

CLS Panel: Princeton – Feb. 28, 2020

What did CLS do well? And where was it deficient, and could have done better? And, finally, what of CLS is still vital and useful?

First, the usual disclaimer. There is no unitary “it” to CLS. As with Cleopatra, its fascination and appeal is in its infinite variety, though there are recognizable kinships among the varieties.

Where CLS was most successful, I think, was as a form of local critique of conventional doctrinal and policy analysis in the law school classroom. There the principal method was to tease out the contradictory strains in ordinary doctrine, group them around dominant principles on the one hand, and suppressed or marginalized or exceptional cases on the other; trying to make explicit the underlying assumptions and social visions implicit in the principles; and train students to generate the arguments and analysis for flipping the categories and privileging the suppressed or exceptional doctrines. In Contracts, that means assembling and generalizing all the doctrines that reflect the equitable, relational, fiduciary, communitarian-cooperative, anti-forfeiture, reliance-based, good faith, distributive-fairness-oriented doctrines of contract law and helping students practice the art of opposing these to the hardline formalism of the privileged mainstream contract principles. This approach derives directly from Duncan’s 1976 article on Form and Substance in Private Law Adjudication and his 1982 article on Distributive and Paternalist Motives in Contract and Tort Law. I’ve used this approach in Contracts teaching for years, without ever mentioning CLS as such, and have found it – in combination with Stewart-Macaulay-Marc-Galanter law-in-action takes on the structural advantages of powerful parties -- quite effective in challenging the deep subterranean complacencies of ordinary law-talk.

Similarly, I think CLS writers – and many fellow travelers – usefully applied many of the same insights to legal historiography – challenging privileged narratives of capitalist triumph embedded in conventional histories of law, and helping to recover not only, as the left-wing bottom-up histories had, the experiences of people crushed under those triumphs, but also the ways in which law helped constitute social practices, not only in elite legal thought and opinions and treatises, but in the everyday vernacular practices of slavery, master-servant relations, commercial and agricultural debt, monopoly, family structures – and also alternative visions, again as realized in actual social practices.

Also: our goal was to make transparent the hidden ideological agendas of liberal legalism. We could not then have realized how much help we would get in that project from right-wing legal realism. I don’t think Mitch McConnell is under any illusions that judging is a neutral apolitical practice.

Where I think we fell short, and where the opportunity seems to me to be for current generations, is to apply similar insights and techniques to law as it is actually practiced. Some CLS work – I’m thinking partly here about Bill Simon’s work on welfare administration and producers’ cooperatives, and Kathy Stone’s on labor law (including her remarkable prescient work on compulsory arbitration) – did go into that kind of detail. And there is of course a huge critical literature on policing and prosecuting and punishing. But I teach in a law school most of whose graduates go on to practice in large law firms. Many law teachers avert their eyes from that

reality, preferring not to think about it – I have these nightmare visions of myself as one of those grinning devils in a Hieronymus Bosch painting, shoveling poor damned souls into the fiery pits of Hell. But what is that work? Is it mostly socially valuable or destructive work? This is a world -- in which lawyers help to grease the wheels of a financialized global corporate economy, extracting rents, squeezing labor, evading taxes and laundering money all over the world for the benefit of autocrats and criminal enterprises -- which we need to understand much better than we do in order to see where the points of leverage may be for challenge and exposure and reform. Here Willy Forbath's comrades in the Law & Political Economy movement can be of real service.

These are discouraging times. But that isn't new. I started law school in 1968-71, the years of student uprisings and anti-Vietnam war protests, but also of the Robert Kennedy and King assassinations, the Soviet crushing of Prague Spring, the Chicago police riot and election of Nixon; Cambodia Spring, Earth Day and the Kent State shootings. Since then there is this repeated experience of frozen social arrangements giving way to sudden fluidity, thaws and openings -- African-American civil rights, the relations between men and women, between humans and the natural environment, fixed gender categories and roles, transformed utterly, the Iron Curtain melted away, the old, grim, formidable Soviet Empire dissolved, Velvet and Orange Revolutions, democracy movements in the Middle East -- and yet in so many cases followed by Thermidor: Tiananmen Square, Tahir Square, reaction, constriction, the closing down of possibilities, the reassertion of old hierarchies and repressions and the emergence of new poisonous alliances of corrupt plutocracies with neo-fascist ethnic-nationalist demagogues. Is constructive legal change possible? Always! Is it threatened? Always!

Opponents of CLS called us cynics, corrupting youth with our critical pessimism about the legal system. What rubbish! CLS found its formative moment, and its generative energy, in the sense of possibility, of movement, even in dark times. I often think of Wordsworth's great paean to what the French Revolution felt like to its enthusiasts in its early days --

Bliss was it in that dawn to be alive,
But to be young was very heaven!—Oh! times,
In which the meagre, stale, forbidding ways
Of custom, law, and statute, took at once
The attraction of a country in romance!

UNFREEZING LEGAL REALITY: CRITICAL APPROACHES TO LAW

ROBERT W. GORDON*

Critical Legal Studies continues to flourish despite persistent criticism concerning its goals and aims. In the lecture reproduced below, Professor Gordon demonstrates why such global criticism is not only harmless but irrelevant to the central message of the movement. Borrowing from the growing body of CLS scholarship, he illustrates, through example, that the most valuable contributions of CLS are essentially local in nature. But these predominantly local critiques, he explains, can be readily extended to new areas in order to destroy the seemingly necessary connection between the way our law is and the way it must be.

A NEW way of talking about and practicing law has come on the scene in the last ten years: "Critical Legal Studies," or "CLS" for short. I am particularly pleased by your invitation to speak on the subject because it demonstrates an intellectual curiosity and generosity of spirit that have lately been in short supply in legal academia. A few people associated with CLS are, like myself, comfortably tenured at good law schools, and are invited to give prestigious lectures on our modish heresies. But most of the people affiliated with CLS, or influenced by CLS ideas, or willing to take and discuss CLS seriously, are younger lawyers who have suddenly found themselves in desperately precarious situations.

* Professor of Law, Stanford University. A.B., 1967, Harvard College; J.D., 1971, Harvard Law School. The first version of this essay was given as the Mason Ladd Memorial Lecture at the Florida State University College of Law in April 1985. I am very grateful to the Dean, faculty, and students of the College of Law and especially to Janet Bowman, Larry George, Lynne Henderson, Adam Hirsch, John Larson, Jack Van Doren, and Don Weidner for their hospitality and helpful comments. I tried out later versions of this essay on student audiences at the University of California at Berkeley (Boalt Hall) School of Law, Duke University Law School, and Wayne State University Law School. The comments and questions at those sessions helped me figure out how to revise this piece. Mark Kelman and Robert Weisberg made valuable comments on this draft.

They struggle hard to find or hold on to teaching jobs in law faculties whose fierce hostility to CLS is surpassed only by their members' refusal to learn anything about CLS ideas. Such resistance is ungrounded. Despite the huge amount of publicity focussed on the movement, its opponents have produced few intellectually substantial discussions of its work, relying instead upon offhand and wildly inaccurate dismissive caricatures.¹ Certainly no outside critique of CLS even comes close to the detailed CLS critiques of mainstream legal and law-and-economics scholarship, or to the intense debates about its work that have taken place within CLS and the wider circle of sympathetic nonadherents.²

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

1. Most of the published critiques of CLS seem to me to fall into one of three categories: (1) Polemics directed generally and vaguely against the writer's preconceived and completely misinformed view of CLS work—usually the view that CLS is a sort of crude instrumental Marxism—and making no attempt to engage with any specific CLS texts; (2) Critiques, more or less informed, and ranging from sympathetic to truly venomous, treating CLS as if it were a global philosophy or social theory of law rather than (as I would urge is true of most CLS work) a set of local critiques of local situations and discourses, and engaging only with the most general-sounding statements and dicta of CLS writers rather than with the bulk of their work, which consists of some very concrete and detailed discussions of legal-doctrinal, law-and-economics, and legal-historical scholarship plus about a dozen histories of legal doctrines and institutions; (3) A handful of critiques that take the trouble to address the specific concerns of particular CLS texts. Most of the latter are by legal historians: see, e.g., Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979); Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981); Alford, *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 TEX. L. REV. 915 (1986); Watson, Book Review, 91 YALE L.J. 1034 (1982)(reviewing M. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* (1981)). Some are by legal economists: see, e.g., Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV. 349 (1984); Markovits, *Duncan's Do Nots: Cost-Benefit Analysis and the Determination of Legal Entitlements*, 36 STAN. L. REV. 1169 (1984). These pieces exhibit various degrees of perception (Professor Alford's is the outstanding one) into the substance of the works criticized but are alike, admirable, and exceptional in actually trying to come to grips with that substance.

2. Besides the critiques mentioned *supra* note 1, there are what one might call family quarrels—critiques by people thoroughly familiar with CLS work and methods and at least moderately sympathetic to some of its political or intellectual aims. See, e.g., *Symposium on Critical Legal Studies*, 6 CARDOZO L. REV. 693 (1985) (particularly the contributions of Diamond, Yablon, Jacobson, Shupack, and Bratton); Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527; Holt, *Labor Conspiracy Cases in the United States, 1805-1842: Bias and Legitimation in Common Law Adjudication*, 22 OSGOODE HALL L.J. 591 (1984); Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. LEGAL STUD. 1 (1986); Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199 (1984); Luban, *Legal Modernism*, 84 MICH. L. REV. 1656 (1986). See generally Van Doren & Bergin, *Critical Legal Studies: A Dialogue*, 21 NEW ENG. L. REV. 291 (1986).

own legal education. We hoped to produce some work about law that would try to make clear and convincing our felt uneasiness, and to work those inchoate feelings of dissatisfaction into a critique with some cogency and content. We hoped also to begin to build up a number of descriptions of legal practices—concepts, doctrines, institutions, routines, underlying structures—that would seem more real, more resonant with our experience.

Since most of us were and are law teachers, our first targets were the ways in which traditional subjects, such as those of the standard first-year courses, were taught and written about in mainstream legal scholarship. Much of the product of the movement to date has been demolition work (“trashing”) on that scholarship. Much also has been historical, an attempt to figure out how our current accepted modes of thinking about law should have come to take hold of our minds. In the process of doing the history, we discovered a partly buried treasure, the writings of the “Legal Realists,” a group of legal scholars of the 1920s and 1930s who, like ourselves, devoted much intellectual energy to slaying their fathers, in their case the “formalist” generation of doctrinal legal scholars such as C.C. Langdell, Samuel Williston, and Joseph Henry Beale. Now the Legal Realists are mostly remembered for having been skeptical about the determining force of precedent, for believing that judges could always reach any result they wanted and would therefore decide cases out of class bias or passing whimsy. The CLS writers have tried to resurrect some of the Legal Realists’ more substantial scholarship, to appropriate it to their own purposes, and to generalize it into a critique of mainstream modes of liberal-legal thought more far-reaching than anything the Legal Realists themselves had in mind.

So far I have described CLS as a movement chiefly of legal intellectuals. But at the same time it is a movement in pursuit of some shared political and social objectives. We do not have a uniform view of the world—in fact we seem always to be quarrelling fundamentally, if also mostly affectionately, with one another. But we are united in that we would like our work, in so far as it is possible, to help in modest ways to realize the potential we believe exists to transform the practices of the legal system to help make this a more decent, equal, solidary society—less intensively ordered by hierarchies of class, status, “merit,” race, and gender—more decentralized, democratic, and participatory both in its own forms of social life and in the forms it promotes in other countries. Many of us thus regard as a primary audience for our work what might be

called mainstream center or left liberals who share much of this general political agenda, but believe that for a whole host of reasons it is hopeless to try to achieve it. They may believe that the cards are stacked too heavily against change, that the effort to realize less hierarchy in society would entail tremendous costs—loss of productive efficiency, loss of individual freedom, threateningly expansive state power—and would in any case be hopeless because the power hierarchies are so entrenched. In conversation with people who see themselves in the center or left of American liberalism, even if they are in fact members of privileged elites, one encounters again and again this paralysis, founded in their sense that legal and social realities are frozen, that we have reached the end of history and that the possibility of fundamental change is now forever closed to us.

Now a central tenet of CLS work has been that the ordinary discourses of law—debates over legislation, legal arguments, administrative and court decisions, lawyers' discussions with clients, legal commentary and scholarship, etc.—all *contribute* to cementing this feeling, at once despairing and complacent, that things must be the way they are and that major changes could only make them worse. Legal discourse accomplishes this in many ways. First by endlessly repeating the claim that law and the other policy sciences have perfected a set of rational techniques and institutions that have come about as close as we are ever likely to get to solving the problem of domination in civil society. Put another way, legal discourse paints an idealized fantasy of order according to which legal rules and procedures have so structured relations among people that such relations may primarily be understood as instituted by their consent, their free and rational choices. Such coercion as apparently remains may be explained as the result of necessity—either natural necessities (such as scarcity or the limited human capacity for altruism) or social necessities. For example, in a number of the prevailing discourses, the ordinary hierarchies of workplace domination and subordination are explained: (1) by reference to the contractual agreement of the parties and to their relative preferences for responsibility versus leisure, or risk taking versus security; (2) by the natural distribution of differential talents and skills (Larry Bird earns more as a basketball player because he is better); and (3) by the demands of efficiency in production, which are said to require extensive hierarchy for the purposes of supervision and monitoring, centralization of investment decisions, and so forth. There are always some residues of clearly un-

happy conditions—undeserved deprivation, exploitation, suffering—that cannot be explained in any of these ways. The discourses of law are perhaps most resourceful in dealing with these residues, treating them as, on the whole, readily *reformable* within the prevailing political options for adjusting the structures of ordinary practices—one need merely fine tune the scheme of regulation, or deregulation, to correct them. But the prevailing discourse has its cynical and worldly side, and its tragic moments, to offset the general mood of complacency. In this mood it resignedly acknowledges that beyond the necessary minimum and the reformable residues of coercion and misery there is an irreducible, intractable remainder—due to inherent limits on our capacity for achieving social knowledge, or for changing society through deliberate intervention, or for taking collective action against evil without suffering the greater evil of despotic power.

These discourses of legal and technical rationality, of rights, consent, necessity, efficiency, and tragic limitation, are of course discourses of power—not only for the obvious reasons that law's commands are backed by force and its operations can inflict enormous pain, but because to have access to these discourses, to be able to use them or pay others to use them on your behalf, is a large part of what it means to possess power. Further, they are discourses that—although often partially constructed, or extracted as concessions, through the pressure of relatively less powerful groups struggling from below—in habitual practice tend to express the interests and the perspectives of the powerful people who use them. The discourses have some of the power they do because some of their claims sound very plausible, though many do not. The claim, for example, that workers in health-destroying factories voluntarily “choose,” in any practical sense of the term, the risks of the workplace in return for a wage premium, is probably not believed by anyone save those few expensively trained out of the capacity to recognize what is going on around them. In addition, both the plausible and implausible claims are backed up in the cases of law and of economics and the policy sciences by a quite formidable-seeming technocratic apparatus of rational justification—suggesting that the miscellany of social practices we happen to have been born into in this historical moment is much more than a contingent miscellany. It has an order, even if sometimes an invisible one; it *makes sense*. The array of legal norms, institutions, procedures, and doctrines in force, can be rationally *derived from* the principles of regard for individual autonomy, utilitarian

efficiency or wealth creation, the functional needs of social order or economic prosperity, or the moral consensus and historical traditions of the community.

There are several general points CLS people have wanted to assert against these discourses of power. First, the discourses have helped to structure our ordinary perceptions of reality so as to systematically exclude or repress alternative visions of social life, both as it is and as it might be. One of the aims of CLS methods is to try to dredge up and give content to these suppressed alternative visions. Second, the discourses fail *even on their own terms* to sustain the case for their relentlessly apologetic conclusions. Carefully understood, they could all just as well be invoked to support a politics of social transformation instead.³ Generally speaking, the CLS claims under this heading are that the rationalizing criteria appealed to (of autonomy, functional utility, efficiency, history, etc.) are far too indeterminate to justify any conclusions about the inevitability or desirability of particular current practices; such claims, when unpacked, again and again turn out to rest on some illegitimate rhetorical move or dubious intermediate premise or empirical assumption. Further, the categories, abstractions, conventional rhetorics, reasoning modes and empirical statements of our ordinary discourses in any case so often *misdescribe* social experience as not to present any defensible pictures of the practices that they attempt to justify. Not to say of course that there could be such a thing as a single correct way of truthfully rendering social life as people live it, or that CLS writers could claim to have discovered it. But the commonplace legal discourses often produce such seriously distorted representations of social life that their categories regularly filter out complexity, variety, irrationality, unpredictability, disorder, cruelty, coercion, violence, suffering, solidarity and self-sacrifice.⁴

3. For one example among many, see Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) (cost-benefit analysis, usually employed to limit regulation, can be manipulated, entirely consistently with its premises and principles, to justify virtually any regulatory regime).

4. It should not really be necessary to say—but I will say it anyway to ward off charges of appalling hubris—that nobody in CLS would claim to have originated or to possess an exclusive claim on such critiques of liberal discourses generally and of liberal-legal ones specifically. Indeed some of the most acute of the critiques of this kind that have informed CLS writing have come from relatively *conservative* critics of liberalism (Burke, Burckhardt, Tocqueville, Weber, O.W. Holmes, etc.), and from within the liberal tradition itself (Bentham, J.S. Mill, T.H. Green, etc.) as well as from the “left.”

Summing up: The purpose of CLS as an intellectual enterprise is to try to thaw out, or at least to hammer some tiny dents on, the frozen mind sets induced by habitual exposure to legal practices—by trying to show how normal legal discourses contribute to freezing, and to demonstrate how problematic these discourses are. I realize that what I have said so far is massively abstract and vague. To make it more accessible, consider the following sample of a CLS method of approaching a fragment of legal discourse. I should first give fair warning that CLS is too heterogeneous, too divided into conflicting schools and working methods, too well stocked with mavericks and eccentrics, to have produced an orthodox canon of “correct” approaches. The sample of CLS method I give here does not, as it happens, derive from any of my own work but from the work of others. It is a variant of one particular strain of CLS critiques, both more formally and more elaborately set forth in works of Duncan Kennedy, Roberto Unger, Clare Dalton, Peter Gabel, Elizabeth Mensch, Karl Klare, Mary Joe Frug, and Jay Feinman on critical contract law, and in Mark Kelman’s superb forthcoming book on CLS scholarship generally.⁵ I cannot warrant that my attempt to apply their methods would meet with their approval, and I strongly recommend to readers who want to learn more about the methods to consult their work before charging them with all the errors and follies I may have committed here. My example is a case of a kind that I would teach in my contracts course, and, in honor of the occasion, a Florida case.

The case is *Vokes v. Arthur Murray, Inc.*⁶ This was an action brought in the Circuit Court of Pinellas County, Florida, to rescind, on grounds of fraud, some fourteen contracts for dance les-

5. See Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) [hereinafter *Form and Substance*]; Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982) [hereinafter *Distributive and Paternalistic Motives*]; Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983); Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601 (1977); Mensch, *Freedom of Contract as Ideology* (Book Review), 33 STAN. L. REV. 753 (1981) (reviewing P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979)); Klare, *Contracts Jurisprudence and the First-Year Casebook* (Book Review), 54 N.Y.U. L. REV. 876 (1979) (reviewing C. KNAPP, *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* (1976)); Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U.L. REV. 1065 (1985); Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984); Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983); M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (forthcoming 1987, Harvard University Press).

6. 212 So. 2d 906 (Fla. 2d DCA 1968).

sons with the Arthur Murray franchise in Clearwater. A "friend" (not quite a friend, actually an instructor at the dance studio) brought Audrey Vokes to the studio for a party, spent most of the evening with her, and kept telling her what a great dancer she was and what a great future she had as a dancer. The studio then sold her an initial promotion package of eight half-hour dance lessons for \$14.50. Over the next sixteen months, Audrey Vokes was given Medals for Dancing, promoted within the Arthur Murray hierarchy of accomplished dancers, and was made eligible for special trips to Miami and Trinidad (at her own expense). Most important, she was throughout this period repeatedly being signed up to new long-term contracts for dance lessons. At the time she finally decided to pull out, she had contracted in advance to pay \$31,090 (in 1969 dollars) for 2,302 hours of lessons. The trial court dismissed her suit to rescind for failure to state a claim. The case went up to the Second District Court of Appeal, where the court reversed the trial court and said there was a good cause of action.

The trial judge evidently treated the case as a routine collections matter—a standard transaction describable in completely standardized, abstract language. *C*, a consumer, enters into a forward contract with *D*, a dance studio. The contract stipulates that *D* will give *C* *H* hours of dance instruction for a price, *P*, payable in installments. *C* breaches by not paying installments as they fall due. *C* is liable for the unpaid balance of the contract price. The "normal" framing of the transaction for decision, even today, remains that of nineteenth-century classical liberalism—what we now tend to call the "right-wing" or (very misleadingly) the "conservative" view of private bargains as presumptively free and efficient. The court will automatically give effect to the formal signs of voluntary agreement, in this case the facial terms of the written contract. Ms. Vokes' competence to contract and consent to the terms are presumed from her signature. In order to have any chance of success in her suit, she must struggle against the normal framing and recast her situation as falling into some recognized category of exceptions and defenses: duress, fraud, mistake, undue influence, unconscionability, and so forth.

The category that Judge Pierce of the district court of appeal eventually settled on to release Ms. Vokes from her contract was fraud, or misrepresentation. The specific problem that the court focused on was that, as the studio must have recognized from the start, the poor lady was a lousy dancer and could not have been made a good or even acceptable dancer however many hours and

dollars she were to invest in trying. But the seller is allowed a fair amount of leeway for "puffery"—inflated sales pitches, hyperbole, flattery, psychological manipulation, and so forth. Further, as counsel for the studio stressed in his argument, even a seller who knows that the transaction may develop serious problems that will impair its value to the buyer has no obligation to share his superior knowledge.

But in this case, Judge Pierce asserted, the studio people went beyond puffery and nondisclosure: they lied. The customer could barely hear the beat. Knowing that, they still told her she could be a great dancer, and thus induced her to sign up for lots of long-term contracts. (If she were really such a bad dancer, the studio's counsel argued, she was unjustified in relying on the studio's claims that she was a good one!)

Classical contract law, the body of law built to enact the political economy of nineteenth century laissez-faire liberalism,⁷ constructs the basic framework for this decision. To avoid holding for the studio, the court of appeals threw it into one of the exception-types to the normal case. In so doing, however, the court accepted the normal framing of the situation—telling us that most of the time, contractual transactions of this kind are fine. Notice that the court even treated an occasion where it is *not* enforcing a contract as an occasion to reassert the basic norm of freedom of contract as the natural, normal, desirable situation—one in which the court puts its authority behind the form as representing the true intention of the parties.

The conventional framework looks like this:

<i>Normal</i>	<i>Deviant/exceptional</i>
Will of parties	Public policy
Market transactions	Regulation; Redistribution, Paternalism
Private ordering	Public "intervention"

The prominent language of the case, the phrases you would stress with magic marker, decides for Audrey Vokes with the least possible disruption of the frame. The decision is market-reinforcing, rather than market-regulating. The usual presumption that contractual transactions are entered into as a result of free, ra-

7. See generally P. ATYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979).

tional, voluntary choice is overcome by strong evidence that one party, the studio, fed some deliberately distorting information into the bargain. The studio did not have to volunteer any information about its performance; but once it did, subject to a discount for puffing, the information had to be true. Audrey Vokes was deliberately given false *facts*. Observe the picture of the consumer decision here. It is drawn from the account given of rational choice in scientific positivism. We accumulate data, bits of information, from observation and from what people tell us. We then use that data to decide how to allocate our resources in such a way as will maximize our preferences. Ms. Vokes' decision process was distorted by bugs in her data input.

To his credit, Judge Pierce did not entirely rely on this characterization of the dealings between Audrey Vokes and the dance studio—which would be a truly nutty description as well as an extremely abstract and mechanistic one—a description that would not even begin to capture the interaction between Audrey Vokes and her dance instructors in a way that any of the participants or, say, a novelist, anthropologist, or even an inquiring lawyer, would find intelligible or interesting. The nutty, abstract quality of this description comes out of trying to fit this experience into certain categories of legal analysis which—for purposes of classification, administrative convenience, doctrinal consistency, political legitimacy, and ideology—finds formal categories, and the squeezing of experience to suit them, a necessary, and indeed indispensable aspect of the lawmaking function. “Law means so pitifully little to life,” as Karl Llewellyn used to say. “Life is so terrifyingly dependent on the law.”⁸ There is no point in complaining about abstraction in law *per se*; if law is not abstract, it is not law. It is *how* legal discourse abstracts, in any particular situation, that matters.

In any case, our sense of experience is always pushing up against the legal categories, and potentially forcing alternative understandings of what is going on. In *Vokes*, some of these alternative understandings emerge in the narrative of the facts. A case is a story, and as all lawyers know, the way the story is told is often crucial to the outcome.⁹ So at the very start we learn that Ms. Vokes is a “widow of 51 years” and “without family” and had hopes of find-

8. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 751 (1931).

9. This point has been well dramatized recently in an excellent piece of description and advocacy on contract law teaching. See Wangerin, *Skills Training in “Legal Analysis”: A Systematic Approach*, 40 U. MIAMI L. REV. 409 (1986).

ing a "new interest in life"; and that the dance instructors, besides misinforming her, subjected her to the unwitting influence of a "constant and continuous barrage of flattery, false praise, excessive compliments, and panegyric encomiums," and to "overreaching blandishment and cajolery."¹⁰

Through the briefly sketched images of the court, our rational consumer has been transformed into a lonely, vulnerable woman in search of excitement and companionship—the dance studio, from a seller of dancing skills, into a sort of surrogate lover.¹¹ A 51-year-old widow who would not dream of going, for example, to a singles bar wants safe and respectable ways to find male companionship. Learning how to dance is such a way. The dance studio becomes not just a way of getting there, but the destination itself: a place where attractive and charming instructors discover in her unsuspected graces and talents, and encourage her to feel desirable and at home among friends. They put her in a hierarchy of achievement and reward her efforts with medals and promotions. Was she really misled by being told how graceful and talented she was? Would things have been better, and she happier, if she had been given a coldly critical appraisal of her dancing ability? Perhaps the flattery and attention, even the lies if one must label a seducer's compliments as such, were not a distortion of the service the studio should have been rendering her, but an essential part of the service itself. The commodity the studio men are supplying is much more than dancing skills; it is the sensation of being alive and exciting.

At this point, any classical-liberal lawyer might want to interrupt and ask, "So what?" He might say that all this is simply extraneous and irrelevant, that it's just sentimental detail. Particularizing the facts in this manner might make one feel sorry for one of the parties, but that hardly justifies defeating their formal contractual expectations. One might also paint just such a tragic picture of the managers of the dance studio, small business people just barely scraping a profit from their franchise, depending on income streams from long-term contracts to pay the rent, feed the kids, and keep instructors employed. Should they run a business

10. *Vokes*, 212 So. 2d at 907.

11. I must stress here that the characterizations in this paragraph and elsewhere in this lecture of "Audrey Vokes" and the people at the "Arthur Murray studio" are not intended to convey anything about the *real* Audrey Vokes or studio personnel. I am extrapolating, perhaps entirely fancifully, from the sparse clues in the opinion. The editors of the *Florida State University Law Review* made efforts on my behalf to find further information about the case from briefs and records but were unable to do so.

dependent upon good customer relations by first insulting the customers—coldly appraising their dancing abilities and telling them, if they have none, to get lost?

Besides, the lawyer might say, all this circumstantial detail you have added just makes the studio's case stronger. If Audrey Vokes *wanted* to hear half-truths about her ability, if flattery and cajolment is all part of the service, then there has been no "distortion" of rational choice. She has contracted for what she wants—what we all want—the illusion of endless youth and erotic vitality, powers expanding rather than contracting with age. If the courts deny dance studios the right to sell this commodity by insisting on flatly factual dealings with their customers, then people like Audrey Vokes will have many more restricted choices, maybe nowhere to go, or at least will have to pay higher prices to compensate the studios for the risk of ad hoc judicial invalidation of some of the other customers' contracts. The court may say, with heavy sarcasm, that the studio's "flowery eulogiums . . . proceeded as much or more from the urge to 'ring the cash register' as from any honest or realistic appraisal of her dancing prowess."¹² So in America it has become illegal to want to make a buck?—especially by supplying a service (flattery and companionship) that a large section of the population needs and comes to dance studios to satisfy?

Yet some of us readers of the case continue to feel—don't we?—that Judge Pierce's narrative detail is or should be somehow relevant to the decision of the case, that to hear the story changes our view of the situation and of the justice of enforcing the contract, and not only because, in the way he has told it, we are made to feel sorry for Audrey Vokes' lonely and vulnerable widowhood. Judge Pierce's appeal with these surplus details is to what might be called an underground jurisprudence of equity. The jurisprudence is not actually all underground. Some of it has been formalized in the categories of "undue influence" or (more vaguely) of "fiduciary relationships."¹³ The idea is that in relationships in which people have achieved a certain level of intimacy and an expectation of mutual trust there should be a big change in the legal ground rules affecting their interaction. Once a party has come to expect that the other will not take every advantage of her that he can, and her guard is down, the other's room for self-interested strategic maneuvering should be limited. To some extent he is now

12. See *Vokes*, 212 So. 2d at 909.

13. See E. FARNSWORTH, *CONTRACTS* § 4.20, at 268-71 (1982).

expected to look after her interest as well as his own. That is the usual interpretation of professional services—medical or legal, for example. The dance studio in the *Vokes* case manufactures its commodity, its magic illusions, by creating an atmosphere of highly eroticized romantic intimacy; the instructors become substitutes for (barely sublimated) lovers of the customers. The outrage of the court, reflected in the law of undue influence or of advantage taking of fiduciary relations, comes in part from the sense of betrayal that we all experience when we realize that a lover, or an intimate, someone whom we trusted to take care of us, has all along had nothing in mind but his own profit. The plaintiff says: "You've seduced me and abandoned me, and now, to add insult to injury, you expect me to pay for the experience."

The set of equitable conceptions that Judge Pierce implicitly appeals to thus creates a somewhat revised picture of the framework we started with:

<i>Normal</i>		<i>Deviant/exceptional</i>
Private choices		State policy
Arms-length in markets	Fiduciary relations	intervention/ regulation

We have added a new, intermediate category that mixes private with public obligation: it imposes a set of implied obligations arising from this supposedly peculiar context of fiduciary relations. Yet the "normal" world of business bargains is still assumed to be first: classical contract law's neo-Hobbesian nightmare images of the society of atomistic individuals—solitary self-interested selves drifting about pursuing their own projects, seeing other people either as instruments of their purposes or threats to their security. In this fantasy of predatory paranoiacs, formal contracting represents the only safe way for people to associate with one another. Contracts are those carefully circumscribed interactions in which these solitary beings briefly join together for an alienated moment of mutual exploitation.

It is quite extraordinary—and a tribute to the power of ideology to structure perceptions of reality—that this legal view of the standard transaction should have come to prevail over the everyday experience of economic dealings in the business world, largely conducted by members of trading communities in continuing relationships with one another, who have established for one another governing conventions and norms quite unlike those, in most respects, of classical contract law. Written documents are not expected to

define in advance all the terms of performance; flexibility in adapting terms to changing circumstances is a virtue, literal insistence on formal terms ("working to rule") a type of bad faith obstructionism. In hard times—such as shortages, strikes, price increases—parties are expected, within limits, to tolerate shortfalls in performance, lend each other mutual support, and share in losses. This description of the contracting behavior of ordinary capitalist merchants actually fits much more closely the pattern of rules constructed for the deviant, "fiduciary" category than the supposedly standard arms-length one.¹⁴

The argument is frequently heard that unless formal contract terms are enforced to the letter, the economy will collapse. But in fact the exact opposite would approach more closely the truth: it is insistence upon formal enforcement that would cause collapse.¹⁵ A regime promoting short-term self-interested individualism—opportunism, strategic behavior, predation and paranoia—can be, as any transaction-cost-attentive economist, or any businessperson knows, highly inefficient: people have constantly to expend valuable resources providing against the risk that somebody might take advantage of them. Furthermore, long-term dealings require flexibility and a commitment to cooperate. Formally specifying everything that will happen in advance is a waste of resources, and holding trading partners to such specifications in changing circumstances is mostly folly.¹⁶ The legal system, the argument might run, should therefore underwrite relationships of trust, of general reciprocity, and penalize breaches of trust—*especially* in situations where the relationship is not likely to be a continuing one, so that the sanction of refusing future dealings is unavailable. From this perspective, what the court does in the *Vokes* case is simply to enforce one party's expectation that the other side will treat them in good faith in every transaction.

14. For classic descriptions of the "relational" reality of continuous business dealings, see Macaulay, *Non-Contractual Relations in Business*, 28 AM. SOC. REV. 55 (1963); I. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); Dore, *Goodwill and the Spirit of Market Capitalism*, 34 BRIT. J. SOC. 459 (1983).

15. This sentence is somewhat misleading as seriously overstating the determinacy of "formal enforcement." Classical contract law, as its Legal Realist critics never tire of pointing out, is prodigal with formal escape hatches to formal enforcement, e.g., lack of consideration, defects in offer-and-acceptance, mitigation-forseeability-uncertainty limitations on remedies, etc.

16. For the "transaction-costs" argument, see, in addition to sources cited *supra* note 14, Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J. LAW & ECON. 233 (1979).

Vokes, one might say, should not be seen as a deviant transaction at all, just one involving a set of ideas about what the parties have "consented" to different from those involved in the typical arms-length transaction.

The argument just made is one that asks us to see nonenforcement in this case not as an interference with, but a promotion of, the goals of free contracting in the market. Obviously, it is not the only such argument that can be made. To list briefly a few more:

1. There is the argument made by the court: the studio misled the customer about the value of the bargain by lying about her dancing ability. It was not a terribly plausible argument, but there is another one like it—that the studio knows a key fact about these deals that customers do not know: the appetite for commercial dancing services rather rapidly reaches a saturation point. Few people end up actually wanting anything like the vast total of hours they sign up for. Selling these contracts is like selling a fairy coach: the contracts are beautiful, but they turn into pumpkins at midnight. The studio knows this from long experience; and the customers do not and will not usually be able to find out until it is too late. Arguably indeed it is this asymmetry in knowledge that makes long-term contracting both possible and necessary in this business: the customers would not keep coming back unless they had locked themselves in to the contracts.

2. The previous set of arguments suggests a second: the customer's capacity for "free contracting" in the present has to be limited to preserve her capacity for free choice in the future. The studio should not be able to bind her to this agreement because it ties up too many of her assets and too much of her time for too long. This is like the common law policies against lifetime assignments of earnings, long-term covenants not to compete, contracts to sell oneself into slavery, or the rules criminalizing addictive drugs.¹⁷ The familiar metaphor for this form of restraint upon the present to protect future choice is the story of Ulysses and the Sirens: Ulysses has his sailors tie him to the mast so he will not throw himself into the sea chasing the irresistible song of the Sirens.¹⁸

3. The addictive drugs analogy suggests yet another line of argument, going to contractual *capacity*. The particular seduction tech-

17. See *Distributive and Paternalistic Motives*, *supra* note 5, for a thorough development of the general form of this argument.

18. See generally J. ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (2d ed. 1985).

niques used to sell the contract have suspended Ms. Vokes' capacity for rational choice. The studio hooks her on glamorizing flattery, then threatens to withhold the drug unless she keeps signing contracts. The main evidence for this is simply the outlandish quantity of lessons—if she danced for two hours a day, every day, for the next ten years she still would not have consumed all the hours purchased. She is not “crazy” in the sense of committable or diagnosably psychotic, but the situation has hooked her. You could also make a case for *duress* out of the same facts: the studio has created a temporary monopoly situation in which its attentions are of unique value. It has driven her out into a desert where it owns the only water concession, and it uses the situation to extort gigantic rents.

4. Yet another approach, fully consistent with the logic of enforcing free contracts, would simply be to argue that the studio breached the contract before the customer did, by failing to keep her satisfied. The attention she received earlier was a sample, a sort of implied warranty of the treatment she would get later. One might also argue that her obligation to pay was subject to an implied condition of continuing customer satisfaction. When the lessons no longer turned her on, she could cancel.

With this battery of arguments in mind, let us redraw our diagram:

<i>Normal</i>	<i>Deviant/exceptional</i>
Free choice in markets	State policy
Protect reasonable expectations of parties: relations of trust, good faith; implied conditions of fair dealing, satisfaction	Intervention/ Regulation
Protect overall (long-term) capacity for free choice	
Foster conditions of free exchange	Null set
Police against choice-distorting, choice-limiting conduct: information distortion or non-disclosure; Coercion via addiction-and- withholding	

The point of the new diagram is that all the moves that the classical liberal wants to characterize as state *intervention* into, or regulation of the regime of private contracting can easily be recast as protecting and fostering the regime of private contracting itself. Every system of free contract needs ground rules ("constitutive" rules), specifying when an exchange is going to be considered free. Every system has repeatedly to decide what will count as impaired choice—what is fraud, duress, lack of capacity; which of a person's choosing selves, the earlier or the later, is to be protected in her choices; should agreements be construed formally and narrowly or broadly and functionally, and so forth. The sum of these decisions will constitute the real system in force.¹⁹ In the case of late twentieth-century contract law, there happen to be at least *two* rival and contradictory systems of ground rules for private ordering that courts and litigants can appeal to: a formal neo-Hobbesian world of "individualist" rules, specifying a very narrow, but firmly binding once assumed, scope of mutual obligation; and a quite informal regime of "altruist" standards, creating a hazy open-ended realm

19. See *Distributive and Paternalistic Motives*, *supra* note 5.

of indefinite reliance-based duties, relatively easy to escape upon changed circumstances or the other side's dealing in bad faith.²⁰

Predictably, the redrawn diagram drives classical liberals crazy. They object that such a sloppy scheme of ground rules sabotages the whole libertarian enterprise of trying to draw clear enforceable lines setting off private voluntary choice from state (coercive) intervention. All contracts that turn out badly for one party will be vulnerable to attack on grounds of insufficient disclosure, misleading information, limited capacity to contract at the time, or changed circumstances. All contracts, they say, involve some disparity in market power, in knowledge and in bargaining skill. All contracts may be analyzed as involving coercive threats: "If you won't deal with me on my terms I'll withdraw from the relationship."²¹ Nearly all contracts in the business world involve a number of partners in some sort of close and continuing relationships. If we start to recognize all these situations as grounds for nonenforcement of formally specified terms, the whole system of private bargaining becomes exposed to legal challenge.

Modern liberals of course respond to this classical *cri de coeur* with reassurances that we need not worry, the integrity of the system has not been compromised. It is just that the task of identifying the freely-bargained transaction has shifted from a formal rule-based to an informal particularistic approach that more reliably distinguishes the fair from the rogue transaction than did the old system. CLS people tend to agree with the classical liberal: his complaint is accurate, and that is the point. The regime of exceptions does indeed contradict, and potentially swallow up, the regime of rules. And things are even worse for the classical liberal. Not only is it true that what he thinks of as the norm of private contract enforcement will justify a lot of legal conclusions that he was used to thinking of as interventionist,²² but to add to his growing feeling that the world has gone crazy and is being turned upside down consider that enforcement of the "core" or "normal" transaction of the classical system itself involves making a lot of controversial public policy choices—choices about how to regulate. From this perspective *all* routine contract enforcement represents

20. See *Form and Substance*, *supra* note 5.

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

22. He complains that the court is interfering with contracting—the court replies that it's just enforcing the ground-rules upon which the institution of contracting essentially depends. The case is not a violation, but a strengthening of the framework.

a form of regulation of private transactions. The framework could be redrawn to look like this:

<i>Normal</i>	<i>Deviant/exceptional</i>
Law merely facilitating private voluntary choices	Regulatory Law
Null set	All of contract law

This point of view, these days, should be completely uncontroversial, or at least a lot less controversial than it was in the 1890s, when Holmes began articulating it. It was the standard point of Legal Realism, and most first-year contracts classes in law school will make the point often. But even people who readily acknowledge the point at some abstract level do not behave in practice as if they believed it, so let me flesh it out a bit for the sake of completeness.

The lawyers and political economists of the late nineteenth century thought they had worked out a completely neutral and apolitical system of contract law that would maximize both wealth and natural liberty. For the system to operate, they believed, all the courts had to do was to follow the rules protecting formally manifested free intentions. They somehow persuaded themselves that the legal reinforcement of free contracting did not implicate the coercive power of the state in the same way that "regulation" of contracting would have done. Of course a party who relies on legal enforcement is not engaging in a private transaction in the sense that an agreement to have lunch next week is a private transaction.²³ If things go wrong, he hopes to have the option of having his interpretation of the deal backed up by state force—up to and including the 101st Airborne Division or National Guard if defendant resists enforcement. If defendant does not pay up, they will take her furniture, they will take her house, and sell it to satisfy the judgement. That is coercive. The problem is, what are the conditions under which state force is to be deployed? Or as one of the early Legal Realists, Arthur Corbin, put it, "What acts are those which will cause society to come forward with its strong arm?"²⁴

23. Nor, obviously, is the agreement to have lunch wholly "private" if what one means by that is that it binds the parties only because and to the extent they both want it to. The norms that create such commitments and sanction their breach are socially created; one of the common sanctions, refusal of further economic dealings, is also one of the legal system's recognized privileged instruments for inflicting harm on others.

24. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 170 (1917).

The Legal Realists took particular delight in showing that every set of apparently innocuous or neutral rules, even rules like the "mailbox" rules dictating when acceptance is effective, involved making potentially controversial choices among competing policies. The *Vokes* situation provides a good example. To the trial court, protecting the will of the parties, their contractual intentions, means putting state force behind Arthur Murray's contract forms, with Audrey Vokes's signature on them. The studio's form, without any further inquiry into the circumstances of the transaction, and despite the fact that on its face it seems to have committed the customer to a grotesque bargain, is taken to represent the customer's intentions. The producer of the form, and of the carefully orchestrated circumstances of its signing, is thus allowed to control the interpretation of the transaction. The fascinating part of the whole business is the way in which the trial court makes a policy decision conferring great social power upon the party who controls the form, then equates the power regime it has just created with natural liberty—the "intentions of the parties"—and finally proclaims its reluctance except in extreme cases to displace the form on the ground that to do so would substitute the *law's* judgment for the voluntary acts of the parties!

Notice that the argument I am making here is *not* the traditional left-liberal or socialist one in favor of more intervention into market transactions or more intensive regulation of contracts. It is a calling into question of the categories of private "free contract" and public "regulation" as adequate descriptions of social life and experience. All the reasons for not letting Arthur Murray collect Audrey Vokes's property can be rephrased as rational-choice-enhancing, market-reinforcing reasons. And all the reasons for enforcing collection can be characterized as regulatory and interventionist—overriding Audrey Vokes' freedom of choice for the sake of Arthur Murray's security and the security of enterprise profits generally. The slogan of free contract is like the slogan of private property—they are both empty and they do not adequately specify what goes on in a capitalist economy. The issue is always: what kind of property, what kind of contracting regimes, should a legal system put its force behind? Abstract notions of property and contract, liberty and efficiency, give one literally no help at all in answering those questions.

As I say, at a highly theoretical level, liberal lawyers and economists should find nothing controversial in any of this: they have known it all for a long time. What liberal scholarship does not em-

phasize is how the discourse of courts and lawyers, like popular discourse, constantly, subtly, almost unconsciously, keeps privileging one possible set of regulatory policies—one possible view of the world—as natural, normal, rational, free, efficient, and *usually* OK and just. The initial reaction, *even among people who like to think of themselves as left-liberal, consumer-protection minded, on the side of the underdogs, etc.* (which has been the general tendency of the judges and jurists who developed the modern post-Realist law of contracts, for example), is that Audrey Vokes has got to lose unless she can work hard to convince the court that her case is exceptional, that she belongs to a deviant class, and that protecting her involves paternalist “intervention” into and “regulation” of free contractual choice in some mysterious way that judgment for the studio would not involve.²⁵

The pervasiveness of this mind set was nicely illustrated when, after this talk was over, an evidently highly intelligent student came up to me and said something like: “Isn’t the example you’re giving here one of those hard cases on the borderline that are always hard to decide because they involve special fact situations where applying the normal rules would cause obvious injustice or exceptional hardship? Isn’t it that rules aren’t really designed for extreme cases like this, but for ordinary commercial transactions, where the legal system really *should* just routinely enforce the contracts that the parties have agreed to?” I was considerably distressed by the remark because it showed that the main points I had been trying to make had not gotten through at all: that every act of contract enforcement involves putting force behind one particular regime of “free bargaining” versus competing regimes that could be enforced instead; that the doctrines of contract law in fact make available to parties in *all* cases—including cases of contracts that appear “on their face” (meaning *as first framed for the categories of the legal system*), to require a single clearly correct outcome—a multiplicity of regulatory regimes, some rooted in individualist, and others in cooperative, solidary, visions of economic life;²⁶ but in the face of this multiplicity, one regime, the classical-

25. On the tendency of even left-liberal legal discourse to privilege the right-wing libertarian position, see M. KELMAN, *supra* note 5.

26. A spectacular example of how to turn an “easy” case into a “hard” one, or an “individualist” framing into an “altruist” one in the commercial context is *Columbia Nitrogen Corp. v. Royster*, 451 F.2d 3 (4th Cir. 1971). The parties had what appeared from their contract documents to be a minimum-quantity, fixed-price, three-year contract for purchase and sale of phosphates. When phosphate prices plunged in the late 1960s, the buyer tried to

liberal-formal-individualist regime, has been given an arbitrarily privileged status over the others. I had hoped to fuzz up and make problematic in the audience's mind the basic distinction between "voluntary agreements" on the one hand, and "regulation of agreements" on the other; but for this one auditor at least I had spectacularly failed to do so. I was briefly sorry that I had chosen for my talk exactly the kind of case that editors of contracts casebooks put in their "Unconscionability" or "Policing the Bargain" sections to exemplify the kind of far-out, deviant, sleazy commercial behavior, exploiting exceptionally vulnerable parties, that contract law has had to develop extraordinary remedial devices to control—the kind of case that, because it seems so grotesque, *does not* seem to raise questions about routine legal enforcement in the rest of the economy. The student's response was precisely that of post-Realist judges and scholars generally: to try to isolate out exceptional classes of transactions (here "consumer" as opposed to "commercial" transactions, and transactions involving exceptional vulnerability to exploitation and harsh results) from the ordinary dealings at the heart of the market economy. Such isolating devices therefore become means of legitimating, through normalizing them, the *routine* instances of exploitation and vulnerability in market transactions—of denying the everyday realities of pain and coercion in business life.

The perspective I have been arguing for suggests that every case—like every other instance of legal discourse, is a tiny enterprise of world creation. Not an isolated enterprise, it fits in with millions of similar instances to create the fields of consciousness through which we interpret, and thus continually produce and reproduce, familiar social realities. Thus, even the fair and generous decision of this court—like the relatively fair, generous, good-faith and socially-minded contracts jurisprudence of the post-Realist generation—reaffirms the stock images of the way it believes the world is, and must be most of the time. It opposes the normal world of business to the quasi-fiduciary world of the dance-studio

order as little as possible on the contract and to renegotiate the price. The seller stood firm on the stated contract price. The buyer was successful in persuading the Fourth Circuit Court to require the introduction of evidence of trade custom and course of dealing since "because of uncertain crop and weather conditions, farming practices, and government agricultural programs, express price and quantity terms in contracts for materials in the mixed fertilizer industry are mere projections to be adjusted according to market forces," *id.* at 7, and further because the buyer had waived express contract terms for the benefit of the seller when the seller was going through hard times, and the buyer was now deserving of reciprocity.

transaction—the “masculine” world of routine legal enforcement to the “feminine” and sentimental one of equitable exceptions—the hypothetical reasonable consumer, self-reliant, predatory and paranoid, to this exceptional, deviant case of an emotionally vulnerable woman in late middle age who seems peculiarly in need of protection.²⁷ There is even a fairly obvious connection between the “normal” world constructed through individualist contract rhetoric and the social world actually inhabited by Audrey Vokes. Both are worlds so devoid of sympathetic dealing and solidary association that the widow has to resort to buying companionship as a commodity, and then watch her companions like a hawk to make sure they are not exploiting her.

The point of analysis like this is simply to unfreeze, to “deconstruct,” this tiny exercise in worldmaking—to point out that certain kinds of familiar common-sense categories, such as the public-private distinction employed in contract discourse, can be turned upside down so as to shake up our conventional perceptions of reality. People react differently to this sort of demonstration:

1. Some are blasé and depressed. They think, “It’s all a question of power, anyway. You can prove till you’re blue in the face that the justifications of power are intellectually arbitrary and it won’t get you anywhere.” This seems to me surely at least partially wrong: power is maintained partly on the acceptance of its justifications.

2. Some are impatient: “This is all very well, but what does it do for Audrey Vokes and people like her? What should Judge Pierce have done that he didn’t do? What action does it recommend?” More generally, “What’s the political point of this kind of demonstration, anyway?” Some quick responses:

(a) A very large part of the point is simply to teach, not through one example like this one but through hundreds of them, a method of critique that a student can readily spray on similar discourses that she is quite certain to encounter repeatedly elsewhere. The

27. Clare Dalton has brilliantly portrayed the construction of social life in the “cohabitation contract” cases such as *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); *Hewitt v. Hewitt*, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979). Dalton points out that women in these cases are either: (1) pictured in the judicial rhetoric as saints, victims, or whores—women who have sacrificed everything for love, been the objects of sexual exploitation, or have tried to seduce men out of their money, or else (2) completely abstracted from the intimate domestic context and treated as partners to ordinary commercial bargains. The images leave no room for a conception of relations between men and women outside marriage founded upon mutual sexual affection, mutual sacrifice, and shared financial and in-kind contributions to the partnership. See Dalton, *supra* note 5, at 1095-1113.

assumption is that there is a common structure underlying the standard discourses that rationalize domination and hierarchy, that certain types of rhetorical moves recur again and again, so that if you can pick up the structural form of such arguments, you can match an appropriate discourse of critique to local discourses of power as and when the opportunity arises.

(b) Suppose the opportunity is one like our case—i.e., suppose you are the lawyer for someone like Audrey Vokes or a clerk for someone like Judge Pierce. What does the critique suggest you do in that situation? One answer is to press for an expansion of the standard framing of such transactions, for a rhetoric of decision that emphasizes as central, normal goals of the legal system the protection of the long-term capacity for practical freedom, the enforcement of fiduciary obligations to people one has made emotionally dependent, the limited relevance of formal signs of assent to long-term, high-price bargains, and so forth. This would be a very tiny blow to strike for the reconstruction of social life, but if the point is valid that social life as presently constituted is constructed out of millions of such acts of construction, it would be a real blow. The *Vokes* case itself was reported in ALR²⁸ and has been reprinted in a number of contracts books, so it has actually had a fairly wide circulation in the legal culture.

(c) Would the opinion do much in an immediate way to protect consumers against being victimized by dance studio practices? Well, no, probably not much at all, except perhaps to help dramatize the problem. Common law regulation through the judiciary is not likely to provide much leverage against abuses of this kind, because it works case-by-case, and the studios do not mind losing a few cases if they can keep binding most customers to their contracts.²⁹ A lawyer for Audrey Vokes who was indignant enough about her treatment to want to help others avoid it would probably seek other forms of leverage on the studios—local banks and insurance companies, publicity, lobbying groups for the elderly who could push for legislation altogether prohibiting long-term con-

28. 28 A.L.R. 3d 1405 (1969). See also Annotation, *Seller's Liability for Fraud in Connection with Contract for the Sale of Long-Term Dancing Lessons*, id. at 1412.

29. See Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970); Schrag, *On Her Majesty's Secret Service: Protecting the Consumer in New York City*, 80 YALE L.J. 1529 (1971); Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115 (1979).

tracting in such businesses,³⁰ and so forth. The really basic problem revealed by this case is how lonely people are, and how few places there are in many communities for people to associate in nonthreatening ways in public. This is, of course, a much larger problem that legal practices have also had some share in creating—and that legal practices could play some role in ameliorating—but it is one that contract law decisions cannot immediately very much affect.

What I want to urge, in response to the frequently heard question, “But what solutions does CLS have?” is that there cannot be any predesigned set of “solutions” for the social situation revealed by the *Vokes* case. There is a politics of stasis—which is the normal politics of the legal system—and a politics of transformation, whose tactics and strategies would have to vary locally according to local contexts. The outsider to the context can at best identify a set of strategies that have worked elsewhere, at other places and times, and some reasons why the strategies might or might not work in this one. Creative variation must be a task for the people on the scene.

3. Some people who take seriously the message of the CLS approach exemplified here are panicked: “If you collapse freedom and regulation into the same thing, the same interpretive morass, if you seem to make both freedom and coercion, private choice and public power, into interchangeable rhetorics, you deny the capacity of law to solve the problem of power in social life and open us up to all-encompassing totalitarian state regulation to which no plausibly coherent limits can be set.” This is an extreme reaction. It supposes that we are completely incapable of knowing freedom when we experience it, so we have to encode its meaning in frozen reified forms, even with the full knowledge that the forms will not really work as we hope they will and will indeed often subvert freedom as well as protect it. I am not here arguing against rules—such as the excellent rule that the police should not break down the door at 3 a.m. or should at least have to give reasons to someone outside the police bureaucracy before they do—but against the kind of rule fetishism that supposes salvation comes through rules, rather than through the social practices that the rulemakers try to symbolize and crystallize, and that blinds one to

30. See, e.g., CAL. CIV. CODE §§ 1812.50-.54 (West 1985). I am told these statutes were in fact drafted by Stanford Law students who had read cases like the *Vokes* case in their contracts classes.

the possibility of oppression through rules. The fetishism of "freedom of contract," for example, makes it hard to see that a particular free-contract regime in force can be a means of facilitating as well as restraining domination and hierarchy in social life.

4. And a few (the few for whose sake if anybody's the whole enterprise is worth the trouble) experience a thrill that is perhaps a premonition of genuine progress. In law schools, for instance, an awful lot of the training that we give—even those of us relatively speaking on the left—is deliberately, brutally, anti-sentimental. "There's no such thing as a free lunch." This is useful: as my colleague Mark Kelman says, it's always useful for conservatives to point out that you can't get habitable housing by having a judge declare that landlords have to warrant habitability. But at the same time, conservatives—who here include left-liberals who have absorbed the major elements of the conservatives' picture of the world, a world in which most transactions are free and voluntary in some meaningful sense most of the time—have been allowed too long to get away with creating a sense of the hopelessness of change out of false legitimation and false necessity. If there is no such thing as a free lunch, it is also true that there is no such thing as a free contract. 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.