed litigation. Parol evidence, for example, is and was a goal of classical contract law. It excludes consideration of many claimed agreements that are not incorporated into the final writing.
- Rules lead to unfair results, as in *Gianni*.⁷¹ Because they lead to unfair results, judges manipulate them to achieve justice. Thus, Rules’ virtue of predictability may be more apparent than real. Rules breed complexity. Try writing out, for example, the parol evidence rule, with its exceptions and provisions. You will have at least one page.

⁶⁹ The following is mostly taken from MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES, 40-63 (1987) (Prof. Kelman concludes by explaining “Why Rules and Standards Are Both No Good”).

⁷⁰ Mary Ellen Podmolik, *Federal Rules Wreak Havoc on Condo Sales*, CHI. TRIB., July 30, 2008 at 1, available at <http://archives.chicagotribune.com>.

⁷¹ *Gianni*, *supra*, note 26.

The Good

- Rules are clear. Thus they are (1) easy to apply, and (2) citizens can easily conform their behavior to them and remain safe from liability.
- Rules control judges. Justice Scalia justifies his love of rules on his conviction that the alternative is the substitution of a judge's own whims and personal preferences for the law.
- Rules constitute the law and make it a separate, discrete endeavor. If the law were to consist only of morals and ethics, it would not be law, but something else.⁷²

Standards

The Good and the Bad of Standards mirror that of Rules:

The Bad

- Standards are unpredictable and therefore bad for planning. Suppose, for example, that a client asks your advice on whether he can revoke acceptance of a good.

Factors to be considered under UCC Section 2-608 include:

- Whether the nonconformity substantially impairs the value of the good to the buyer;
- Whether the buyer accepted the good
 - on the reasonable assumption that its nonconformity would be cured and
 - it has not been cured *or*
- Without discovery of the nonconformity if
 - the discovery was difficult *or*
 - if the acceptance was reasonably induced by the seller's assurances.

Also, revocation must occur:

- Within a reasonable time after the buyer discovers or should have discovered it, and
- Before any substantial change in condition of the goods which is not caused by their own defects.

⁷² STANLEY FISH, *The Law Wishes to Have a Formal Existence* in THE STANLEY FISH READER 165 (H. Aram Veese Ed. 1999).

The Section goes on to deal with the buyer's rights and effect of the buyer's use of the goods. Hence, any advice you would give is clear at the extremes, but there is a large grey area.

- Standards are expensive to litigate. Because they are fact dependent, they require extensive discovery and presentation of evidence. Again, examine the question of whether or not a contract existed: under the Formal System, one simply looked to see if there was an offer, an acceptance mirroring the offer, and consideration. If so, there was a contract. Under Article 2, on the other hand, there may be many complex factual issues. If “conduct by the parties”⁷³ may constitute a contract, then the parties must find and present evidence of that conduct, using expensive and time-consuming discovery. Standards may not give rise to personal anarchy on the part of judges, as Justice Scalia fears, but they do give judges wide discretion in deciding cases. The Legal Realists trusted judges to do the right thing and therefore thought such discretion to be a good thing; others with a less favorable view of the judiciary may disagree. “Standards are bad because they are subject to arbitrary and/or prejudiced enforcement.”⁷⁴

The Good

- Standards are not (or at least they should not be) over-or under-inclusive; they should provide more exact justice. For example, the Realists argued that the Formalist rule that prevented modifications of contracts without consideration worked against making necessary accommodations to changing circumstances. The Realists also claimed that judges actually manipulated consideration doctrine to police modifications. Modifications “may be binding if the judge can find an implied rescission of the old contract and the formation of a new one. . . . The realists taught us to see this arrangement as a smokescreen hiding the skillful judge's decision as to duress in the process of renegotiation, and as source of confusion and bad law when skill was lacking.”⁷⁵

⁷³ U.C.C. § 2-204(1) (2004).

⁷⁴ Kelman, *supra*, note 17, at 41.

⁷⁵ Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1700 (1976).

The UCC and the *Restatement (Second) of Contracts* state that consideration is not necessary, but that modifications have to be made in good faith. The rules of the UCC and the *Restatement* should work to allow good faith justifiable modification and invalidate bad faith ones.

- Standards may be more efficient. A contracting party is better off if he can rely on the good faith behavior of the opposite party rather than on a lengthy, detailed writing that is both costly to draft and interpret.
- Standards avoid the bad things about rules: they prevent “gaming the system,” they explicitly allow considerations of justice and they are simpler than many complex systems of legal rules.

The Rules/Standards dilemma is exemplified by *Kiefer v. Fred Howe Motors*.⁷⁶ There a working husband and father bought a car just before his twenty-first birthday.⁷⁷ He returned the car and sued to recover what he paid. He was successful in rescinding the transaction because he had been a minor at the time the contract arose. The court noted that California and New York allow for submitting a contract to court to determine its fairness,⁷⁸ and that such a procedure should police parties who exploit minors’ immaturity while allowing fair deals to be enforced. It also noted that enforcing a rule which invalidates all of a minor’s contracts for non-necessaries invalidates many perfectly proper transactions while failing to protect the immature twenty-one year old. Yet the *Kiefer* court rejected the other jurisdictions’ standard, and applied the rigid rule, because the standard-approach “appears to be extremely impractical in light of the expense and delay that would necessarily accompany the procedure.”⁷⁹ Further, the *Kiefer* court argued, it did not change the rule on minor’s capacity to contract because the appellant had addressed the wrong forum. “We suggest that the appellant might better seek the change it proposes in the legislative halls rather than this court.”⁸⁰ This argument, which concerns with determining the proper institution to make differing types of decision, was the program of the Process School, to which we next turn.

⁷⁶ *Kiefer v. Fred Howe Motors*, 158 N.W.2d 288 (Wis. 1968)

⁷⁷ *Id.* at 289.

⁷⁸ *Id.* at 290.

⁷⁹ *Id.* at 291.

⁸⁰ *Id.* at 290.

THE PROCESS SCHOOL

A Legal Process judge might have refused to stay the eviction order because the landlord who did not provide heat had violated the city housing code rather than a rental agreement, and would therefore have to be brought to court by the city housing authority instead of by his tenant. . . . The implication of Legal Process was that the law is a separate, value-free institution, unconnected to political and moral considerations—more like the Constitution than like the Bill of Rights . . . [T]hat was translated into approaching law in a rigorous, unsentimental, analytical way—or, as it was often put, “thinking like a lawyer.” It’s a shame about the tenant’s being on the street, a lawyer would think, but what’s important is the law.⁸¹

The Process School, which developed during the late ‘40s and the ‘50s, concentrated on the role and function of legal institutions rather than the substantive law. Its foremost proponent was Professor Henry M. Hart, Jr. The first paragraph of his article *Foreword: The Time Chart of the Justices*⁸² lays out his article’s agenda:

This foreword departs from the pattern of most of its predecessors by addressing itself not to any especially noteworthy decisions or events of the past term but rather to problems of the [Supreme] Court’s administration which are common to every term – problems of the volume of the Court’s business and of the ways in which the business is done. An effort will be made to picture these problems as concretely as possible by trying to fit the actual work which the [Supreme] Court does into the time actually available for doing it. After that, a few observations will be tendered about the conditions of the Court’s work and the relation of those conditions to the number and quality of its decisions.

⁸¹ Trillin, *supra* note 7, at 56.

⁸² Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 84 (1959).

The article estimated the available time the Justices of the Supreme Court have to work and their total caseload. It then divided the work into such categories as frivolous petitions, the appellate docket, and argued cases and opinions. Professor Hart drew some conclusions from his work/time analysis: written arguments addressed to the Supreme Court must be brief and well-organized, oral argument is critically important due to the limited time available for each case's consideration, and the Supreme Court's docket should not be expanded at all, in fact, it should be materially decreased. Professor Hart then engaged in a "laboratory analysis" of a recently published Supreme Court opinion which he claimed was "inadequately reasoned" and served to "provide a demonstration of [his] main thesis . . . that the Court would better serve its function, and actually relieve the pressure on its docket, if it tried . . . to write in those fewer cases better-reasoned opinions."⁸³

Hart had selected *Irvin v. Dow*⁸⁴ as his example of the Court's misfeasance. The article then spent many pages going into the history of habeas corpus and Justice Brennan's majority opinion, which ignored the history of the writ, but instead saw the case as involving only the interpretation of the pertinent statute. Professor Hart was not pleased and declared "To explicate in short compass all that is wrong with this reasoning is not easy."⁸⁵ He then explained that the majority opinion was ambiguous, based on an unexplained and inexplicable assertion, and full of technical mistakes.

He saw the opinion as a judicial disaster and complained "It provides a sufficient basis for the submission, herewith earnestly made, that the American people are entitled to better judging than this."⁸⁶ Hart proposed better time-management as the solution, with more time available for "collective deliberation and for private study of argued cases prior to such deliberation."⁸⁷ The legal profession also must do better in its written and oral

⁸³ *Id.* at 101.

⁸⁴ *Irvin v. Dowd*, 366 U.S. 717 (1961) (here discussing a habeas corpus petition contesting the petitioner's conviction and death sentence).

⁸⁵ Hart, *supra* note 81, at 108.

⁸⁶ *Id.* at 122.

⁸⁷ *Id.* at 124. (Note that Hart's point is not that better time management would make the Justices more productive, but that more time would produce better decisions).

arguments before the court and academics must focus on the professional quality of the court's opinions. Hart explicitly argued for a technical view of the law: the Supreme Court's job is not to decide policy issues, to deal with values, or to make choices between substantive legal interpretations, but to do a professional job of interpreting case and statutory law, correctly following precedent, and rendering clear, well-written decisions for the guidance of lower courts. The Realists believed in the creative use of precedent to realize social goals; Hart argued for the correct and precise application of precedent. He concluded: "the time must come when it is understood again, inside the profession as well as outside, that reason is the life of the law and not just votes for your side."⁸⁸

CRITICAL LEGAL STUDIES AND LAW AND ECONOMICS

We now come to two schools of jurisprudence which can be characterized as descendants of Legal Realism. Like a standard idea for a sitcom, one brother (the critical legal scholar) went to art school, wears his hair long, and bemoans the establishment, while the other (the Law and Economics scholar) earned his MBA, has a closely-trimmed haircut, and tries to climb the establishment hierarchy as high as he's able. Each brother, that is, school vigorously maintains that it is the true heir of Legal Realism.

Critical Legal Studies

Asked about the question of whether a landlord can evict a tenant whose apartment has had no heat, a Critical Legal Studies scholar might say the words like "landlord" and "tenant" are part of the mystification process obscuring the right this society gives to force some human beings out of their home. Or he might say that that the real question is not the way the decision goes but how its language adds to the various "belief clusters" that permit "hegemony"—the class domination that is so firmly built into the culture and the language of a society that the dominated accept it as necessary and unchallengeable. He might even say that the legal-services lawyer who brought the case in the first

⁸⁸ *Id.* at 125.

place was simply helping to legitimate the system by furthering the implication that the law is accessible to all.”⁸⁹

Critical Legal Studies (CLS) grew out of Legal Realism. The movement built on the Realists’ attack on Formalism and took it one step further. Like the Realists, the Critical Legal Scholars (the “Crits”) were and are leftist, reformist law teachers, hostile to received legal wisdom.⁹⁰

The Crits believe that legal rules do not determine any particular result: “[F]or any given rule, there were multiple, contrasting and conflicting rules whose resolution required actors to make choices. These choices were political ones that generally reflected, supported, and legitimized the social power of dominant classes.”⁹¹ They, like the Legal Realists, maintain that even rules innocuous or neutral at first glance involve making controversial choices among competing policies.⁹²

Professor Gordon describes the beginning of the movement as one of uneasiness, of dissatisfaction with accepted doctrine: “CLS is a movement mostly of law teachers, but also including some practitioners, which started for most of us in the late 1960s or early 1970s out of a sense of extreme dissatisfaction with our own legal education. We hoped to produce some work about law that would try to make clear and convincing our felt uneasiness, and work those inchoate feelings of dissatisfaction into a critique with some cogency and content.”⁹³

My own view of Critical Legal Studies is the same as my view of Legal Realism: it is futile to describe it as a coherent doctrine. Rather, CLS, like Legal Realism, is a set of attitudes and approaches to the law. As stated by Professor Gordon: “I should first give fair warning that CLS is too heterogeneous, too divided

⁸⁹ Trillin, *supra* note 7, at 70.

⁹⁰ One commenter to this paper questioned the differences between Realism and CLS. That difference is hard to define—it may be more attitudinal, with the Crits being more cynical about the claims of the law and more hostile to the dominant social structure than were the Realists.

⁹¹ Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 343 (2006).

⁹² Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 214 (1987).

⁹³ *Id.* at 196-197.

into conflicting schools and working methods, too well stocked with mavericks and eccentrics, to have produced an orthodox canon of ‘correct’ approaches.”⁹⁴

In the CLS set of ideas, one of the most important is “hegemony,” the idea that the distinctive and elaborate discourse and body of knowledge of the law supports the hegemony of the powers that be. CLS sets out to attack (in its own words, “trash”) the law’s claim that it is based on rationality, consent (with a minimum of necessary coercion), and efficiency; that any necessary changes only consist of fine tuning a basically just, practical, and necessary order.

Some characteristics of the CLS approach are as follows:

- Trashing – Demonstrating that an accepted rule of law is contradictory and indeterminate.
- Attacking claims of “neutral principles of law.”
- Maintaining that the legal doctrine embodies fundamental contradictions in substance and purpose.⁹⁵
- “Flipping” – Showing that an argument for one position can equally well support its contrary.⁹⁶
- Calling into question the accepted categories of the law, such as public versus private, free contract versus regulation, normal contracting versus the deviant/exceptional.

Most of the above is negative – the mission is deconstructive of received legal wisdom. But there is also a positive program, a quest for justice and a better society. CLS, however, does not articulate a theory of justice or what the good society would be like. Richard Michael Fisch discusses the negativity of CLS in his article, *The Question that Killed Critical Legal Studies*, in which he meets an old friend who proclaims, “‘It was bound to fail, Michael,’ . . . ‘The problem with Critical Legal Studies is that it didn’t offer any positive program.’”⁹⁷ Fisch goes

⁹⁴ *Id.* at 201.

⁹⁵ Kennedy, *supra* note 74 (An example in Duncan Kennedy’s argument that contract law contains a fundamental conflict between selfishness and altruism).

⁹⁶ Gordon, *supra* note 91, at 208 (*e.g.*, Professor Gordon’s argument that an application of the strict traditional rules of contract would, far from being necessary for business to function, actually stop commerce in its tracks).

⁹⁷ Richard Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 LAW AND SOC. INQUIRY 779, 780 (1992).

on to say, however, that such a criticism misses the point: it is enough that CLS demonstrates the fallacies of orthodox legal doctrine.⁹⁸ Likewise, the conclusion of Gordon's *Unfreezing Legal Reality* makes a modest, simply hopeful claim about the Critical agenda:

If the resigned and complacent arguments turn out, over and over again, to be wrong, it may be that after all it is possible that altruism, community, democratic participation, equality, and so forth, can be promoted without destroying freedom and economic efficiency. At the very least, there is always the thrill of knowing that some of the fancier rationalistic, or resigned and world-weary arguments as to why nothing important can ever change are no good.⁹⁹

The Legal Realists were lucky in that the Great Depression created a need for reform and opened a window for the realization of new legal ideals. The Crits have had no such luck. John Henry Schlegel writes, "Realism, unlike CLS, captured the state. The Depression occurred while the Realists were active, and the electoral triumph of Roosevelt's New Deal provided a receptive outlet for Realist ideas about law and administrative government. Thus, the politics that underlie Realism became a part of public discourse, while the politics that underlie CLS remained academic."¹⁰⁰

The only CLS case I can think of – and this is a big stretch – is *ProCD, Inc. v. Zeidenberg*,¹⁰¹ in which Judge Easterbrook upheld the validity of a shrink wrap agreement where the buyer's options were to agree or return the software. Although, in CLS language, it supports rather than undermines hegemony, it can be seen as Critical Legal Studies case because Judge Easterbrook puts the question in Crit terms between the software supplier and the purchaser faced with the necessity of agreeing to the supplier's terms or rejecting the software package, *who has the power?*

⁹⁸ *Id.*

⁹⁹ Gordon, *supra* note 91, at 220.

¹⁰⁰ John Henry Schlegel, *Drawing back from the Abyss, or Lessons Learned from Count von Count* 1 CRIT 16 (2008), available at <http://www.thecritui.com>.

¹⁰¹ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

“Must buyers of computer software obey the terms of shrinkwrap licenses?”¹⁰²

Few, if any, courts have adopted CLS as a way of making decisions. But the law student can profit by being skeptical of the claims of black-letter law to rationality and inevitability. Legal arguments are made by pretending the legal analysis is mostly value-free, but the student should realize that all court decisions are at least partly political and hurt and help various interests. Even in the Post-Realist age, legal education stresses the formal aspects of the law and neglects the fact that law has real world consequences.¹⁰³ Everyone in law should ponder the following: “The *point* of Critical Legal studies is that the law is far better understood as a significant aspect of the complex interplay between our culture and structures of thought than it is something that has some sort of ‘room of its own.’ We can’t step outside of law and look at it, we are looking at *us*.”¹⁰⁴ And a thought about justice now and then is a good thing.

Children of CLS:

CLS has generated particularized schools of legal studies, such as Critical Race Theory, Critical Race Feminism, and Latino and Latina Critical Schools. These schools have built “upon the themes and critical understandings of law exposed by the Critical Legal Studies Movement.”¹⁰⁵ It also built on the insights of feminism, dealing with power and the construction of social rules.¹⁰⁶ Critical Race Theory (CRT) began to separate itself from CLS, questioning CLS as being white, male, and elite.¹⁰⁷ Professor Mutua lists the following as to what Critical Race Theory does:

- Holds that Racism is pervasive, rather than a deviation from American norms.
- Rejects claims of meritocracy, neutrality, objectivity, and color-blindness.
- Insists on contextual, historical analysis of law.

¹⁰² *Id.* at 1448.

¹⁰³ Blum, *supra* note 12, at 74.

¹⁰⁴ Fischl, *supra* note 96, at 786.

¹⁰⁵ Mutua, *supra* note 90, at 340.

¹⁰⁶ *Id.* at 345.

¹⁰⁷ *Id.* at 347 (one should note and appreciate the irony of criticism asserting that CLS is elite and hierarchical!).

- Insists on recognition of experimental knowledge and the critical consciousness of people of color in understanding law and society.
- Exhibits interdisciplinary and eclectic thoughts.
- Works towards the liberation of people of color as it embraces the larger project of liberating all oppressed people.¹⁰⁸

Law and Economics

The Law and Economics people tend to think of the law as social engineering—something that helps the wheels go round—so their question about Skelly Wright’s decision on eviction might be what effect it had on the housing market and the supply of housing stock.¹⁰⁹

The Law and Economics movement seeks to use the principles of neoclassical economics to determine what is actually happening in cases and to give a scientifically based guide to decision making. In his textbook, *Economic Analysis of Law*,¹¹⁰ Judge Posner describes economics as the use “of rational choice – in a world – our world – in which resources are limited in relation to human wants. The task of economics, so defined, is to explore the implications of assuming that man is a rational maximizer of his ends in life.”¹¹¹ The systematic application of economics to law (outside of the antitrust field), the “new law and economics,” started in 1960 with the publication of two seminal articles by Guido Calabresi and Ronald Coase. Since then, it has become a major area of legal scholarship with a significant effect on judicial opinions. In the words of Posner: the legal system is one “that economic analysis can illuminate, reveal as coherent, and in places improve.”¹¹² Moreover, economics can “be seen as a tool for understanding and reforming social practices.”¹¹³ In this, Law and Economics follows the Realist program.

¹⁰⁸ *Id.* at 353-54.

¹⁰⁹ Trillin, *supra* note 7, at 76.

¹¹⁰ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992).

¹¹¹ *Id.* at 3.

¹¹² *Id.* at xix.

¹¹³ Stanley Fish, *Neoliberalism and Higher Education*, N.Y. TIMES, Mar. 8, 2009, available at <http://fish.blogs.nytimes.com>, quoting in part Paul Treanor, *Neoliberalism: Origins, Theory, Definition*, available at <http://web.inter.nl>.

The Law and Economics approach has been criticized by many scholars on a variety of grounds. Since it is based on the premises of the discipline of economics, one can attack it on the basis that those premises are false.¹¹⁴

Law and Economics can be seen as a branch of the broader movement of neoliberalism. Stanley Fish defines neoliberalism and discusses it in his New York Times blog:

Here is an often cited definition by Paul Treanor: “Neoliberalism is a philosophy in which the existence and operation of a market are valued in themselves, separately from any previous relationship with the production of goods and services . . . and where the operation of a market or market-like structure is seen as an ethic in itself, capable of acting as a guide for all human action, and substituting for all previously existing ethical beliefs.”

In a neoliberal world, for example, tort questions — questions of negligence law — are thought of not as ethical questions of blame and restitution (who did the injury and how can the injured party be made whole?), but as economic questions about the value to someone of an injury-producing action relative to the cost to someone else adversely affected by that same action. . . .

As Ronald Coase put it . . . “The question to be decided is: is the value of the fish lost greater or less than the value of the product which the contamination of the stream makes possible?” [If closing my factory would be a more significant economic loss, then] you allow my factory to continue to pollute your stream and I will compensate you or underwrite the costs

net/users/Paul.Treanor/neoliberalism.html and also R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

¹¹⁴ See Laurence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 466 (1987) (“Kennedy has argued that cost-benefit analysis . . . does not produce determinate results . . .”)

of your moving the stream elsewhere on your property

Notice that “value” in this example (which is an extremely simplified stand-in for infinitely more complex transactions) is an economic, not an ethical word, or, rather, that in the neoliberal universe, ethics reduces to calculations of wealth and productivity. Notice too that if you and I proceed (as market ethics dictate) to work things out between us — to come to a private agreement — there will be no need for action by either the government or the courts”

The solution is the privatization of everything (hence the slogan “let’s get governments off our backs”), which would include social security, health care, K-12 education, the ownership and maintenance of toll-roads, railways, airlines, energy production, communication systems and the flow of money. (This list, far from exhaustive, should alert us to the extent to which the neoliberal agenda has already succeeded.)

The assumption is that if free enterprise is allowed to make its way into every corner of human existence, the results will be better overall for everyone, even for those who are temporarily disadvantaged, let’s say by being deprived of their fish.¹¹⁵

Seventh Circuit Judge (Richard Posner is the leader of the Law and Economics school, and he lays out its program in the chapter “The Economic Approach to Law” in his book *The Problems of Jurisprudence*.¹¹⁶

¹¹⁵ *Id.*

¹¹⁶ RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 353-62 (Harvard University Press 1990). My use of his book’s description of Law and Economics is unfair, in that Judge Posner states his description is of “the most ambitious effort” of Law and Economics, which he then goes on to critique, but his admittedly exaggerated exposition serves as an exposition of the movement.

Law and Economics assumes:

- All people are rational maximizers of their satisfactions.
- Legislation is a “deal” between interest groups.
- Courts interpret and apply these “deals” and provide the authoritative dispute resolution.
- The common law exhibits a remarkable consistency in working towards “wealth maximization” and economic efficiency.
- The common law (and here is the prescriptive component) *should* maximize society’s wealth.¹¹⁷
- The common law can be reduced to a handful of economic formulas. A few principles such as cost-benefit analysis, the prevention of free riding, decision under uncertainty, and the promotion of mutually beneficial exchanges, can explain most doctrines and decisions.
- Law and Economics differs from Classical Legal Thought in that Law and Economics is empirically verifiable. The ultimate test of a rule derived from economic theory is not the rule’s elegance, logic, or derivation, but its effect on social wealth. Here, Law and Economics follows Legal Realism’s emphasis on pragmatic results. The Classical Legal Theory preferred a Formalist interpretation of contracts because such an approach was inherent in the nature of what contract law was; Law and Economics *may* prefer a Formalist approach to contracts because it pragmatically maximizes welfare.¹¹⁸

Law and Economics opinions are often written by Judge Richard Posner and Judge Frank Easterbrook (both judges on of the Seventh Circuit Court of Appeals and Senior Lecturers at the University of Chicago Law School). A good example is *Walgreen Co. v. Sara Creek Property Co.*,¹¹⁹ which involved a mall tenant (Walgreen) suing the mall owner (Sara Creek) for an order enjoining the owner from renting to a competing pharmacy in violation of the lease. Judge Posner affirmed the granting of the

¹¹⁷ Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 813 (1991) (Law and Economics often just assumes that the goal of law is to promote economic efficiency and wealth maximization without discussion).

¹¹⁸ See Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 876 (2000).

¹¹⁹ *Walgreen Co. v. Sara Creek Property Co.*, 966 F.2d 273 (7th Cir. 1992).

injunction, using a cost/benefit analysis to compare the merits of money damages and an injunction. While the injunctive remedy would cause the parties to negotiate, an award of damages would require the court or jury to determine the amount of those damages; Judge Posner reasoned “a premise of our free market system, and the lesson of experience here and abroad as well, is that prices and costs are more accurately determined by the market than by government.” On the cost side, injunctions require court supervision. Posner then uses economic theory to describe the “bilateral monopoly,” in which two parties can deal only with each other: The lack of alternatives in bilateral monopoly creates a bargaining range, and the cost of negotiations to a point within that range may be high.”¹²⁰ A damages remedy, on the other hand, would avoid the costs mentioned above, but would be less accurate and require the expenditure of additional resources both by the parties in the presentation of evidence and also by the court in reaching its decision. Posner thus concludes that the weighing of these costs and benefits is the job of the district court judge and “as long as we are satisfied that his approach is broadly consistent with a proper analysis we shall affirm.”¹²¹

NEO-TEXTUALISM

There has been a reaction to, or a counter-revolution against, the Legal Realist’s emphasis on context over statutory and contract language. There is a further divergence between the academic reaction, which is based on policy and sophisticated conceptual arguments, and that of several judges, whose opinions evidence the attitude that words have plain meaning and that academic theories to the contrary are just so much hot air.

There is much more legal literature on statutory and constitutional interpretation than on contractual interpretation. Justice Scalia and Judge Easterbrook are in the vanguard of those who argue that a judge should only look to the text of the statute. Easterbrook, although dismissing the concept of “plain meaning” as silly, states that the costs of error in interpretation are minimized if judges engage in a relatively unimaginative, mechanical process of interpretation. Both he and Scalia reject the concept of legislative intent as a useless fiction. Focusing on

¹²⁰ *Id.* at 275-6.

¹²¹ *Id.* at 277.

legislative policies equates meaning with election returns. Judges are not linguistic philosophers who can successfully make nuanced arguments, but overburdened generalists.¹²² Some academics also argue that a textual approach to contract interpretation with a vigorous and expansive enforcement of the parol evidence rule is justified on cost-benefit grounds. Robert E. Scott, in one of his many articles arguing in favor of formalism, states: “Formalist modes of interpretation are justified because, and only because, they offer the best prospect for maximizing the value of contractual relations. . . .”¹²³

But over and above any policy argument, there is the fear that any other way of reading contractual or statutory language will only lead to chaos. Stanley Fish gives a great description of the textualist position: “In that theory communication is anchored by something variously called literal language, neutral language, objective language, plain language, scientific language, denotative language, explicit language, etc. By any name, what is referred to is a level of language immune from contextual variation and therefore resistant to interpretation.”¹²⁴

Any approach other than plain meaning produces chaos:

On the one side, the independent power of self-construing language; on the other, the power generated by the artful distortions of interested agents. If the power of interest is allowed to obscure matters of fact, if the determination of fact turns into a contest of persuasive styles, then the notion of a contract – of an agreement sealed by its verbal representation – goes by the boards; and if that happens, general disaster – the wholesale breakdown of communicative certainty and trust – cannot be far behind.¹²⁵

¹²² Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL’Y 61 (1994).

¹²³ Scott, *supra* note 117, at 875.

¹²⁴ STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 508 (1989) (Fish totally disagrees with the textualist position).

¹²⁵ *Id.* at 507. Judge Alex Kozinski, of the 9th Circuit Court of Appeals, sees himself as part of the defense against a radical takeover of the law. J. Alex Kozinski, *Bending the Law*, N.Y. TIMES, Nov. 2, 1997, § 7. See also, Dana Roithmayr, *Guerillas in Our Midst: The Assault on Radicals in American Law*, 96 MICH. L. REV. 1658 (1998).

The opinions issued in *W.W.W. Associates v. Giancontieri*¹²⁶ and *Trident Ctr. v. Connecticut Gen. Life Ins. Co.*¹²⁷ both illustrate the reaction against Legal Realistic contract interpretation. In *W.W.W. Associates*, the court applied the parol evidence rule in rejecting the use of extrinsic evidence to interpret a cancellation clause as limited to the purchaser alone, because the clause made no mention of such a limitation. The court reaffirmed the old-fashioned parol evidence rule in all its glory: “A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clean, complete document, their writing should be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing.”¹²⁸ Nor could extrinsic evidence be admitted to create an ambiguity: “It is well settled that ‘extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous on its face.’”¹²⁹

In *Trident*, the borrower maintained that under the contract, it had the right to prepay at any time, subject to a fee. The court thought such a reading plainly contradicted the clear meaning of the contract. But bound by the *Erie* doctrine, it followed Judge Rodger Traynor’s rejection of plain meaning rule, expressed in *Pacific Gas*, and remanded the case so that extrinsic evidence could be considered. It did so only under protest, stating that any interpretative method other than plain meaning is not only wrong, but will lead to anarchy:

While this rule creates much business for lawyers and an occasional windfall to some clients, it leads only to frustration and delay for most litigants and clogs already overburdened courts. It also chips away at the foundation of our legal system. By giving credence to the idea that words are inadequate to express concepts, *Pacific Gas* undermines the basic principle that language provides a meaningful constraint on public and private conduct.¹³⁰

¹²⁶ *W.W.W. Assoc., Inc. v. Giancontieri* 77 N.Y.2d 157 (N.Y. 1990).

¹²⁷ *Trident Ctr. v. Conn. Gen. Life Ins. Co.*, 847 F.2d 564 (9th Cir. 1988).

¹²⁸ *W.W.W. Assoc., Inc. v. Giancontieri* 77 N.Y.2d at 162.

¹²⁹ *Intercontinental Planning Ltd. v Daystrom, Inc.*, 24 N.Y.2d 372, 379 (N.Y. 1969); *See also Chimart Assoc. v Paul*, 66 N.Y. 2d 570, 573 (N.Y. 1986).

¹³⁰ *Id.* at 569.

Thus, even though the contract was clear, California law had “turned its back on the notion that a contract can ever have a plain meaning discernible by a court without resort to extrinsic evidence . . . If one side is willing to claim that the parties intended one thing but the agreement provides for another, the court must consider extrinsic evidence of possible ambiguity.”¹³¹

FEMINIST LEGAL THEORY

Feminist Legal theory has many branches, but two themes seem basic: 1) society is dominated by patriarchy, and 2) society subordinates women to men. Feminist Legal Scholars use these basic insights to develop a feminist-based critique of law.¹³² Feminist Legal theory has been successful in changing the law, for example, passing the Equal Pay for Equal Work Act.

There are many sub-schools of Feminist Legal Theory; some of them are described below.¹³³

- Those concerned with substantive equity look to the results of seemingly neutral rules. Equal treatment often leads to unequal results because of the difference between men and women. This approach argues for laws such as those allowing for pregnancy leave.¹³⁴
- Nonsubordination Theory considers whether a legal practice supports the subordination of women.¹³⁵
- The “Dominance” approach or “Radical Femin-ism,”¹³⁶ first developed by Catherine McKinnon, contributed to the inclusion of sexual harassment within the scope of prohibited sexual discrimination under Title VII of the Civil Rights Act of 1964.¹³⁷
- Different Voice Theory sees men and women as having different values and ways of thinking; men see law and society in terms of legal rights, women in terms of an

¹³¹ Trident Ctr. v. Conn. Gen. Life Ins. Co., 847 F.2d at 568-9.

¹³² GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 128 (New York University Press 1996).

¹³³ The following is taken mostly from Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 1 (1994).

¹³⁴ *Id.* at 2-4.

¹³⁵ *Id.* at 4-6.

¹³⁶ MINDA, *supra* note 131, at 137.

¹³⁷ Bartlett, *supra* note 132, at 7; Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

“ethics of care.” This approach seeks laws that reflect women’s consciousness.¹³⁸

CONCLUSION

Looking back at this essay, it seems that the schools of jurisprudence fall into a division between the formalists, who see law as a logical system and interpret documents (constitutions, laws, and contracts) in terms of the text itself, and the realists, who see law in the context of social reality and policy. We can see this division neatly illustrated in *Burnham*, in which Scalia wants to apply the Formal “rule of presence” in determining personal jurisdiction, while Brennan wishes to use *International Shoe* and *Shaffer’s* “minimum contacts standard,” based on policy and fairness.¹³⁹

This division may be a basic human one, similar to that between conservatives and liberals in politics or between classicists and baroque/romantics in art. Certainly, no jurisprudential school is permanently out of fashion, but rather each is recurrently revived and cycled back into prominence. As Stanley Fish states, “the law does not wish to be absorbed by, or declared subordinate to, some other—nonlegal—structure of concern; the law wishes, in a word, to be distinct, not something else.” Formalism satisfies this need and defends against law’s absorption into morality and policy.¹⁴⁰ But law divorced from reality and ends seems absurd. Jurisprudence is not static—legal thinkers are always creating new systems, seeking acceptance for their ideas, and attacking older doctrines. I hope that this essay will be not only helpful to the reader in the study of law, but that it also demonstrates that law and its study are not a matter of the boring memorization of black letter law (although there is some of that), but exciting intellectual endeavors that directly affect how our society functions.

¹³⁸ Bartlett, *supra* note 122 at 11-12.

¹³⁹ *Burnham v. Superior Court*, 495 U.S. 604 (1990); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

¹⁴⁰ FISH, *supra* note 71, at 166-67.

