
2. Critical legal realism in a nutshell

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For about 20 years beginning in the mid-1970s, diverse progressive approaches in the United States found a gathering point for dialogue and political energy in the Critical Legal Studies movement (CLS or “the crits”). CLS was influenced by and influenced other schools of the period, such as critical race theory, critical feminist legal thought, queer legal theory, and Third World approaches to international law. CLS generated a profusion of new scholarship focused initially on class and labor,¹ race and slavery,² sex and gender,³ legal history,⁴ practice,⁵ and pedagogy,⁶ and eventually covering a wide range of legal subjects and fields. Crits participated with others in many forms of legal and political activism; they also launched numerous initiatives to transform legal education. CLS no longer exists as an organized movement, but strands of CLS thinking continue to influence legal scholarship in the US and elsewhere.

We use “critical legal realism” (CLR) to refer to a major branch of CLS that pursued two “theory” projects in tandem. One was to promote the reception in US legal thought of modernist and postmodernist social and cultural theory.⁷ The other was to recover and extend techniques of legal criticism developed by the Legal Realists and their predecessors,⁸ going back to sociological jurisprudence and the revolt against formalism at the turn of the twentieth century in the US and Europe.⁹ Legal Realism faded into retirement as an intellectual movement after World War II. The Realists’ progressive political orientation and antiformalist pyrotechnics were forgotten, and their texts were no longer studied. A bland version of Realism drained of critical purchase came to be mainstreamed and embedded into the collective unconscious of American lawyers. Most US law students now absorb a clichéd rendering by osmosis. Liberal,

¹ See, e.g., Hyde; Klare 1978; Stone.

² See, e.g., Freeman; Klare 1982b; Tushnet. For an account of the relationship of CLS and Critical Race Theory, see Crenshaw et al.

³ See, e.g., Mary Joe Frug 1985; Olsen 1983; Schneider; Schneider et al; Taub & Schneider.

⁴ See, e.g., Gordon; Horwitz 1977.

⁵ See, e.g., Bellow; Gabel & Harris; Simon.

⁶ See, e.g., Feinman & Feldman; Kennedy 1983; Klare 1979b, 1982a.

⁷ Works by Karl Marx, Max Weber, Georg Lukács, Antonio Gramsci, the Frankfurt School, Herbert Marcuse, Karl Polanyi, Jean-Paul Sartre, Ferdinand de Saussure, Claude Lévi-Strauss, Jean Piaget, and Michel Foucault were particularly influential.

⁸ Leading thinkers associated with Legal Realism included Felix Cohen, Morris Cohen, William O. Douglas, Jerome Frank, Felix Frankfurter, Robert Hale, Walton Hamilton, and Karl Llewellyn. Douglas and Frankfurter ascended to the Supreme Court during Roosevelt’s New Deal. Excellent accounts of Legal Realism appear in Kennedy 1993 and Singer 1988. For a collection of original sources, see Fisher et al.

⁹ Central figures in the US were Oliver Wendell Holmes, Louis Brandeis, Roscoe Pound, Wesley Hohfeld, and Benjamin Cardozo.

centrist, and conservative jurists alike opportunistically deploy Realist-style analytics today, usually without knowing the provenance.

CLR resurrected the critical approaches described above and sought to apply them systematically in a wide range of substantive contexts, in policy as well as doctrinal argument, and in private (Kennedy 1976, 1991; G. Frug 1989) as well as public law (Klare 1978; Freeman 1978; G. Frug 1980). CLR was preoccupied with legal arguments of a certain type, namely, arguments that mistakenly or falsely proclaim the legal necessity of an outcome. "Mistaken" in this context means that the claim of the necessity of the outcome is invalid within its own frame of reference because a different, even conflicting outcome can also be justified within the stated premises and analytical framework. (We use "formalist error" to refer to this kind of mistaken claim of legal necessity.) CLR showed that jurists and scholars frequently made false claims for the legal necessity of baneful outcomes, thereby rationalizing domination, inequality, and injustice. Lawyers' work in this mode played and continues to play an important role in constructing and legitimating unjust social arrangements. To sustain this claim, CLR demonstrated that legal discourses and legal reasoning are more open-textured than is suggested by ritual insistence on the "necessity" of legal outcomes. In showing this, CLR also revealed emancipatory possibilities in lawyers' work (Klare 1979a, 1998).

This chapter outlines CLR's main claims and approaches, beginning with critical analytics and the salience of legal culture, proceeding to ideas about the legal construction of the social order, and concluding with transformative possibilities in legal work.

1. LEGAL OUTCOMES ARE UNDERDETERMINED BY LEGAL REASONING

So-called legal reasoning consists of the practiced use by legal actors (judges, attorneys, and others) of a stylized repertoire of rhetorical strategies and argumentative techniques to produce the appearance of the legal necessity of an outcome. Legal reasoning is not an algorithm; it is a set of discursive practices—practices that evoke, enact, and create meanings within a semiplastic, culturally specific medium or legal culture.

"Legal culture" and "legal consciousness" refer to the characteristic thought processes, habits of mind, and argumentative repertoires shared by a group of lawyers at a given time and place (see Kennedy 1980). A legal culture takes shape from its participants' shared experiences of training and socialization, the basic concepts that organize their legal thinking and work, what they regard as appropriate methods of solving legal problems and generating legal knowledge, whether and how they draw conceptual links between different fields of law, what counts for them as a persuasive legal argument, what types of argument they deem *ultra vires* the professional discourse of lawyers (although the argument type might be valid in another discipline such as political philosophy), what their view is of the appropriate role and demeanor of judges and other key legal actors, what enduring political and ethical commitments influence their professional discourse, and what understandings of and assumptions

about human possibility and social organization they share. The discursive configuration of a legal culture gives content to, but also constrains, the legal imagination of its participants, the types of questions they are capable of asking, and, therefore, the range of answers that they can provide. Legal culture is semiautonomous from philosophical outlook and political ideology (understood in conventional "left"/"right" terms). Judges who disagree sharply about the political issues of the day may share a common legal culture. Legal cultures are not necessarily homogeneous; they may unify or fragment over time.

Legal actors deploying the conventional routines of argument within a particular legal culture often find that the legal authorities and texts with which they work are not infinitely plastic. Legal materials can exhibit qualities of rigidity and firmness. Sometimes a norm or rule simply will not yield to a skilled lawyer's best efforts to interpret it in a certain way. Legal reasoning is not a mere façade masking decisions self-consciously made on other grounds. Sometimes discursive conventions observably constrain decision making and influence outcomes, particularly in democratic societies in which fidelity to law is a powerful norm. Legal traditions are internalized in training. Legal education socializes students into culturally specific ways of thinking. It frequently happens that many or most participants in a legal culture will agree that only one interpretation of given materials (or a narrow range of interpretations) or only one solution to a problem (or a narrow range) is plausible. Legal outcomes are often highly predictable; many cases play out as "routine." If this were not so, law practice as we know it would be impossible.

On the other hand, lawyers also regularly find that the analytical repertoire, argumentative conventions, and legal materials do not constrain quite as tightly as students and beginners imagine. The core CLR claim is that it is often possible to destabilize the settled beliefs of a legal community, in which case the experience of "bindingness" or constraint imposed by the legal materials may weaken or dissolve. Lawyers might make an effort to destabilize settled understandings because something important is at stake or perhaps because they have been exposed to a different legal culture. When lawyers step back and interrogate a widely shared understanding, they are often able to justify a radically different or even contrary understanding of what the legal materials imply using perfectly respectable and accepted tools of legal reasoning presently residing in the legal culture. Destabilization initiatives are not always successful. Whether and when a powerful sense of constraint will unfreeze cannot be predicted, but neither is the experience uncommon.

We emphasize the modest nature of the indeterminacy thesis because this is often misunderstood. It is not a global claim about intrinsic properties of language, reason, texts, or interpretation. CLR did not claim that it is impossible to construct a relatively determinate system of legal reasoning, or that the tools of legal reasoning can never yield results that lawyers will agree are legally correct, or that any authority or text can or may appropriately be given any meaning a legal interpreter wishes to impose on it. Critics sometimes argue that the theory of legal indeterminacy leads inexorably to nihilism and the view that "anything goes" or that any legal result is as valid as any other. This criticism is demonstrably false. That judges should be self-conscious and transparent about the values they bring to their work does not imply that they are free to decide simply by consulting their philosophical assumptions or by enacting their

personal (“arbitrary”) preferences. More philosophically, CLR does not disdain reason; rather, it challenges the misuse of reason and the exaggeration of its powers. Without positing a transcendental ego, reason can criticize values, interrogate social practices, deepen self-consciousness, and inform judgment. Critical theory embraces dialogue based on good-faith reason giving and attempts to persuade by appeal to social experience, empathy, and solidarity. It distinguishes between good/persuasive legal arguments and bad/unconvincing legal arguments.¹⁰

2. A LEGAL ACTOR’S SENSE OF BEING ‘BOUND’ IS BETTER UNDERSTOOD AS AN *EXPERIENCE* OF THE LEGAL MATERIALS AND TOOLS OF REASONING THAN AS AN *ENTAILMENT* OF THEM

What we call legal constraint is best understood as a kind of experience that lawyers have of legal materials. Legal necessity is an “effect” that “is the product of work in the legal medium” (Kennedy 2014: 126). As noted, legal actors often possess a high degree of confidence and little if any doubt that the materials and reasoning conventions require a particular outcome without any interpretive input on their part. What lawyers cannot do with the tools presently available to us is to *prove* that the materials entail the posited result. The possibility of destabilization of settled understandings cannot be ruled out. At the same time, lawyers cannot prove that legal work within the discursive frame can always destabilize settled understandings.

Lawyers’ ordinary conversation suggests that they imagine legal concepts to possess inherent or self-defining content that we can apprehend. The conviction that a given legal concept must be understood in a certain way may be so powerful—so much a matter of “common sense” within a legal culture—that lawyers will attribute the meaning to the norm rather than to their experience, understanding, or interpretation of the norm.¹¹ “Mechanical” rule application is common in most if not all legal cultures. Lawyers may authentically and in good faith reject any suggestion that their conclusions reflect interpretive work by them. But legal texts and concepts do not have voice, and they cannot speak to us. They cannot define, apply, or revise themselves without some sort of activity of the human mind (whether or not this is apparent to our consciousness). Activity of mind occurs and cannot but occur within a culturally constructed medium; accordingly, the “known” is never entirely separable from the perspective of the “knower.” Whether a given set of legal materials entails a proposed legal outcome is something we cannot know (or deny) with certainty.

¹⁰ See Klare 2015; see generally Singer 1984.

¹¹ On the phenomenon of “reification,” see Berger & Pullberg and Berger & Luckmann.

3. EMPTY PROPOSITIONS, TAUTOLOGIES, GAPS, CONFLICTS, AND AMBIGUITIES PERMEATE LEGAL RULES AND DISCOURSES

Professionally respectable work within the discursive medium of a legal culture shows that legal rules and maxims are often unrevealing because they are empty or tautological (Felix Cohen 1935),¹² and that legal argument is often pliant because permeated with gaps, conflicts, and ambiguities. A “gap” arises when it appears that no extant norm was intended to apply to the circumstances at hand. A “conflict” is a situation in which two or more norms or lines of authority plausibly apply to a legal problem, and the respective norms or authorities would, if applied, produce different outcomes. “Ambiguity” is present when it appears that the canonical authorities applicable to a legal situation have more than one possible meaning, and the plausible meanings of the authority or norm point in different directions with respect to the outcome.

Critical analytics of both the earlier generations and of contemporary CLR revealed the pervasiveness of empty general propositions, tautologies, gaps, conflicts, and ambiguities in field after field of law. The Realists and their predecessors demonstrated that the accepted canons of legal decision making (deduction, induction, adhering to precedent, weighing the equities, resort to underlying purposes, and so on) cannot entirely close the gaps, resolve the conflicts, or make the ambiguities go away. This is why the existing rules, authorities and decision procedures do not, by themselves, yield determinate outcomes and why a member of the legal community can often make competent, plausible arguments that the rules and authorities point in multiple, even conflicting directions.

4. LAWYERS PARTIALLY CONSTRUCT THE LAW TO WHICH THEY SAY THEY ARE BOUND AND OWE FIDELITY

Because empty propositions, tautologies, gaps, conflicts, and ambiguities are pervasive, legal argument regularly passes through and is inflected at “bend points” intermediate between the norms or rules and the outcomes. At a bend point, the line of argument veers in one rather than another direction compatible with the norm in question, with path-dependent and outcome-determinative consequences. Often the inflection amounts to leaning one way or the other in terms of conflicting perspectives already solidly embedded in the legal materials (for example, individualism versus altruism, security of expectation versus freedom of action). These bend points are ports of entry for philosophical convictions, cultural sensibilities, unconscious assumptions, or what for a given judge is simply “common sense.” World views play, and cannot but play, a routine role in legal decision making. This is not necessarily illicit, nor does it mean that judges exceed their rightful authority or arbitrarily inject personal convictions into

¹² See Holmes: 3 (“empty general propositions ... teach[] nothing but a benevolent yearning” (referring to the familiar maxim *sic utere*)).

the process. Complicated questions, unnecessary to address here, arise as to whether and when the values, assumptions, and sensibilities that influence judges at the bend points in argument are properly described as “legal” or “extralegal,” or sometimes one, sometimes the other. But even taking the most expansive view of what counts as “legal,” the culturally bounded perceptions, sensibilities, and experiences judges bring into adjudication at the bend points eventually overflow the repertoire of legal reasoning.

“Abuse of deduction,” the formalist’s vice, lies in the faith (or expressed faith) that deduction, induction, analysis of legal purposes, or some other neutral decision procedure reveals a determinate solution to a legal problem that is insulated from the socially constructed sensibilities and/or contestable, intermediate choices that inflect legal argument, when in fact it is the case that professionally respectable work can justify an equally plausible, alternative outcome. In this situation, decision makers who sincerely believe that the authorities require them to rule a certain way are mistaken. Their error may be innocent or motivated. Depending on their level of self-consciousness and sophistication and upon what they disclose to the public in their written opinions, their error may be in bad faith.

Lawyers and judges partially construct the law to which they say they are bound and owe fidelity. They shape the legal materials not only through choices made at bend points in individual cases but more generally in choices they make about how to allocate and deploy their interpretive energies—a scarce resource (Kennedy 1997). That judges place their own imprint on the law in their encounters with the legal materials over time poses difficult questions about the legitimacy of adjudication in representative democracies.

5. THE ACCEPTED INTERPRETIVE MAXIMS OF A LEGAL CULTURE FREQUENTLY POINT TOWARD CONFLICTING OUTCOMES IN A GIVEN CASE

Consider Karl Llewellyn’s discussion of precedent and *stare decisis* (1930: 56–69). According to conventional wisdom, the common law practice of adhering to precedent carries forward the accumulated wisdom of the past, promotes legal stability and predictability, fosters equal treatment of like cases, and restricts judges to their proper role subordinate to the legislature. Precedent-following achieves these desiderata by constraining and steering decision makers’ choices. Llewellyn demonstrated, however, that the practice of adhering to precedent is not the constraining decision procedure it is often made out to be. Rather, it is a repertoire of rhetorical maneuvers that allow decision makers to claim *either* that they are bound by prior authorities *or* that they are free to depart from them. Even in its most traditional understanding, the principle of *stare decisis* sometimes constrains judges and sometimes gives them freedom of motion.

For one thing, there is the problem of the pervasiveness of conflicts, previously discussed: “[I]n any case doubtful enough to make litigation respectable the available authoritative premises—i.e., the premises legitimate and impeccable under the traditional legal techniques—are at least two, and ... the two are mutually contradictory as

applied to the case in hand" (Llewellyn 1931: 1239). A more fundamental source of tension between constraint and freedom within *stare decisis* is that the method contains within itself potentially conflicting mandates with respect to prior authorities. The decision maker is bound to adhere to a past authority but only when past authority is "on point"; distinguishable past authority does not bind and may be disregarded. The injunction to "follow applicable precedent" tells us how to proceed once we know that a given precedent is or is not "on point." It does not and cannot tell us *whether* a given precedent is "on point." From one view, an authority appears applicable and may therefore be taken as binding. But from another, the precedent is distinguishable, in which case the advocate or decision maker may escape its binding ties without abandoning *stare decisis*. The discursive repertoire of precedent-following provides practitioners with a scalpel to cut free from unfavorable precedent. At the same time, a familiar understanding in common law systems is that the "holding" of a prior case encompasses the reasons relied upon or necessary to reach the result. In this aspect of precedential reasoning practitioners have a platform upon which to expand the scope and binding power of favorable precedents. *Stare decisis* bears less resemblance to an algorithmic decision procedure and more to a toolbox containing two equally legitimate and dogmatically correct operating procedures—namely, distinguishing and extending precedent. In any given case, these steering mechanisms point in opposite directions. *Stare decisis* does not and cannot tell us which of these devices to employ on a given occasion.¹³

Stare decisis is—but is no more than—an invitation to deploy a catalogue of argumentative clichés. Whether or not the legal actor appreciates this, applying the common law method to a new case involves conscious or unconscious choices ("interpretation" or "the exercise of judgment") concerning the facts in the earlier case, the facts here, the meaning of the prior case, the meaning of the new situation, the evolution of social context, and the purposes to be served by and the likely effects of legal rules. The *stare decisis* toolkit contains numerous maxims (such as "the precise facts of the case control its meaning"), each of which is canceled out by an equally valid countermaxim (such as "extract and apply the *ratio decidendi*"). The method of reasoning from precedents does not contain its own criteria for determining which maxim to follow. The conventions of legal reasoning by precedent-following certainly influence lawyers' work methods and patterns of thought, often quite powerfully, but frequently the capacity of the conventions and maxims to steer decision makers to a determinate conclusion runs out. Resolution of the case then becomes, consciously or otherwise, a matter of choice and judgment upon which contestable ethical and political considerations inevitably bear.

¹³ Common law systems also accept that precedent may be "overruled" under some circumstances, but the discursive conventions contain only spongy criteria as to when overruling is appropriate (e.g. "times have changed"). In *Payne v. Tennessee*, 501 U.S. 808 (1991), the US Supreme Court described *stare decisis* as a "principle of policy," not an "inexorable command." The Court said that *stare decisis* has greatest weight "in cases involving contract and property rights, where reliance interests are involved" but is less compelling in cases involving procedural and evidentiary rules. On that understanding, the Court felt comfortable overruling constitutionally grounded precedents of criminal procedure that barred capital sentencing based on certain evidence and, having done so, it ordered a man's execution.

Llewellyn found the same maxim/countermaxim pattern in the canons of statutory interpretation and other contexts. CLR work later generalized Llewellyn's observations by showing that across a wide range of legal fields and contexts, for every maxim or argument type in the discursive repertoire, one can usually find an equally respectable, although equally formulaic, countermaxim or argument type that cuts in the opposite direction with respect to the outcome of a given case.

6. AS LEGAL ACTORS UNDERSTAND THEM, MANY BASIC NORMS AND PRINCIPLES REFLECT OR EMBRACE COUNTERVAILING VALUES WITH POTENTIALLY CONFLICTING IMPLICATIONS FOR OUTCOMES IN CASES TO WHICH THEY APPLY

The pattern of conflicting considerations and maxims surfaces in purposive or "policy" reasoning as well as in doctrine (Kennedy 1976). It is a common experience for legal actors to agree that a particular norm or principle governs a case but to find that the norm or principle embodies conflicting values and purposes with contradictory implications. Determining what the norm or principle implies for the case then involves (consciously or unconsciously) leaning in the direction of one or the other of the embedded values or policies.

For example, lawyers understand "private property" to embody the idea that owners may utilize their property in a self-interested manner. Seen in this light, ownership implies privileges and entitlements. But lawyers also typically understand "private property" to embody the idea that owners are entitled to be protected from the uses that other owners make of *their* property. Seen this way, ownership implies duties to use one's property so as to protect neighbors or even strangers. Which implication of property should predominate in any instance—the self-interested or the altruistic—is ultimately a matter of judgment, indeed, a judgment of public policy. "[P]roperty [is] a symbol for the conclusion that certain patterns of behavior are to be enforced between people for the benefit of society as a whole."¹⁴ That the concept of private property may have conflicting implications for the resolution of a particular controversy does not mean that it is impossible to reach a conclusion or that anyone's judgment is as good as anyone else's. It does mean that the concept of private property by itself cannot tell us whether, in a particular case, I may use my land without regard to the interests of others, or whether I must use my land so as to respect the interests of others. Drawing "deductions" or "entailments" from the concept of property always involves an element of circular reasoning. "It is incorrect to say that the judiciary protect[s] property; rather they call[] that property to which they accord[] protection" (Hamilton & Till: 536).

Similarly, "freedom of contract" promotes the values of personal liberty and autonomy, but it also requires constraints on liberty in order to protect legitimate expectations (interests typically invoked by the phrase "commercial certainty and predictability"). In every contract judgment, the court in effect strikes a balance

¹⁴ Student Note: 489–90. See also Felix Cohen 1954.

between the promisor's freedom of action and the promisee's expectations and reliance. Contractual freedom affords individuals a zone of liberty in which to self-order their own affairs, but to defend "freedom of contract" in strictly libertarian terms without attending to the coercive side is unpersuasive. The promisee in every contract case proclaims fidelity to private ordering while seeking to mobilize the power of the state to coerce the promisor to do something the latter would prefer not to do. We may tell losing defendants that their own liberty and autonomy are vindicated by the court's judgment enforcing the contract, but what they experience is that the sheriff seizes their property if they do not pay up. Whether the government should deploy its power in this way is always ultimately a question of public policy (Morris Cohen 1933: 586).

A standard argument for enforcing voluntary agreements is that doing so maximizes aggregate welfare. But contract litigation arises because a previous agreement is no longer utility maximizing for one of the parties or because a party can no longer afford to perform. Whether blanket enforcement of all agreements that happen to be entered enhances aggregate welfare is a hopelessly complicated empirical question (Singer 1988a: 484–5). In any event, no contract regime enforces all agreements, and no contract regime compels breaching defendants to repair the full extent of the consequences of their breach. Contract law contains many excuses for nonperformance, limitations on damages for breach, and doctrines permitting recovery by breaching plaintiffs, undoubtedly reflecting an intuition that contract enforcement can sometimes produce suboptimal outcomes. How and to what extent a given contract regime vindicates the expectation interest boils down to "no more than a series of economic policy choices by the state."¹⁵ Whether, when, and to what extent the state should impose its coercive power on a contract defendant in order to vindicate the plaintiff's expectations and/or reliance always ultimately involves judgments that cannot be deduced from the idea of contractual freedom because that idea encompasses conflicting notions of desirable policy.¹⁶

7. LEGAL NORMS AND OUTCOMES ARE UNDERDETERMINED BY SOCIAL STRUCTURE AND POLITICAL IDEOLOGY

CLR's crossfertilization of American critical legal traditions and modernist social theory led to the insight that particular "types" of society—whether capitalist, socialist, or other—do not possess an inbuilt structure that tightly determines the legal regime in place (Unger 1983: 567–70 & 660–5). The law/society relationship is much more indeterminate, somewhat in the same way that the legal authority/legal outcome relationship is indeterminate (Kennedy 1979: 362 note 56, Gordon 1984: 75–81). A social or economic institution—say, a market for the purchase and sale of labor power in a capitalist society—can be legally structured in a wide variety of ways based on different, foundational rule sets (Steinfeld 1991). These rule sets may have quite different distributive consequences, for example, as between workers and employers. In a general way, one might attribute the content and distributive effects of a particular

¹⁵ Mensch: 760 (footnote omitted) (discussing classic text of Fuller & Perdue).

rule set—for example, the law of contractual offer and acceptance in late nineteenth century England—to the type of society in which it appears (industrial capitalism, in this example). But the attribution would tell us very little about the shape and content of the rules or possible alternative configurations. Moreover, the claim would be circular. One cannot provide a coherent description of late nineteenth century English industrial capitalism—the social type to which the content of the rules is supposedly attributed—without discussing the legal rules that partially construct and constitute that social order.

As with the indeterminacy of legal reasoning, the claim about indeterminacy in the law/society relationship is modest. It is not an argument that a given social type is compatible with any legal arrangement imaginable or that the characteristics of and challenges facing a society in a given historical period have no bearing on the shape of legal rules. A particular, historically grounded rule set may follow recognizable patterns or observe a kind of culturally specific logic. The modest claims are, first, that we cannot identify core social structures (such as “the relations of production”) that tightly determine legal institutions, and second, that legal rules, practices, and cultures are central to identifying what we mean by a given social order and its characteristic arrangements (such as “the relations of production”).

Along similar lines, the precise legal implications of a general political viewpoint or ideology—say, “conservatism” or “leftism” or Marxism or neoliberalism—are relatively indeterminate. Progressive lawyers who see themselves as sharing overarching political values frequently find themselves in sharp disagreement about the appropriate institutional or legal resolution of a problem. As we pursue these disagreements, the “legal” sometimes inflects the “political.” As Duncan Kennedy argued, rule choices emerge from “interaction between the legal materials, understood as a constraining medium, and the ideological projects of judges [or advocates].” The resulting legal decisions “should be understood neither as simply the implications of authority nor as the implications of the ideological projects, but as a compromise” (Kennedy 1997: 19).

8. LEGAL RULES AND PRACTICES OFTEN PLAY A SIGNIFICANT ROLE IN CONSTRUCTING SOCIAL LIFE; ADJUDICATORS BEAR SOME RESPONSIBILITY FOR THE EFFECTS OF THEIR DECISIONS

Social systems are organized or “constructed” by humanly crafted and culturally transmitted norms, discourses, and practices which, in modern societies, are frequently embodied in legal rules. These norms, practices, and rules can have significant effects on human conduct, experience, and belief. Law is endogenous to human behavior and interaction. The relationships and identities that fill daily life—family; employment; gender and sexual relationships and identities; race hierarchies; buying, selling, and owning, and so on—are *always already legally constituted*. All institutions and power dynamics in contemporary societies are at least partially constituted by rules of law. There is no natural, “prelegal” or “law-free” domain of social interaction in modern societies. People act, transact, believe, desire, and aspire as they do in part because of

the powers, authorities, immunities, expectations, and entitlements established in law.¹⁷ Adjudicators bear some responsibility for the social impact of their decisions, whether or not they are aware of or acknowledge the cumulative effects their choices produce on the texture of social life and the distribution of power and wellbeing.

For example, markets are structured by legal ground rules that define capacity to contract, allocate property entitlements, distinguish voluntary exchange from coerced transfer, divide the outputs of joint productive activity, and so on. There is no such thing as “the” market; there are only “markets,” discrete institutional arrangements, each structured by a particular set of background rules. Likewise, there cannot be a “free market,” if what is meant by that is a market unregulated by law. Legal decision makers do not face a choice between “staying out of” or “intervening in” markets. Law is always “in” from the start; markets are always already structures and practices shaped by law. The important questions are what approaches the law should take in constructing markets and with what effects.

Similarly, families and family life are structured by largely taken for granted background norms, which in modern societies are embodied in legal rules. The family is regulated by numerous legal rules that determine what constitutes a family, who may marry, how decisions are taken within families, which family members have capacity to contract or own property, in what ways parents may control children, and so on. No family is “private” or “independent of” or “autonomous from” the state, if what is meant by these phrases is a social unit the composition and inner workings of which are untouched by law (Olsen 1983, 1985).

The socially constitutive power of law is at work not only when legal rules establish an entitlement or obligation but also when the law refrains from doing so or is simply silent, thereby privileging legal subjects to act in certain ways that affect the lives of others. Much vintage Realist writing was directed at problematizing the classical act/no act distinction (see Hale 1943, 1946). People interpret their experience and conduct themselves “in the shadow” of background rules of law. Where the rules impose no limits or obligations on some aspect of social or economic interaction, the resulting distributive effects may properly be attributed to the community or the state in the sense that it is always possible that someone will call attention to and challenge the gap or omission and make a proposal for legal change.

9. RULES OF LAW DISPOSE DISTRIBUTIVE STAKES

The legal ground rules of social and economic interaction often significantly affect distributive outcomes in transactions and relationships (such as employer/employee, owner/neighbor, landlord/tenant, seller/consumer, husband/wife) that implicate the pursuit of wellbeing (sustenance, income, knowledge, fulfillment, and so on). Defining entitlements, privileges, liabilities, and immunities in one way rather than another may

¹⁷ “I am not persuaded that there is, in the modern State, any right which exists which is not ultimately sourced in some law, even if it be no more than an unarticulated premise of the common law[.]” *Du Plessis v. De Klerk*, 1996 (5) BCLR (CC), at par [79] (Mahomed DP concurring).

produce quite different consequences for the distribution of power and welfare and, therefore, for people's lived experience and quality of daily life. For example, the particular rule set in place may favor employers vis-à-vis employees, sellers vis-à-vis buyers, landlords vis-à-vis tenants and husbands vis-à-vis wives. With differently formulated background legal rules, we might observe over the long run different power relationships and a different distribution of wellbeing.

Private law rules empower some actors while disempowering and subordinating others. For example, private law establishes ground rules that govern how one acquires assets and how one may use one's assets and legal endowments in interaction with others. P, a landowner, negatively affects the interests of Q, a malnourished, homeless person, by denying Q's request for rent-free access to P's property and/or edible yield. Though grievous harm or even death may result, P is nevertheless privileged to refuse Q's request pursuant to the public policy decisions embodied in the common law of property, namely, that normally owners may exclude strangers and that, if push comes to shove, the local authorities will use force to uphold owners' privilege to exclude (Morris Cohen 1927; Hale 1923, 1943).¹⁸

Realist writing revealed that so-called freedom of contract consists of negotiation conducted and agreements made within a legally structured framework of mutual pressure and coercion. Offerees consent to a bargain in order to avoid negative consequences that offerors may inflict upon them by withholding what the offeror owns and the offeree desires or needs, which might include the necessities of life (Morris Cohen 1927). However, an offeror may also desire or need what an offeree has. A "price" is a metric of the relative strength of the coercive powers which law puts at the parties' disposal, respectively. Sellers' revenue is the sum of the prices that others are willing to pay in order to induce sellers to refrain from utilizing their legally granted power to withhold access to what they own and others need or desire. The social distribution of income reflects the relative balance of the legal powers of coercion granted by law to the various members of the community.¹⁹

For example, legal rules privilege employers to deny workers access to opportunities to earn income unless the workers agree to accept the employers' wage offers. A system of private property and "free" contract therefore endows employers with significant power to coerce prospective employees. Of course, where industrial action is immune from liability and/or affirmatively protected, law grants the workers a reciprocal coercive power to withhold what the employer requires (profit-generating labor power) unless the employer agrees to the workers' wage demands. The wage level is neither unilaterally imposed by the employer, nor does the employee "freely" consent to it. Employer offers and worker responses are channeled by law-structured economic

¹⁸ But see *State v. Shack*, 58 N.J. 297, 277 A.2d 369 (1971) (farm owner may not exclude attorney and poverty worker seeking entry to assist resident farm laborers; property rights must serve "human values" and cannot be applied so as to deprive vulnerable persons of what is essential to their health, welfare, and dignity).

¹⁹ See Hale 1923: 478 ("[t]he distribution of income ... depends on the relative power of coercion which the different members of the community can exert against one another. Income is the price paid for not using one's coercive weapons").

pressures. The wage bargain reached in a given case reflects the relative balance of the employers' and the workers' legally authorized powers to coerce each other.

Courts say that they only enforce agreements entered into "freely" and that they decline to enforce "coerced" arrangements. The Realists argued that all bargains combine aspects of choice and aspects of coercion. "[C]oercion, including legal coercion, lies at the heart of *every* bargain."²⁰ Contract doctrines such as fraud, duress, undue influence, and unconscionability supposedly show us a bright line between "freely chosen," enforcementworthy bargains and "coerced" bargains that do not merit enforcement. In fact, these doctrines mark the blurred, porous, and ever shifting boundaries between coercive behaviors which the community is prepared to accept as normal and those which it is not. When a court announces that it will withhold enforcement because a particular bargain resulted from "coercion" rather than voluntary agreement, the court is using the ostensibly fact-based concept of coercion as an emblem for a moral conclusion or intuition, namely that it would be unfair to enforce the bargain. "Doctrines of duress are intended to raise precisely the question whether it is 'rightful' to use particular types of pressure for the purpose of extracting an excessive or disproportionate return."²¹ To paraphrase Hamilton and Till, it is incorrect to say that the courts enforce voluntary bargains but deny enforcement of coerced bargains; rather, they call "voluntary" or "consensual" the bargains they will enforce, and call "coerced" those which they are not prepared to enforce.

10. RULES OF LAW DISPOSE CULTURAL AND IDEOLOGICAL STAKES

Legal practices and discourses create and privilege meanings that contribute to the store of culturally available symbols and artefacts that comprise the medium in which people interpret their experiences. To the extent that they are salient and diffused in society, legal discourses and practices orient consciousness and construct identities. For example, legal practices that treat women in certain ways and legal discourses that explain and justify such treatment induce people to believe that such treatment is appropriate to the identity of "being a woman" (see Mary Joe Frug 1985, 1992).²²

Here again, the law produces effects by its gaps and silences as well as by its more overt content. A assaults his wife, B. No liability ensues because the jurisdiction observes a strong doctrine of interspousal tort immunity. Predictably, B files no action against A. The police make no intervention. No court is ever called upon to adjudicate A's conduct or enforce a sanction against him. As traditionally understood, no governmental action has occurred. Conventionally, A's conduct is considered without reference to the immunity rule. But if social and historical context are brought into the picture, one can draw a connection between A's conduct and longstanding rules that

²⁰ Mensch: 764 (*italics in original*) (relying on classic Legal Realist texts).

²¹ Dawson: 288. See generally Hale 1943.

²² The strand of argument concerning the "legal constitution of the subject" played little role in the work of the Legal Realists or their predecessors. It reflects the influence of modernist social theory on CLR.

subordinate women, and the effects of such rules on popular and police attitudes toward domestic violence. That for centuries the legal system placed little or no inhibition on spousal abuse likely contributed something to male socialization and the incidence of abuse. If the jurisdiction has a constitution committed to gender equality, the presence of the tort immunity ("state nonaction") should in principle be subjected to constitutional scrutiny for compatibility with the equality guarantee.²³

Sometimes in history, legal discourses have widespread cultural and psychological impact at grassroots level. Legal discourses—even traditionalist legal discourses—can be repositories of oppositional values and emancipatory aspirations that can be tapped in times of social conflict. The more familiar cultural effect of law is to legitimate the status quo, that is, to induce people to believe that existing social arrangements are fair or, at any rate, the best we can do. Elite legal discourses tend to naturalize the background rules that sustain unjust social arrangements. These discourses often function as legitimating ideology. A common ideological effect of legal discourses is to induce people to consent to their own domination.

11. INTERROGATION OF BACKGROUND LEGAL RULES MAY REVEAL TRANSFORMATIVE POSSIBILITIES

Many legal rules that play a role in structuring social and economic life reside very far in the background of legal and popular consciousness—so far back that such rules are virtually invisible and often not even recognized as legal rules at all. Even lawyers tend to forget that each and every legal rule is a humanly crafted artefact. An example is the default rule of property law by virtue of which the employer owns the commodities produced through the joint activity of management and labor (Fischl 1987: 527–8). There is nothing natural or eternal about this principle of social organization; it was centuries in the making. A similarly invisible rule is the default principle of family law that parents have custody of their children and determine the children's place of residence. It takes mental effort to recall that this is, in fact, a legal rule. This rule makes obvious sense under most circumstances, but it may produce negative consequences in some situations. Some children suffer preventable abuse because this elementary rule of family law discourages relatives, friends, and neighbors from acting appropriately to rescue children from domestic violence.

Critical legal approaches open imaginative and political space for projects to interrogate and reenvision our legal contexts with a motive to transform them. Background rules of law matter. We can bring them out of the background and into the foreground to spotlight their distributional consequences. Casting a critical light on background rules may unfreeze and destabilize their coded ideological content. In the context of conducive political mobilization and resistance, the rules can be revised to aim at more egalitarian, democratic, caring, and ecologically sound outcomes and the establishment and continuous revision of a legal, social, and economic infrastructure

²³ "[E]very social practice ... in some way relies upon and is sanctioned by a legal rule that can—in suitable circumstances—be subjected to constitutional review." Van der Walt: 665.

designed to enable all people to enjoy ample and meaningful prospects for self-realization. CLR invites us to regard criticizing and contesting background rules, and working to alter them, as practices essential to fashioning a more just and egalitarian world.

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