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A CRITICAL THEORY OF LAW

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Many law professors consider their primary job to be teaching legal doctrine and legal skills. Students, they think, must learn how to find applicable legal rules and how to make the kind of arguments lawyers use in court. Of course, as academics, these law teachers also feel that they should offer their students something more than legal doctrine; they need to provide students with some theoretical insight into the subjects they teach. But since the primary job of law professors is to teach law, not theory, they treat any theoretical dimension that law schools offer as necessarily limited. Some theoretical questions can properly be addressed in basic courses, and others can be addressed later in law school in optional courses such as jurisprudence or legal history. But these matters are "extras", not the core of the curriculum It is obvious, they might say, that the primary focus of teaching law has to be law. [1]

The aspect of critical legal theory that I am going to present today is devoted to a critique of the position I have just outlined. In my view, it is not possible to teach law without at the same time teaching theory. The attempt to present oneself as teaching law and not theory is itself one recognisable, and controversial position. Moreover, every time lawyers reason from precedent, or apply legal principles to specific facts, or combine arguments based on policy with arguments based on legal doctrine, they present a contestable view both of the nature of law and of social life. I think that students need to learn how to identify the theoretical position about law and society invoked by any legal argument, even legal arguments made by law professors. They need to learn that there is no such thing as a "legal analysis" that does not embody a controversial stance on issues of moral and political theory. Once they see that there is no way to extricate law from moral and political theory (or, for that matter, from literary and philosophical theory), students will better understand how legal arguments are constructed, how they limit the kind of solutions to legal problems considered possible, and how they obscure the extent of the responsibility of the judge or lawyer or law professor making the argument for the kind of world he or she purports merely to be describing.

I expect the statements I have just made about the relationship between law and theory will not easily be accepted by those who want to see themselves as simply teaching law. To explain and defend the aspect of critical legal theory I am presenting here, it seems to me that it would h useful, therefore, to examine a concrete legal issue. I will limit myself to discussing only one such issue even though it is obvious that one legal problem cannot conceivably capture the complexity of the legal system. All I can hope to do by examining a single legal question is to illustrate a critical analysis of law. To do so, I have chosen to discuss a legal issue that I expect most people will find familiar because it raises a basic *issue* of contract law. The issue is whether an employee can enforce an employer's promise, made during the course of an employment contract, to increase her salary. [2]

CRITICAL ANALYSIS: A CASE STUDY

Consider the case of Jane, who has a one-year contract to be a designer for a clothing manufacturer at $200 per week. After being on the job only 3 months, Jane gets an offer for a comparable job from another company at $250 per week, Her supervisor, Bob, hears about the offer and calls her into the office. They have the following conversation:

"Is it true that you want to leave us," he asks?

"Yes." she responds.

"Jane, how can do that? You are under contract with us."

"Somebody offered me more money," she replies.

"How much did they offer you," Bob asks?

"They offered me $250 per week."

> "I can't find another designer now," Bob responds, "and I have to send my sample line out on the road. I'd rather give you $225 per week than let you go."
>
> "If you give me $225," Jane replies, "I'll stay."

After this conversation, Bob dictates to his secretary a contract that contains the exact words of Jane's first contract except that it provides that Jane will get $225, rather $200, per week for doing her job as a designer. Both parties then sign the contract. Later, Bob refuses the pay the extra salary, and Jane sues him for the difference. [3]

The Doctrine of Consideration

One familiar way to think about whether the contract modification just described is enforceable is in terms of the law of consideration. Contracts normally require consideration to be enforceable, yet Jane promised her employer to do nothing more for the extra money than she was already obliged to do. "The general rule," to Lindgren, Carter and Harland's Contract Law in Australia, "is that a promise to perform an existing duty is no consideration, at least when the promise is made by a party to a pre-existing contract, when it is made to the promisee under that contract, and it is to do no more than the promisor is bound to do under the contract." [4] Since Jane promised Bob nothing additional in exchange for his promise to pay the extra money, one might conclude, the contract modification lacked consideration and, therefore, was unenforceable.

This form of reasoning presents the relevant legal doctrine as clear-cut and suggests that the application of the doctrine to the facts of the cases is indisputable. It is an example of what is often called "formalism", a theory which presents law as a logical process that it is radically distinct from moral and political controversy. As the American legal realists in 1920s and 1930s delighted in showing, however, there is no way of deducing an answer to a concrete legal problem from abstract concepts such as "consideration". [5] On the contrary, the same form of reasoning can readily lead to the opposite result. An alternative analysis, for example, might conclude that there is consideration for Bob and Jane's contract modification: the consideration Jane offered was the rescission of her rights under a promise to perform her old contract. "The principle that… a contractual obligation already owed to the other party is no consideration for a return promise by the latter," Lindgren, Carter and Harland tell us, "has no application where the earlier obligation is or can be first lawfully terminated." [6] It is certainly possible to

understand Jane and Bob's conversation as leading to a termination of the first contract. If so, their subsequent agreement would constitute a new contract, and new contracts are enforceable. "All concede," says a leading American case, "that an agreement may be rescinded by mutual consent and a new agreement made thereafter on any terms on which the parties may assent." [7]

Like the opposite result presented earlier, the conclusion that the contract modification is enforceable can readily be made to appear to be the obvious application of established legal doctrine. But if both applications of the doctrine of consideration are obvious, how does one choose between them? This is a critical question for formalist theorists. Unless legal analysis can generate a correct answer to this kind of run-of-the-mill legal problem, the solution to the problem would appear to be based on something quite different from "pure" legal reasoning. The law of consideration, however, cannot itself provide the answer to this legal problem because, as Lindgren, Carter and Harland correctly show, the opposing arguments both rely on rules that are well-established parts of the doctrine of consideration. Moreover, neither will the mere reading of precedent decide the case — certainly not in the United States. There are two well-known lines of precedent dealing with contract modifications of this kind: some cases uphold the modifications, [8] while others invalidate them. [9] Of course, an enormous amount of legal talent has been devoted to rationalising conflicting lines of cases such as these. But how is one to do so?

Most often, the attempt to rationalise conflicting lines of authority is made in terms of the facts of the case that has to be decided. The critical issue for any application of the doctrine of consideration in our case, for example, might be thought to be whether Bob's second agreement with Jane was a new contract or simply a modification of her old contract. According to the doctrine of consideration, Bob and Jane's second agreement is enforceable if it is a new contract and unenforceable if it is not. A close study of the facts, a formalist might contend, can tell us whether the modification is, in fact, "new". To rest the legal decision on the facts of a case in this way, however, requires one to take a stance on a controversial and fundamental philosophical issue. One has to treat facts as something objective — as something available for a dispassionate, perhaps empirical, discovery by a "factfinder". One has to reject, in other words, the modernist argument that one can never discover "facts" without simultaneously engaging in an act of interpretation. Much of modern philosophy has been devoted to a critique of the notion that one can understand the world in a way that is independent of one's perspective. [10] "The participation of the speaker", to Michael Polanyi, is part of "any sincere statement of fact." [11] According to this view, there is no place outside moral, social, and political controversy where one can situate oneself, look "objectively" at the situation, and find out what the facts "really are."

From a modernist perspective, the consideration issue in our case cannot be resolved simply by asserting that the contract falls either into the category "new" or "not new." Either interpretation of the situation is possible. Whether or not the contract is new requires a decision about what determines something to be new — whether, for example, merely signing another contract is enough to distinguish between a modification of something old and the creation of something new. If this were enough to make a new contract, avoiding the consideration doctrine would be no more than a technical trick. All that would be required would be typing up a new piece of paper. Indeed, one might find a "new" contract even if the parties made no express agreement to terminate the old contract. This seems to be the position adopted (at least for contracts with a termination clause) by Lindgren, Carter and Harland, who claim that, "if the procedure of express termination is not followed, no doubt the court will be asked to find (and will find) either an implied agreement to terminate the original contract or perhaps an immediately operatively mutual variation of it for the future." [12]

These interpretations of "newness" would go a long way toward undermining the requirement that contract modifications require consideration. Defenders of the legal duty rule would be likely to object to these understandings of what constitutes a new contract. They might insist that, for a contract to be new, there has to be something different about its terms. To create a new contract, Jane would have to offer Bob something of value in

exchange for his second promise.

One cannot avoid the uncertainty about the definition of "new", however, by attempting to resolve it by some other factual inquiry, such as ascertaining whether Bob actually received something of value in exchange for his promise to pay Jane more money. To be sure, one could understand Bob as getting something of value for his promise. After all, he wanted Jane to stay and work for him rather than quit and work for someone else. He might well have considered valuable her giving up her legal right to walk away (and be sued for damages) rather than to stay on the job. Yet one might also conclude that Jane gave Bob nothing in exchange for the promised increase in wages. Jane's duties in exchange for the new promise were exactly the same as her duties under her original contract; this case might, therefore, seem completely distinguishable from a case in which Jane promised to work longer hours, or take on extra duties, or something of that sort. Indeed, our case can be understood as a classic example of a case in which the promisor received nothing whatsoever in exchange for his promise.

To frame the issue in our case in factual terms — to frame it in terms of the question whether the contract was "new" or whether Bob received "something of value" — thus restates the controversy whether the contract should be enforceable but does not resolve it. To decide whether the contract was "new" or whether Bob got "something" in exchange for his promise requires an interpretation of what "new" or "something" means. To decide which interpretation of these words to prefer, however, one has to adopt a contestable position on questions of political and moral theory. The decision whether to treat Jane's promise as valuable, for example, involves fundamental issues concerning the allocation of power in the workplace. By treating Jane's offer to stay on the job as consideration, one improves her ability to increase her wages by giving her the benefit of a competition between potential employers who want her services; enabling her to enforce her employer's promise in court is thus a form of empowerment. Alternatively, by treating Jane's remaining on the job as not worth paying for, one strengthens her employer's ability to control and limit his employees' options; permitting an employer to promise an employee more money and yet avoid the enforcement of the promise is itself a form of empowerment. Moreover, the decision whether the signing of a new piece of paper (or doing even less) is sufficient to make a promise binding — even when the promise is only made in response to a threatened breach of contract — raises fundamental issues of fairness and obligation. One can "logically" decide these issues only if one adopts one possible interpretation of the facts of the case (and of the doctrine of consideration) and ignores available alternatives.

Promissory Estoppel

The recognition that legal analysis requires a resolution of conflicts of this kind led some American legal realists to abandon the notion that one could reason from general principles (such as "consideration") to a result in a case such as ours. They insisted instead that arguments of policy were the decisive ingredients in legal analysis. Policy arguments are often used in a formalist legal analysis as well, of course, but formalists seem to consider these arguments as supplements to the real business of legal reasoning. The legal realists, by contrast, made policy questions the very terms in which the legal issue would be decided. Instead of framing the issue by asking whether there was consideration, for example, they framed it in terms of a doctrine like promissory estoppel. Under that doctrine, "a promise which the promisor should expect to induce action or forbearance of a definite and substantial character on the part of the promisee … and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." [13] The decision whether Bob's promise to Jane is enforceable is thus explicitly posed as a question about the requirements of justice.

Shifting the legal analysis to promissory estoppel, however, does not solve the problem faced by the formalists — that the applicable doctrine allows one to generate opposite answers to the legal issues raised by our contract modification case. Bob's promise led Jane to give up an alternative job at higher pay, as he foresaw it would, and Jane reasonably relied on what he said. One could easily argue, therefore, that employees should be entitled to rely on this kind of promise by an employer — that it would be unjust to let him avoid his obligations to her. Indeed, the

flexibility of allowing contract modifications of this kind seems good public policy. Contracting parties should be allowed to change their deal in any way they want as long as both actually agree to the new terms. Yet it is also true that Jane was able to get her boss to promise her extra money for doing the same job only by taking advantage of his desperate need for her services. One could readily think that justice does not require enforcing a contract modification agreed to only because of the pressure exerted by an employee's threat to quit just when she is needed. As a matter of fairness and sound public policy, people should not be allowed to profit in this way from threats to break their contracts. "To permit plaintiff to recover under such circumstances," to a leading American case, "would be to offer a premium upon bad faith, and invite men to violate their most sacred contracts that they may profit by their own wrong." [14] From this point of view, it would be unjust to enforce the promise even if the pressure would not be considered sufficient to constitute duress.

Here again, then, there are two alternative readings of the contract modification: one emphasising Bob's willingness to enter into a new contract with Jane and her justifiable reliance on his promise to provide her extra money; and the other emphasising the pressure Jane exerted to get the extra money and her failure to promise anything in return. Both readings are possible because both are true. Each emphasizes some elements of the situation at the expense of others. For a law professor to read the situation one way rather than the other and then base his or her conclusion on such a reading would not simply be an example of legal analysis. It would be a way to take a stand on a fundamental issue of moral philosophy — what "justice" requires — without defending that position against alternatives. [15]

LEGAL DECISION-MAKING

I could now proceed to analyse other ways people have suggested that one could "logically" or "objectively" decide our modification case — canvassing, for example, concepts such as "the intention of the parties," or "the precedent in our jurisdiction," or "the better reasoned view" or "the trend of the modern cases. [16] But the number of possible grounds that purport to answer legal questions objectively are virtually endless. Moreover, it should be clear enough by now that I do not think there is a non-controversial, objective way to decide our contract modification case. Rather than continuing my critique of the objectivity of legal analysis, therefore, it seems more worthwhile to turn to another important issue. Let us accept, if only for the moment, the proposition that good legal arguments can be generated to support opposite results in the simple case being discussed. The question I want to address is: what does this mean about the nature of law?

One possible interpretation of the analysis I have offered is as follows. "I get what you're saying," someone might claim. "You're saying that law is simply subjective — that a judge can do whatever he or she wants in deciding the modification case — that there is no such thing as the Rule of Law. If, as you say, objectivity is an illusion, then we do not have a system of law but a system based on individual judges' subjective views. The result in the modification case will simply depend on the judge's reaction to the case — and that will depend on what the judge had for breakfast."

Let me explain why I think that this is a misinterpretation of my critique of the objectivity of the legal system. In my view, it is a mistake to think that one has to choose between the firm ground of objectivity and the abyss of subjectivity as the only possible explanations for legal decision-making. The allocation of the world into the categories of objectivity and subjectivity is, to be sure, a familiar philosophical position. But it is by no means the only possible position, [17] and it is not my position. [18] The aspect of critical legal theory that I am presenting here is a critique of the notion that legal decision-making is subjective, as much as it is a critique of the notion that it is objective. Judges cannot decide our modification case in any way they want. They are so immersed in a legal discourse that focuses on the facts of the case, the words of the contract, the relevant precedent and the doctrines of consideration and promissory estoppel that they cannot even think about what they want in a way that can be

separated from this legal discourse. [19] Legal decision-makers operate within a legal system that they both inherit and construct. The fact that they inherit it means that their decisions cannot adequately be understood as subjective, and the fact that they construct it means that their decisions cannot adequately be understood as objective. The relationship between legal decision-makers and the legal system is far too complex to be captured by either the concept of objectivity or subjectivity.

In my opinion, we should abandon both objectivity and subjectivity as explanations for legal decision-making. We should explore instead the puzzle that has preoccupied so much of modern social theory: the fact that people create their own reality in a world and with concepts not of their own making. We need to analyse how the terms in which we decide legal issues are created and recreated; how some aspects of our experience become characterised as constraints while others become characterised as amenable to change; how, in short, legal decision-makers give meaning to notions like facts, precedent, and legal doctrine. This involves taking as our subject matter what Anthony Giddens calls the "practical consciousness" of legal decision-makers. [20] An inquiry into practical consciousness focuses not on the subjective intentions of legal decision-makers or their unconscious desires but on the structure of legal imagination. It requires us to identify the tacit assumptions lawyers, judges and law professors make about the nature of the day-to-day world and to investigate the sources and consequences of legal decisions of which the decision-makers may well be unaware. Such a focus is unmistakably theoretical: like the work of many current social theorists, political scientists and literary critics, it forces us to think about the social construction of our own way of thinking. By focusing explicitly on legal analysis and the ways in which preconceptions affect the resolution of any given case, an investigation of the structure of legal imagination enables us to evaluate critically what it means to "think like a lawyer".

The key question, of course, is whether a focus on the structure of legal imagination can help us with a legal analysis of a case like our modification case. One aspect of the case that it should help illuminate, I think, is the question of what a legal analysis is. Anyone who emphasises one of the two styles of legal reasoning presented here — for example, preferring the formalist to the legal realist style — is espousing one legal theory and rejecting another. If so, it seems to me that they ought to articulate why they prefer that form of legal reasoning over the alternative. My general impression, derived from looking at Lindgren, Carter and Harland's *Contract Law in Australia* [21] and Hocker, Dufty and Heffey's *Cases and Materials on Contract* [22] is that the legal realist analysis of cases such as the one we are discussing makes some in Australia a good deal more uncomfortable than it does those of us who teach contract law in the United States. It is remarkable to an American reader, for example, that Hocker, Dufty and Heffey's contracts casebook presents the doctrine of consideration early in the book (at pages 89–129) but postpones the discussion of the doctrine of estoppel for hundreds of pages (at pages 548–66). The sense of the legal system that one gets from this organisational framework is that the doctrine of consideration is "the real law" and that estoppel analysis can be deferred because it is exceptional and limited. The nature of legal analysis would appear to be very different, it seems to me, if Hocker, Dufty and Heffey introduced the doctrines of consideration and estoppel together as equally plausible methods of deciding the same kind of case and then offered reasons why one of them has traditionally been preferred over the other. Moreover, although Lindgren, Carter and Harland do discuss estoppel cases — such as *High Trees* [23] and *Legione v Hateley* [24] — in their section dealing with consideration, [25] they too suggest that the doctrine of estoppel has limited usefulness. They go to great lengths, for example, to interpret estoppel doctrine as available only "as a shield and not as a sword." [26] If these writers (and, apparently, Australian judges) prefer one legal theory and many American legal scholars and judges prefer another, it seems to me students are entitled to know what is at stake in the choice between the alternatives. It is certainly not possible to teach the contract modification issue only in terms of the consideration doctrine without, at the same time, teaching legal theory.

There is another aspect of the traditional structure of legal reasoning that I have sought to identify and challenge. In my description of our modification case, I have highlighted the controversial nature of any solution to the case and

have suggested that students should be taught how — and why — contradictory arguments in the case can so easily be made. Many law professors would have adopted an alternative approach to the case, attempting instead to "make sense" of it through an effort to rationalise all modification cases into one coherent legal framework. In fact, many law professors would say that this is obviously how a law professor should discuss a case. I hope that my alternative discussion of the modification case demonstrates that the effort to rationalise all the relevant cases on a subject is only one possible way to teach law. An attempt to rationalise cases is based on the controversial assumption that law is a consistent and a coherent whole rather than a forum for conflict over basic values. This assumption should not simply be an unstated premise of law teaching; it should have to be articulated and defended as a legal theory.

ALTERNATIVE PERSPECTIVES

Finally, there are a multitude of ways to analyse the structure of legal reasoning about the substantive problem in our modification case. One of them, as I have already suggested, focuses on the political issues involved in allocating power between employers and employees. Since there is no politically neutral answer to the legal problem in our case, any proposed solution can usefully be defended and criticised in terms of its underlying political assumptions. It is important to examine how alternative political assumptions concerning the employer/employee relationship structure the opposed interpretations of the doctrines of consideration and promissory estoppel even though an explicit discussion of political issues is considered irrelevant and inappropriate under either doctrine. Additional ways to analyse the legal arguments in the case include those based on literary theory, [27] feminist theory, [28] philosophy, [29] and intellectual history. [30] I simply sketch one of these.

You may have noticed that we have been discussing *Jane v Bob*. Did you think that it was relevant that one of the parties in the case was a woman? I suspect many of you would answer this question "no." The gender of the parties is normally considered so irrelevant in legal analysis that legal problems are frequently stated and resolved in terms of a genderless hypothetical, framed as a case of *A v B*. The assertion that gender plays no role whatsoever when a male boss seeks to get his female assistant to give up extra income to accommodate his needs is, to be sure, one possible interpretation of the facts in our case. But another interpretation would suggest that the very insistence on the irrelevance of gender when stating the facts of the case — like the invisibility of gender in the doctrine of consideration — helps perpetuate the kind of male domination the existence of which is denied by those who make no reference to issues of gender. I, for one, do not think that Bob's conversation with Jane can properly be interpreted without discussing the power men exercise over women in the workplace. If the legal question (under a promissory estoppel theory) is whether the pressure Jane exerted against her boss was unacceptable when she demanded higher pay, it seems important to investigate the pressures that caused Jane to be willing to give up a $250 offer and accept only $225 to accommodate her boss' needs. Similarly, if the legal question (under a consideration theory) is whether Jane gave up something valuable by staying on her job, this evaluation will be informed by an investigation of the impact of sexism on the structuring of the job market. One can easily dismiss all these issue as irrelevant — many law professors do. Whether one considers gender irrelevant or essential to an evaluation of the case, however, one is taking a controversial stand on an issue of theory. [31]

CRITICAL THEORY IN LEGAL EDUCATION

I began by observing that many law professors consider their job to be the teaching of legal doctrine and legal skills. I hope I have made it clear that I agree that this should be their job. A critical analysis — whether informed by political theory, feminist theory, philosophical theory or literary theory — should help students understand the choice among possible kinds of legal analysis and the reasons why any legal argument they make is only one possibility among many. Students who learn how to analyse the ways in which preconceptions structure legal argument should be better able to make the arguments themselves. Moreover, they should be better able to see how

legal arguments help determine the organisation of the workplace and the power relationship between employers and employees, whether or not legal decision-makers consciously attempt to do so. It is important for students to recognize that legal doctrine, by resolving a case such as ours, creates as well as reflects the politics of the workplace. Some people seem to fear that recognition that there are alternative solutions to legal problems will lead law students to adopt the skeptical position that one legal argument is as good as another. In my experience, however, it is rare to find someone who actually thinks that all arguments on any important social issue are equally good. Recognition of the existence of large-scale controversy within the legal system is more likely to have another effect: it is likely to increase people's awareness of their own responsibility for the legal arguments they make. This is true for law professors as well as for law students. If no-one can describe the law or the world "as it is", law professors can offer students only theories of law and theories of social life. If so, we have to be careful not to assume that our theory is the only one that our students can properly adopt. We need to empower our students to recognise theoretical controversy and assume responsibility for their own positions on matters of social consequence. We disable our students from assuming this kind of responsibility if we suggest to them that we are offering them no theory at all — that we are simply presenting the world as it is. If lawyers play an important role in the making of the modern world, as seems increasingly to be true, we should teach our students to become conscious of, and responsible for, the kind of world they use their talents to defend, and thereby, help to create.

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[1] For a statement and an analysis of this position, see C Sampford & D Wood, Theoretical Dimensions of Legal Education — A Response to the Pearce Report (1988) 62 *ALJ* 322.

[2] For alternative critical analyses of contract law see, for example, RW Gordon, Unfreezing Legal Reality: Critical Approaches to Law (1987) 15 *Fla St UL Rev* 195; C Dalton, An Essay in the Deconstruction of Contract Doctrine (1985) 94 *Yale LJ* 997; MJ Frug, Re-reading Contracts: A Feminist Analysis of a Contracts Casebook (1985) 34 *Am UL Rev* 1065; JM Fineman, Promissory Estoppel and Judicial Method (1984) 97 *Harv L Rev* 678; D Kennedy, Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power (1983) 41 *Md L Rev* 563; R Unger, The Critical Legal Studies Movement (1983) 96 *Harv L Rev* 563, at 616–48; B Mensch, Freedom of Contract as Ideology (1981) 33 *Stan L Rev* 753; KE Klare, Contract Jurisprudence and the First Year Casebook (1979) 54 *NYUL Rev* 876; P Gabel, Intention and Structure in Contractual Conditions: Outline of a Method for Criminal Legal Theory (1977) 61 *Minn L Rev* 601.

[3] Compare *Schwartzreich v Bauman-Basch Inc* (1921) 231 NY l96, l31 NE 887.

[4] KE Lindgren, W Carter & DJ Harland, *Contract Law* in *Australia* (Sydney: Butterworths, 1986) at 101, quoting *Wigan v Edwards* (1973) 47 *ALJR* 586.

[5] See, for example, FS Cohen, Modern Ethics and the Law (1934) 4 *Brooklyn L Rev* 33; J Dewey, Logical Method and the Law (1924) 10 *Cornell LQ* 17. See generally, L Kalman, *Legal Realism at Yale 1917–60* (Chapel Hill: University of North Carolina Press, 1986) at 3–44; G Peller, The Metaphysics of American Law (1985) 73 *Cal L Rev* 1151, at 1226–40.

[6] Lindgren, Carter & Harland, *supra* note 4, at 102.

[7] *Schwartzreich v Bauman-Basch Inc* (1921) 231 NY 196, at 203, 131 NE 887, at 890.

[8] See, for example, *Schwartzreich v Bauman-Basch Inc* (1921) 231 NY 196, 131 NE 887; *Martiniello v Bamel* (1926) 255 Mass 25, 150 NE 838; *Angel v Murray* (1974) 113 RI 482, 322 A2d 639.

[9] See, for example, *Lingenfelder v Wainwright Brewery Co* (1891) 103 MO 578, 15 SW 844; *Alaska Packers' Assn v Domenico* (1902) 117 F 99; *Hilde v International Harvester Co* (1926) 166 Minn 259, 207 NW 617; *Nicolella v Palmer* (1968) 432 Pa 502, 248 A2d 20; *Recker v Gustafson* (1979) 279 NW2d 744.

[10] See, for example, F Nietzsche, *The Will to Power* (W Kaufmann & RJ Hollingdale, eds, London: Weidenfield & Nicolson, 1974) at 267, 282–83; L Wittgenstein, *Philosophical Investigations,* 3rd ed (GEM Anscombe trans, Oxford: Basil Blackwell, 1958); W Quine, *Word and Object* (Cambridge: Technology Press, 1960) at 1–25; HG Gadamer, *Truth and Method* (G Barden & J Cumming eds, Seabury: Continuum Books, 1975).

[11] M Polanyi, *Personal Knowledge,* 2nd ed (London: Routledge & Kegan Paul, 1962) 254.

[12] Lindgren, Carter & Harland, *supra* note 4, at 103.

[13] American Law Institute, *Restatement of the Law, Contracts 2d* (St Paul: American Law Institute, 1981) s90.

[14] *Lingenfelder v Wainwright Brewery Co* (1891) 103 MO 578,15 SW 844, at 848.

[15] In the United States, the legal realists might also have analysed Bob and Jane's attempted contract in yet another way, that is summarised in s89(a) of the second *Restatement of Contracts.* This section provides that, even without consideration, "a promise modifying a duty under a contract not fully performed on either side is binding … if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made." See American Law Institute, *supra* note 13. One could certainly see why this modification might seem fair and equitable — after all, Jane only asked for $225 while she could get $250 from the other employer. Moreover, the modification only occurred because of the unanticipated new job offer. This is the very kind of contract, one might conclude, that s89(a) envisioned would be enforceable without consideration. It may be, however, that a new job offer is not the kind of "unanticipated circumstance" which would authorise a contract modification without consideration. Other jobs might be thought to be the very thing one should anticipate having to turn down once one accepts employment. And, of course, one could think the modification "unfair and inevitable" for the very reasons that it was argued to be "unjust". Shifting the terms of analysis from consideration to promissory estoppel to s89(a), therefore, does not change the fact that we can reach opposite results in deciding the case.

[16] See, for example, EA Farnsworth, *Contracts* (Boston: Little, Brown, 1982) at 278, who observes, "the [Uniform Commercial] Code adds a flexible requirement of good faith, with an objective component of fair dealing in the case of a merchant… . The trend is plainly in this direction".

[17] See, for example, the works cited in note 2, *supra*.

[18] For an extended critique of the objective/subjective distinction, see G Frug, The Ideology of Bureaucracy in American Law (1984) 97 *Harv L Rev* 1277.

[19] See D Kennedy, Toward a Critical Phenomenology of Judging (1986) 36 *J Legal Educ* 518.

[20] A Giddens, *The Constitution of Society: Outline of the Theory* of *Structuration* (Cambridge: Polity Press, 1984) at 41–45, 327–34.

[21] Lindgren, Carter & Harland, *supra* note 4.

[22] PJ Hocker, A Dufty & PG Heffey, *Cases and Materials on Contract*, 5th ed (Sydney: Law Book Co, 1985).

[23] *Central London Property Trust v High Trees House Ltd* (1947) 1 KB 130.

[24] [1971] HCA 74; (1983) 46 ALJR 1.

[25] Lindgren, Carter & Harland, *supra* note 4, at 376–83.

[26] *Id* at 380.

[27] See, for example, Dalton, *supra* note 2.

[28] See, for example, Frug. *supra* note 2.

[29] See, for example, Unger, *supra* note 2.

[30] See, for example, Klare, *supra* note 2.

[31] See generally, Frug, *supra* note 2; C MacKinnon, Feminism, Marxism, Method and the State: An Agenda for Theory (1982) 7 *Signs: J of* Women *in Culture and Soc'y* 515.
